

THE PROTECTION OF LANGUAGES AND OF LANGUAGE  
RIGHTS IN THE SOUTH AFRICAN CONSTITUTION

BY

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## **ABSTRACT**

### **The Protection of Languages and of Language Rights in the South African Constitution**

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The 1996 South African Constitution contains a number of provisions that deal specifically with the protection of languages and of rights relating to language. The most important of these is section 6 which recognises 11 languages as official languages. This recognition is in line with recent developments in international law where common standards in relation to the protection of minority languages are in the process of being developed. The recognition of multilingualism as well as its implementation is thus becoming an obligation resting on all states, including South Africa. International law shows that persons belonging to linguistic minorities are entitled not only to protection against discrimination based on the language they speak, that is, formal equality, but also to positive state action in order to ensure their substantive equality. International law furthermore prescribes that where protection is given to minority languages, the principle of proportionality must guide states, and that legislation needs to be sufficiently detailed in bringing about such protection.

The present thesis has as its main aims the interpretation of the provisions of the 1996 Constitution, in accordance with the above-mentioned international standards and the evaluation of the extent to which South African has complied with its constitutional obligations. The thesis in addition makes proposals in relation to what needs to be done to comply with such obligations. This is done in respect of the three levels of government - national, provincial and

local - as well as the three state branches - the legislature, the executive and the judiciary. In addition, the implementation of the constitutional requirements in the educational sector is analysed.

The thesis shows that a number of steps have thus far been taken in the process of giving effect to the relevant provisions of the Constitution. This includes the adoption of language policies on the national, provincial and local levels, as well as the enactment of language legislation in some provinces. In many provinces as well as municipalities, little effort has however been made to comply with these constitutional obligations. On the national level, much likewise still remains to be done in this regard. The current South African Languages Bill (2011) only caters for the activities of the national government, and does so in a way which conflicts with international norms. The Bill does not deal with parliament or the courts, and much uncertainty remains about the way in which the Constitution is to be given effect to in relation to these state branches. In relation to education, the issue of single-medium schools has been controversial, but has now been resolved by the Constitutional Court. Commendable policies have furthermore been adopted to provide for mother-tongue education, but it appears that English is slowly becoming the dominant language in education, at the expense of mother-tongue instruction.

## DECLARATION

I declare that *The Protection of Languages and of Language Rights in the South African Constitution* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Izak Fredericks

10 August 2011

Signed: .....

## PREFACE

A number of colleagues, relatives and friends have played a role in the completion of this thesis. In particular thanks are due to the persons whom I had the good fortune to have as advisors. This consisted of my supervisor, Prof. J de Ville, who, patiently and over an extended period, gave structure and depth to my ideas. In this endeavour he was assisted by Louis van Huyssteen who generously made his expertise and experience available to me; the fact that Prof Van Huyssteen unsuccessfully encouraged me to pursue further study while he was Chairperson of the Public Law department made his participation doubly significant. The goodwill shown by the Dean of the law faculty, Prof J Sloth-Nielsen, in arranging relief from presenting lectures at a time that I was most in need of it, is appreciated. My good friend and squash partner, Bob Martin, considered it his duty to not only encourage me but also to bolster my self-esteem.

At this time I also wish to pay tribute to my immediate family. My wife, Marlene, and daughter Cordelia, gave me their unstinting support and proved to be a fruitful, and necessary, duo of naggers. My son, Llewellyn and his wife, Zenobia, were a constant source of positive reinforcement. Last but certainly not least, my grandson, Cullen, already knows that his smile lightens my mood.

Bellville

10 August 2011

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# Chapter 1

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## Introduction

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### Language row delays high-profile trial

The trial of eight men facing 300 charges, including money laundering, fraud and theft, did not start on Monday as intended because the prosecutor, Brooker Nhantsi, does not understand Afrikaans.

Nhantsi, a Scorpions deputy director, has until Wednesday morning to find an interpreter to translate the case into English for him.

The case has been preceded by five years of investigation, allegedly involving R19 million. It has a 17 000-page docket.

Seven of the eight accused are Afrikaans-speaking. So are 20 of the witnesses, the legal representatives and the magistrate.

Nhantsi said he had a previous case where the court record had to be transcribed for him into English. He said it was his

constitutional right to conduct the case in English.

‘The accused are entitled to use Afrikaans. It is a right the state will respect’ he said.

However, Pretoria Court interpreters objected, saying they could not interpret for a court official.

Lucas Moloto, chief interpreter, told the court that they had not been trained to interpret legal arguments. They were trained to interpret from indigenous languages to English or Afrikaans, but not to correctly interpret ‘legal terms to legal people’.

‘We are willing to help, but it cannot be our responsibility if there are misunderstandings,’ he said.

Nhantsi told the court it would be

discrimination against him if interpreters did not render their services to him as a court official who could not speak Afrikaans.

He said the argument that interpreters could not interpret legal arguments was 'bizarre'.

He said if the court could not direct interpreters to help him, his only option would be to take the ruling to the minister of justice to ask for an interpreter for him.

Defence advocate Koos van Vuuren said his two clients were ready to proceed. The case had been put down for 28 days and it was costly for the accused. 'The thing of the interpreter raised its head in November. Last month the prosecutor was asked again in what language the trial would proceed. He said he would have an interpreter ready,' the advocate said.

Defence lawyer Herman Alberts said Nhantsi knew everyone involved in the case was Afrikaans. He said the authorities should have foreseen this problem before they appointed the prosecutor.

To this Nhantsi replied: 'I am a delegate of the national office, exercising my duty as best as possible. I cannot do that if I have to continue in a language I don't understand.'

Magistrate Kallie Bosch found that this was

'not a language issue but an interpreter issue'.

'The interpreters cannot be forced to interpret if they do not feel comfortable' he said.

The prosecution was given until Wednesday to start with an interpreter.

If this did not happen, there would be prejudice to the accused and the case would be scrapped from the roll, Bosch said.

Outside court legal representatives made it clear they did not have a problem with Nhantsi not being able to speak Afrikaans.

They said the prosecuting authority should have appointed someone who could understand the language.

## **1 Introduction**

The incident quoted above which was reported in the Independent Online of February 4, 2004,<sup>1</sup> demonstrates to what extent the recognition of multiple official languages, as provided for in the 1993 and 1996 South African Constitutions, can create unforeseen implementation difficulties. Section 6(1) and (2) of the 1996 Constitution provides the following in this respect:

(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

The rest of the section provides for the manner of implementation of the recognition of multilingualism by laying down certain criteria, and furthermore provides for the establishment of a Pan South African Language Board for purposes of giving effect to these provisions. A number of other provisions in the Constitution likewise relate to linguistic rights.

Through its recognition of 11 official languages, it appears that South Africa has learnt from the general history of language rights as well as from the local history of disregard for indigenous languages. History shows that, due to the rise of the nation state in the 19<sup>th</sup> century, the recognition and promotion of one national language at the expense of others spoken in the same territory has been

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<sup>1</sup> See Otto H 'Language row delays high-profile trial' (4 February 2004) available at <http://www.iol.co.za/news/south-africa/language-row-delays-high-profile-trial-1.122802?ot=inmsa.ArticlePrintPageLayout.ot> (accessed on 28 July 2011).

the norm until very recently. Most former colonies followed this trend when becoming independent, not however by making one local language the official language, but the colonial language. South Africa, because of its peculiar colonial history, recognised two languages as official languages from 1910-1994. Policies of monolingualism and bilingualism were followed in most countries of the world despite the reality of multilingualism, also in South Africa.<sup>2</sup> The recognition of only one or two dominant languages as official languages inevitably has consequences for minority groups as well as for minority languages themselves,<sup>3</sup> as has been increasingly recognised in the 20<sup>th</sup> century. As Laponce recently noted, language is used not only for communication, but also for exclusion.<sup>4</sup> Another threat to local languages is presented by globalisation, and the consequent dominance of English.<sup>5</sup> This is because when languages meet ‘they form hierarchies, and in the long run ... the strong reduce the effectiveness of the weak and eventually eliminate them’.<sup>6</sup> In order to survive, minority languages need the assistance of political (and legal) institutions.<sup>7</sup>

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<sup>2</sup> See in this regard Lewis, MP (ed) *Ethnologue: Languages of the World* 16 ed (2009) Dallas, Tex.: SIL International Online version: <http://www.ethnologue.com/> (accessed 28 July 2011).

<sup>3</sup> According to Lewis *Ethnologue* (2009), 473 of the 6909 living languages are threatened with extinction.

<sup>4</sup> Laponce JA ‘Minority Languages and Globalization’ available at <http://www.cpsa-acsp.ca/papers-2004/Laponce.pdf> (accessed 24 June 2011) 5.

<sup>5</sup> Laponce ‘Minority Languages and Globalization’ (2004) 1-2.

<sup>6</sup> Laponce ‘Minority Languages and Globalization’ (2004) 2.

<sup>7</sup> Laponce ‘Minority Languages and Globalization’ (2004) 3.

The dominance of English in the world today is also felt in South Africa where it is recognised as one of the 11 official languages.<sup>8</sup> Serious doubts have recently emerged regarding the government's commitment to the implementation of the constitutional provisions in relation to linguistic rights. Some have expressed the view that whilst the state is proclaiming multilingualism, it is effectively practising monolingualism.<sup>9</sup> The importance of not only constitutionally recognising multilingualism, but also developing and implementing detailed language policies cannot be overestimated. Interaction between state and subject, which is made possible by the recognition of linguistic rights, is the hallmark of responsive and accountable government.<sup>10</sup> In linguistically homogeneous states, the language used in government functions is

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<sup>8</sup> According to the 2001 Census, English is the home language of only 8.2% of the population; see Statistics South Africa Census 2001 available at <http://www.statssa.gov.za/census01/html/default.asp> (accessed on 28 July 2011).

<sup>9</sup> See e.g. Mwaniki, MM *Language Planning in South Africa: Towards a Language Management Approach* (PhD thesis, University of the Free State, 2004) available at <http://etd.uovs.ac.za/ETD-db/theses/available/etd-09302005-100916/unrestricted/MWANIKIMM.pdf> (accessed 28 July 2011) 15-16; De Varennes F 'Language rights in South Africa: All are equal but some are more equal than others?' Presentation at the Faculty of Law, University of Pretoria on 10 February 2010, available at <http://www.afrikaansetaalraad.co.za/?p=1676> (accessed on 12 March 2011); Henrard K 'Language rights and minorities in South Africa' (2001) 3:2 *International Journal on Multicultural Societies* 82; and Strydom H *International Standards for the Protection of Minorities and the South African Constitution* (2002) available at [https://www.givengain.com/cause\\_data/images/2137/02\\_05\\_Int\\_Standard\\_Minorities\\_Publ.pdf](https://www.givengain.com/cause_data/images/2137/02_05_Int_Standard_Minorities_Publ.pdf) (accessed on 28 July 2011) 25.

<sup>10</sup> See e.g. s 57(1)(b) of the 1996 Constitution.



usually self-evident. However, as noted above, the vast majority of states contain diverse linguistic groups, making linguistically homogeneous states rare exceptions to the rule. A strong connection is furthermore today recognised between language, identity and human dignity.<sup>11</sup> In the last few decades, linguistic diversity has moreover been recognised as a value in itself.<sup>12</sup> Rules regulating interaction between state and subject should for these and other reasons take account of the interests of minority language groups.<sup>13</sup>

## **2 Research question**

In recognising officially multiple languages, South Africa follows an international trend which became especially strong in the last few decades of the

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<sup>11</sup> See e.g. Kraus PA *A Union of Diversity: Language, Identity and Polity-building in Europe* (2008) Cambridge: Cambridge University Press 81, 105; and the Explanatory Note to OSCE High Commissioner on National Minorities *Oslo Recommendations on the Linguistic Rights of Minorities* (1998) available at <http://www.osce.org/hcnm/67531> (accessed on 28 July 2011); Henrard K 'Language and the administration of justice: The international framework' (2000) 7 *International Journal on Minority and Group Rights* 79; see further chapter 2.

<sup>12</sup> See chapter 2, specifically the discussion of the European Charter for Regional or Minority Languages.

<sup>13</sup> See also the keynote address of the High Commissioner on National Minorities: 'The protection of persons belonging to minorities has to be seen as essentially in the interest of the state. If the state shows loyalty to persons belonging to minorities, it can expect loyalty in return from those persons. Part of this would seem to be that states should not make empty promises as these are a sure way to erode confidence.' Van der Stoel M 'Keynote address of the High Commissioner on National Minorities at the CSCE Human Dimension Seminar Case Studies on National Minority Issues Positive Results', Warsaw, 24-28 May 1993, available at <http://www.osce.org/odihr/19660> (accessed on 28 July 2011).

20<sup>th</sup> century. Recognising minority languages<sup>14</sup> is however not only a fashion statement. Common standards in relation to the protection of minority languages are in the process of being developed in international law, so that the recognition of multilingualism as well as its implementation is becoming an obligation resting on all states, including South Africa. The primary question this thesis aims to answer is what exactly the South African Constitution requires from the state in relation to languages. In interpreting the provisions of the 1996 Constitution, account will necessarily have to be taken of the precise nature of these international standards and of the obligations which they impose on states in relation to minority languages. In the process it will have to be established whether linguistic rights are simply negative rights, thereby effectively amounting to (only) a prohibition against discrimination, or whether they also impose a positive duty on the state. If it is found that linguistic rights imply a positive duty as well, the extent of such duty will have to be determined in relation to the three levels of government (national, provincial and local) as well as the three state branches (legislature, executive, and judiciary).

A number of steps have already been taken by the South African state to give effect to the provisions of the Constitution in relation to languages. This

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<sup>14</sup> ‘Minority languages’ should here be understood as referring to any language of which it can be said that its speakers consist of less than 50% of the population (see Human Rights Committee *Ballantyne, Davidson, McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993) par 11.2. This would make of all official South African languages minority languages. English is however for various reasons the ‘dominant’ language in South Africa, and therefore effectively a ‘majority’ language.

includes the adoption of language policies on the national, provincial and local levels.<sup>15</sup> In three provinces, legislation has furthermore been enacted to give effect to the language provisions of the Constitution. A number of court cases have in addition dealt with language rights, raising questions about the language of court proceedings, language policies in schools, and even more pertinently, whether the government has complied with its obligation under section 6(4) of the Constitution to ‘regulate and monitor their use of official languages’ ‘by legislative and other measures’. This thesis will evaluate the steps taken in order to determine whether they comply with the constitutional obligations and, if insufficient, what else would have to be done to ensure compliance. The thesis will in addition analyse the relevant court decisions in order to ascertain whether they correctly interpret the constitution.

### **3 Significance of this thesis: Literature Survey**

There has been great interest in the provisions of the language provisions of the 1993 and 1996 Constitutions from all over the world. There is therefore no shortage of material on this topic in the legal field. Most of the research however is in the nature of law journal articles and therefore inevitably tend to focus on specific issues in relation to the protection of language rights such as the enactment of legislation in the official languages, language in education or in the courts, or is relatively succinct. More in-depth studies do not focus

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<sup>15</sup> For a number of these policies, see University of the Free State Unit for Language Facilitation and Empowerment ‘Database Language Policies’ available at <http://humanities.ufs.ac.za/content.aspx?id=217> (accessed on 29 July 2011).

exclusively on linguistic rights.<sup>16</sup> PhD studies in the area are not in the legal field.<sup>17</sup> No comprehensive study has therefore as yet been undertaken in the legal field in relation to the language provisions of the South African Constitution. More specifically, no detailed study has as yet been undertaken which interprets the relevant constitutional provisions in light of international norms, and evaluate, in light thereof, the steps taken thus far towards implementation on the three levels of government, in the three state branches and in the educational sector. The present study nevertheless does not seek to chart a completely new course. The studies that have thus far been undertaken in relation to this issue are of a high quality and, as will appear from the analysis that follows, the present study is in agreement with most of what has been said thus far. The contribution of the present study lies in its relative comprehensiveness and up to date assessment of the current situation in relation to the implementation of the language provisions of the Constitution.

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<sup>16</sup> See e.g. Henrard K *Minority Protection in Post-Apartheid South Africa: Human Rights, Minority Rights and Self-Determination* (2002) Westport: Praeger.

<sup>17</sup> See Tshigabe AJ *The Language Policy of South Africa as laid down by the Constitution and the Marginalisation of Tshivenda* (MA thesis, Rand Afrikaans University, 1999); Mwaniki, MM *Language Planning in South Africa: Towards a Language Management Approach* (PhD thesis, University of the Free State, 2004) available at <http://etd.uovs.ac.za/ETD-db/theses/available/etd-09302005-100916/unrestricted/MWANIKIMM.pdf> (accessed 28 July 2011); Made ZJ *An Investigation into Implementation of Language Policy in the Eastern Cape with Specific Reference to isiXhosa* (D Litt Thesis, Nelson Mandela Metropolitan University, 2010) available at <http://www.nmmu.ac.za/documents/theses/ZOLISWA%20%20JACQUELINE%20%20MADE.pdf> (accessed on 28 July 2011).

#### **4 Methodology**

This thesis undertakes a comprehensive analysis of the provisions of the South African Constitution in relation to language and linguistic rights in light of recent international law developments in the field. It also investigates the implementation of these constitutional provisions through the enactment of language policies by national, provincial and certain local governments as well as in the educational sector. The present study furthermore surveys the existing literature insofar it contains an evaluation of the current state of implementation. The study is thus restricted to a survey of existing literature both in South Africa and abroad.

#### **5 The Scope and Structure of the Study**

The present study involves a *legal* analysis of the provisions of the Constitution and their implementation. Although reference will be made to relevant non-legal studies in the field, such as linguistics, this study will restrict itself to the issues as outlined above, except insofar as a broader analysis is considered necessary. Although much can no doubt be learnt from other jurisdictions in the present area of concern, the difficulty with comparative analysis in this area of law is that the peculiar history of a country inevitably influences the provisions of its Constitution and legislation in relation to language rights. Comparative analysis therefore has to be undertaken with utmost care because of the differing contexts. In the present study comparative analysis will be undertaken only in certain contexts where valuable lessons can be learnt for South Africa's emerging thinking on language rights. This will specifically happen in chapters 3 and 4 (Canada) and chapter 5 (India, and the United States). There is

undoubtedly a mutual interaction between what happens in municipal law and international law in relation to language and linguistic rights. The policies adopted within countries affect international sentiment and vice versa. For the present study an analysis of international law in the field is of somewhat greater value because of the general principles which can be found there, and which are, at least to some extent, binding on South Africa.

Apart from an analysis of the obligations in relation to language on the three levels of government and the three state branches, the present study will also undertake a limited analysis of developments in the educational sector in relation to language. The public media and specifically the South African Broadcasting Corporation (SABC) is clearly an important vehicle for the implementation of the language provisions of the 1996 Constitution.<sup>18</sup> The study will nevertheless restrict itself to the use of languages in the 'official domains' of government business<sup>19</sup> and will thus, apart from what is stated in the present paragraph, not engage specifically with the way in which the SABC has fulfilled, or failed to fulfil, this role.<sup>20</sup>

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<sup>18</sup> Section 10(1) of the Broadcasting Act 4 of 1999 provides that, insofar as its public service is concerned (as opposed to its commercial service) the SABC '(a) must make services available to South Africans in all the official languages; (b) reflect both the unity and diverse cultural and multilingual nature of South Africa and all of its cultures and regions to audiences; (c) strive to be of high quality in all of the languages served'.

<sup>19</sup> See Du Plessis LT & Pretorius JL 'The structure of the official language clause: A framework for its implementation' (2000) 15 *SAPR/PL* 510, read with fn 18.

<sup>20</sup> Valuable studies of the language policies of the SABC have been conducted by Masenyama, KP *National Identity in Post-Apartheid South Africa: SABC TV's Contribution* (MA Thesis,

The present study consists of six chapters. Chapter 1 is the introductory chapter, and chapter 2 deals with the International Protection of Minority Linguistic Rights. As indicated above, this thesis aims to investigate, with reference to international law, what is required in terms of the South African Constitution in respect of the treatment of languages. In line with the approach adopted in chapter 2 on the relation between international law and municipal law, an attempt will first be made to determine what the requirements are in international law in relation to the protection of languages and of language rights (chapter 2), and thereafter (in chapter 3) the relevant constitutional requirements will be interpreted in light of these requirements.<sup>21</sup> In chapter 2, the focus will be on the interrelation between individual human rights, minority protection and self-determination. This will take place through an analysis of the

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University of Johannesburg, 2005) available at <http://ujdigispace.uj.ac.za:8080/dspace/bitstream/10210/1331/1/KuraiMasenyama.pdf> (accessed on 28 July 2011); and Olivier, JAK *Die Moontlikhede wat Onderskrifte die SABC-TV bied in die Erkenning en Beskerming van Taalregte* (MA Thesis, Potchefstroom University, 2003) available at <http://www.jako.nom.za/JAKOlivierMA.pdf> (accessed 28 July 2011); Du Plessis, T 'The development of a multilingual language policy at the SABC since 1994' 2006 *Acta Academica Supplementum: Multilingualism and the media* 45-75.

<sup>21</sup> According to Dugard *International Law: A South African Perspective* 3d ed (2005) Cape Town: Juta 68, in cases where the constitutionality of statutes are in issue involving rules of international law 'it is the duty of the court to ascertain [first] the content of the [international law] rule and [thereafter] to give an interpretation to the Constitution that accords with this rule...[O]nly if this is impossible because of a clear inconsistency between the rule of international law and the Constitution' will the latter prevail. As Dugard furthermore points out (at 69), there can be no 'proper' interpretation of the Constitution without a consideration of international law.

early historical development of the notion of minority (language) protection as well as of the international law instruments developed under the League of Nations and the United Nations in the 20<sup>th</sup> century, and their interpretation. An analysis will furthermore be undertaken of developments of a more regional nature, primarily in Europe, insofar as the protection of languages and minority linguistic rights are concerned. The most important developments in relation to these issues have taken place under the auspices of the OSCE and the Council of Europe. These developments have led to the development of common standards of minority language protection and can be considered as non-binding international law or 'soft law'. These developments are of great importance for the interpretation of the provisions of the South African Constitution. The aim will be to establish the basic principles of international law in relation to minority language protection.

Chapters 3 to 5 of the thesis deal with the interpretation of the constitutional provisions themselves as well as their implementation on all levels and branches of government; as well as their implementation within the educational sector. Chapters 3 and 4 will inevitably overlap to a certain extent, however the focus of these chapters will be somewhat different. The approach adopted in respect of chapters 3 and 4 furthermore enables one to measure compliance with the language provisions of the Constitution to the closest extent possible.

Chapter 3 deals with the historical development of the language provisions of the Constitution, their analysis, and their implementation in a broad sense on the different levels of government, that is, the national, provincial and local levels. The chapter starts with a historical analysis of the state structure as well as of



the position of languages in South Africa since Union in 1910. This will be followed by an analysis of proposals in relation to language accommodation before the 1993 Constitution, an analysis of the provisions of the 1993 Constitution, as well as of the 1996 Constitution in relation to state structures and language. The analysis in chapter 2, of the common standards in international law, will play an important role here. Note is furthermore taken in this regard of Census 2001, as an aid in determining the prevalence and the spread of the official languages in South Africa. This will be followed by an analysis of the steps taken on the three levels of government to implement the constitutional provisions in relation to language. It will appear from this broad overview that although some significant steps have been taken, especially in certain provinces and municipalities in the adoption of language policies, and in some instances, of legislation, much still remains to be done. The chapter will conclude with an analysis of the role and success thus far of the Pan South African Language Board in implementing and monitoring the language provisions of the Constitution.

Chapter 4 deals with the application of the language provisions of the Constitution to the three state branches, that is, the legislature, the executive, and the judiciary as well as the implementation of these provisions in respect of these branches. This will involve a more detailed analysis of the language policies and legislation already in place or envisaged than was undertaken in chapter 3, in light of the constitutional provisions and international law standards. In relation to the application of the language provisions of the constitution to the judiciary, a number of cases have already been decided. A number of law journal articles have also engaged with the issue. Account is

furthermore taken here of Canadian jurisprudence. Despite differences between the South African and Canadian Constitutions, the general approach of the Canadian courts in relation to language rights, which corresponds with that of the Constitutional Court, is relied upon here. A detailed analysis will be undertaken of all the above, in light of the findings in previous chapters.

Chapter Five examines language rights in education with particular reference to section 29 of the Constitution. Two issues will receive detailed attention here. Firstly, an analysis will be undertaken of the issue of mother-tongue education, which has been the subject of a number of international law instruments. Although this issue has not as yet been extensively debated in legal circles in South Africa, it raises important constitutional issues. Although vocational training, adult education and tertiary education will not be specifically discussed, the principles laid down here are also applicable to them. The second issue to be discussed here is the controversial issue of single-medium schools. A number of cases have in recent years been decided on this specific issue, with some finality now having been obtained by the Constitutional Court decision in the *Ermelo* case. These cases will be discussed, also in light of the international standards raised in chapter 2.

Chapter 6 is the concluding chapter. It will contain a summary of the findings and recommendations made in the earlier chapters. The thesis ends with a note of optimism. Although there is room for improvement, the groundwork has been laid by the government to follow international law insofar as the recognition of language rights as well as the protection of minority languages is concerned.

## Chapter 2

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### International protection of minority linguistic rights

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#### 1 Introduction

In the introductory chapter, the change from the traditional idea that one national language is the characteristic norm of a state, towards the eventual universal recognition of the existence of minority languages within states in the 20<sup>th</sup> century, was briefly mentioned. A specific factor that influenced and at the same time delayed the recognition of minority linguistic rights was the linkage insisted on between nation, culture/language and state in the 19<sup>th</sup> and early 20<sup>th</sup> centuries.<sup>1</sup> This right of a nation to form its own state is what some writers refer to as the ideal form of self-determination.<sup>2</sup> The almost inevitable consequences of this ideal are described by Strydom in the following terms:

[T]his process of nation building, once set in motion, could not stop at the boundaries of language and culture assimilation but found its completion in the excesses of the twentieth

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<sup>1</sup> Strydom H 'South African constitutionalism between unity and diversity: Lessons from the new Europe' (1997) 12 *SAPR/PL* 375; De Varennes F *Language, Minorities and Human Rights* (1996) The Hague: Martinus Nijhoff Publishers 13-23.

<sup>2</sup> Thornberry P 'Self-determination, Minorities, Human Rights' (1989) 38 *ICLQ* 869.

century in the form of the holocaust, Bolshevik oppression, apartheid, and ethnic cleansing. These events should remind us of how dangerously unsuccessful the republican idea of the state as the guardian and integrator of diverse life forms can become in the face of an ethno-centric and naturalistic concept of the nation.<sup>3</sup>

International law, as will be shown in this chapter, in the 20<sup>th</sup> century moved beyond this understanding of the state. This development progressed through various stages: bilateral agreements; agreements under the auspices of the League of Nations; and eventually, international treaties and instruments which provide comprehensively for minority language protection. Through this historical process, the restricted protection of minority rights in particular jurisdictions have matured into norms of universal application. Before engaging in more detail with this historical process, it is necessary to first give attention to the South African Constitution, insofar as it regulates the status of international law vis-à-vis municipal law.

## **2 The South African Constitution and International Law**

The South African Constitution contains a number of important provisions in relation to international law, the most important of which, for our purposes, are sections 39(1) and 233 of the Constitution.<sup>4</sup> They provide as follows:

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<sup>3</sup> See Strydom H 'International Standards for the Protection of Minorities and the South African Constitution' (2002) available at [https://www.givengain.com/cause\\_data/images/2137/02\\_05\\_Int\\_Standard\\_Minorities\\_Publ.pdf](https://www.givengain.com/cause_data/images/2137/02_05_Int_Standard_Minorities_Publ.pdf) (accessed on 28 July 2011) 7.

<sup>4</sup> Other references to international law are to be found in ss 35(3)(l), 37(4)(b)(i), 37(8), 199(5), 200(2), 201(2)(c), 231, and 232.

39(1) When interpreting the Bill of Rights, a court, tribunal or forum –

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

233. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The argument can be raised at this point that section 6 of the Constitution (the primary provision on language rights) does not form part of the Bill of Rights, and that section 39(1) – and accordingly international law itself - is not applicable in its interpretation. This argument cannot be accepted for a number of reasons. First, there is a clear overlap and cross pollination between section 6 of the Constitution (one of the founding provisions) and provisions of the Bill of Rights, such as section 9(3) (equality), section 29 (education), section 31 (the rights of religious and cultural, religious and linguistic communities) and section 35 (language rights in trial proceedings). As will appear from the further discussion, section 6 can in a way be read as spelling out in more detail the requirements of section 9 in respect of substantive equality, specifically within the linguistic field. International law similarly recognizes a close relation between language rights and human rights. A strict distinction can in other words not be drawn between the latter two notions. Second, the aim of the above-quoted provisions is clearly to prescribe a break with the apartheid-era approach of hostility vis-à-vis international law and to bring about harmony between South

African municipal law (as a whole) and international law.<sup>5</sup> Section 233 in effect gives constitutional recognition to the common law presumption that the legislature does not intend to violate international law.<sup>6</sup> When referring to ‘legislation’ that needs to be interpreted in accordance with international law, section 233 must thus be read as referring also to the Constitution itself, with section 39(1) emphasizing the importance of aligning specifically the interpretation of the Bill of Rights with international (human rights) law.<sup>7</sup>

The judgment of Chaskalson P in *S v Makwanyane*<sup>8</sup> has made it clear that not only international law which is binding on South Africa, but also international law which is not so binding can be relied on in terms of s 35 of the 1993 Constitution. This seems to include all those sources of international law recognized in article 38(1) of the Statute of the International Court of Justice, that is –

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<sup>5</sup> Dugard *International Law* (2005) 25-6, 69.

<sup>6</sup> Du Plessis L *Re-Interpretation of Statutes* (2002) Durban: Butterworths 173; Keightley R ‘Public international law and the final Constitution’ (1996) 12 *SAJHR* 415.

<sup>7</sup> Dugard *International Law* 64-5. See however Du Plessis *Re-Interpretation of Statutes* (2002) 173 who is of the view that ‘the legislation referred to in section 233 probably does not include the Constitution’. With reference to the *Azapo* case, he however expresses the view that the common-law presumption against the violation of international law applies to the interpretation of the Constitution itself (with the exception of chapter 2). In the latter respect Du Plessis (at 173) reads s 39(1)(b) as requiring that the interpretation of chapter 2 ‘*must* be made subject to considerations of international law’, thereby stretching somewhat the literal reading of the provision.

<sup>8</sup> 1995 (3) SA 391 (CC) par 35.

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>9</sup>

According to one reading of the judgment, the above would constitute an exhaustive list, and the reference to international law in section 39(1) would therefore include only international law which is binding in general, even though it would not necessarily be binding on South Africa.<sup>10</sup> Non-binding international law, so-called ‘soft law’, would thus be excluded from consideration. Examples of soft law are resolutions of the UN General Assembly, standards set by declarations adopted at international conferences, and recommendations such as the ones referred to below.<sup>11</sup> They have the potential of eventually leading to binding treaties or of becoming rules of customary international law. Until that happens, they serve ‘as a useful guide to state conduct’.<sup>12</sup> According to Olivier, the value of soft law lies on the moral and political level and she furthermore points out that it can play ‘an important role in facilitating and mobilising the

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<sup>9</sup> See *S v Makwanyane* par 35 fn 46 where reference is made to an article of Dugard. Of these, treaties is the primary source, and customary international law the second most important source; see Dugard *International Law* (2005) 27.

<sup>10</sup> Olivier M ‘Interpretation of the Constitutional provisions relating to international law’ (2003) 6(2) *PER* 30.

<sup>11</sup> Olivier ‘Interpretation of the Constitutional provisions relating to international law’ (2003) 30, Dugard *International Law* (2005) 34-8.

<sup>12</sup> Dugard *International Law* (2005) 38.

consent of states required to establish binding international law'.<sup>13</sup> Olivier also points out that soft law finds itself in the grey area between law and non-law and that it is therefore not legally irrelevant.<sup>14</sup> There can consequently in principle be no objection to reliance on soft law in the interpretation of the South African Constitution. The Chaskalson judgment in *Makwanyane* clearly stands open to such a reading too.<sup>15</sup> This latter reading would furthermore fit very well with the notion of 'transformative constitutionalism' which Pieterse for example defines 'as mandating the achievement of substantive equality and social justice, the infiltration of human rights norms into private relationships and the fostering of a "culture of justification" for every exercise of public power'.<sup>16</sup>

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<sup>13</sup> Olivier M 'The relevance of "soft law" as a source for international human rights' (2002) 35 *CILSA* 289.

<sup>14</sup> Olivier 'The relevance of "soft law" as a source for international human rights' (2002) 294.

<sup>15</sup> Chaskalson P in *S v Makwanyane* specifically notes (par 35) that reports of specialised agencies such as the International Labour Organisation may in appropriate cases provide guidance as to the correct interpretation of the Bill of Rights. This dictum points towards the inclusion of 'soft law' for interpretive purposes. See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) where the court invoked the United Nations Guidelines on the Role of Prosecutors in developing the common law in accordance with s 39(2) of the Constitution; and *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) where the court invoked Guidelines on Justice Matters involving Child Victims and Witnesses of Crime of the Economic and Social Council of the United Nations in interpreting the notion 'the best interests of the child' in s 28(2) of the Constitution.

<sup>16</sup> Pieterse M 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SAPL* 156. See also Langa P 'Transformative constitutionalism' (2006) 17 *Stell LR* 353 who views transformative constitutionalism as inter alia requiring 'the establishment of a truly equal society and the provision of basic socio-economic rights to all'.



### 3 Early developments regarding the protection of language rights

The great empires of Alexander the Great, the Romans, the Ottomans and the Chinese as a rule allowed for local languages to continue to be used.<sup>17</sup> With the rise of the modern state in the 16<sup>th</sup> century, bilateral agreements were used to protect minorities.<sup>18</sup> Usually, no specific attention was given to language in these agreements. The need for minority protection arose at the time because of a bond of nationality or culture between a minority located in a ‘host’ country as a result of, for example, a cession of land; as well as in cases where the state which the minority considered to be its ‘natural home’, wished to protect that minority. This connection induced the ‘protecting power’ to enter into a treaty with the ‘host’ country to safeguard the rights of the minority. The protection granted in the minority protection treaties at their most generous extended to custom, religion, education, property and law.<sup>19</sup> The protection of religious freedom was particularly important because of the tension between different versions of Christian belief as well as between Christian and Muslim powers.<sup>20</sup> Generally

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<sup>17</sup> De Varennes *Language, Minorities and Human Rights* (1996) 4-10.

<sup>18</sup> Capotorti F *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) New York: United Nations 1-2; Thornberry P *International Law and the Rights of Minorities* (1991) Oxford: Clarendon Press 25-8.

<sup>19</sup> Thornberry *International Law and the Rights of Minorities* (1991) 26.

<sup>20</sup> Thornberry *International Law and the Rights of Minorities* (1991) 25-8 mentions inter alia the Treaty of Olivia of 1660; the Multilateral Convention of 1881 for the Settlement of the Frontier between Greece and Turkey; The Convention of Constantinople of 1879; The Treaty of

the treaties protecting minority rights at this stage were episodic and ‘a wilderness of single instances rather than any comprehensive scheme’.<sup>21</sup> Whereas these treaties were at first of a bilateral nature, in the 19<sup>th</sup> century multilateral treaties are to be found which protected not only religious freedom, but also the civil and political rights of minorities.<sup>22</sup> As for our main concern here, that is, the recognition of multilingualism, the obligation to protect minorities, as noted above, did not in general extend specifically to language rights. The one exception is the Final Act of the Congress of Vienna (signed on 9 June 1815 by Austria, France, Great Britain, Portugal, Russia, and Sweden), which allowed the Poles in Poznan to use Polish for official business, together with German.<sup>23</sup> Generally the treaties provided little protection since they contained inadequate supervisory machinery to establish whether treaty provisions were in fact observed. These treaties, despite their laudable objectives, at the same time threatened international peace, as they could be used as a pretext to launch an assault on another country for an alleged failure to adhere to the treaty provisions.<sup>24</sup> Insofar as the municipal protection of language

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Carlowitz of 1699; and the Treaty of Peace between France and Great Britain of 1713 as examples.

<sup>21</sup> Thornberry *International Law and the Rights of Minorities* (1991) 25.

<sup>22</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 2-3.

<sup>23</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 3. De Varennes *Language, Minorities and Human Rights* (1996) 24 in addition mentions the 1516 Treaty of Perpetual Union where Swiss speakers of German were specifically mentioned as entitled to certain benefits.

<sup>24</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 3.

and minority rights is concerned, a start was made in the 19<sup>th</sup> century in countries such as Austria, Hungary, Switzerland and Belgium, which recognised different languages as official languages.<sup>25</sup>

## **4 Multilateral institutions and the protection of language rights**

### **4.1 The League of Nations**

After World War I, the Paris Peace Conference tried to deal with the problems caused by the collapse of the Austro-Hungarian Empire and the consequent redrafting of the boundaries of states. The redrafting of borders resulted in the creation, by relocation in different states, of ethnic and linguistic minorities. No state was restructured in such a way that it accommodated only one particular ethnic group. Another consequence was that the status of various groups was altered: some groups had changed from being non-dominant to being dominant within a state (such as the Czechs, Slovenes and Poles), while others had become less dominant (German-speaking groups in Belgium, Poland and France, for example).<sup>26</sup> In drafting the Covenant of the League, one of the questions was how it should regulate the rights of minorities. Some, like Wilson, held the view that in all states where racial or national minorities were to be found they should have the same rights as the majority.<sup>27</sup> Provision thus had to be made for the

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<sup>25</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 3-4.

<sup>26</sup> De Witte B 'Conclusion: A legal perspective' in Vilfan S (ed) *Ethnic Groups and Language Rights* (1993) New York: New York University Press 305-6.

<sup>27</sup> Thornberry *International Law and the Rights of Minorities* (1991) 38-40; Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 16-17.

general accommodation of minorities within state structures. Powerful states which would have been affected by this proposal were not however prepared to go along with this proposal as they believed that this would violate their sovereignty.<sup>28</sup> As a result, the Covenant of the League of Nations did not incorporate any provision specifically protecting the rights of minorities in member states.<sup>29</sup> However, minority protection was provided for in newly established and enlarged states. States such as Poland, Czechoslovakia and Yugoslavia (newly created states), and Romania and Greece (which had increased their territory) were required by the League of Nations to sign the so-called Minorities Treaties. Additional international instruments for minority protection, for vanquished states and new admissions to the League were largely based on the model provided by the treaty with Poland.<sup>30</sup> The Minorities Treaties provided in general for the following duties to be placed on states:<sup>31</sup>

- (i) the grant of nationality of the newly created or enlarged state based on habitual residence, or birth in the case where the parents were domiciled in the territory concerned;
- (ii) the protection of life, liberty and freedom of religious belief of all inhabitants;

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<sup>28</sup> Thornberry *International Law and the Rights of Minorities* (1991) 39-40.

<sup>29</sup> Lerner L 'The evolution of minority rights in international law' in Brölman C, Lefeber R & Zieck M *Peoples and Minorities in International Law* (1993) Dordrecht: Martinus Nijhoff Publishers 83.

<sup>30</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 18.

<sup>31</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 17-18.

- (iii) equality of all nationals before the law, equality of civil and political rights, and equality of treatment and security;
- (iv) differences in relation to race, language or religion would not prejudice any national with regard to public employment or the exercise of professions and industries; nationals belonging to minorities had the right to establish at own expense schools and other educational establishments based on language or religion;
- (v) no restriction would be placed on the free use of any language in private conversation, in commerce, in religion, in the press, in publications, or at public meetings; allowing the use of the mother tongue, orally or in writing, before the courts; providing instruction in the mother tongue at primary school, where there is sufficient demand;
- (vi) the grant of an adequate share of the budget for educational, religious and charitable purposes to minorities; and
- (vii) the provision of special rights to certain minority groups.<sup>32</sup>

States subject to these treaties were required to make these obligations part of their fundamental laws and any laws which conflicted therewith would be null and void.<sup>33</sup> Capotorti points out that the system of minority protection under the League of Nations was both similar to and represented an advance in relation to

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<sup>32</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 18-19. De Varennes *Language, Minorities and Human Rights* (1996) 26-7 points to the fact that these treaties already recognised the individual rights of all inhabitants in some respects, an approach that would become dominant after WW II.

<sup>33</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 19; Thornberry *International Law and the Rights of Minorities* (1991) 44.

the earlier treaties providing for the protection of minorities. Advances were the creation of a supervisory function by the Council of the League and its minorities committee, as well as the establishment of the Permanent Court of International Justice to decide on disputes.<sup>34</sup> These agreements thus had an international dimension, to be guarded over by the League of Nations.<sup>35</sup> However, as before, only smaller states were bound to comply with these measures. The great powers were not bound, also not in their dealings with the inhabitants of their colonies. The protection of national minorities was thus not as yet accepted as a general principle of international law.<sup>36</sup>

## **4.2 The United Nations**

Whereas the League of Nations had the problems of Europe as its primary focus, the United Nations aimed at solving the problems of the world.<sup>37</sup> Like the Covenant of the League of Nations, the Charter contains no specific provision that deals with the rights of minorities.<sup>38</sup> It nonetheless provides for minority protection in an indirect way by protecting minority interests, also in relation to

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<sup>34</sup> See also Thornberry *International Law and the Rights of Minorities* (1991) 44.

<sup>35</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 20; Thornberry *International Law and the Rights of Minorities* (1991) 44.

<sup>36</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 20-6.

<sup>37</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 26.

<sup>38</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 26.

language, via individual rights and freedoms.<sup>39</sup> It also does not protect only the interests of (certain) minorities in certain countries, but the rights and freedoms of individuals in all countries. It in other words lays down a universal principle of minority protection, albeit by way of individual rights.<sup>40</sup> This is also the approach adopted in the Universal Declaration of Human Rights,<sup>41</sup> but, as we will see, is not the case with all other international law instruments after the Second World War.<sup>42</sup>

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<sup>39</sup> De Varennes *Language, Minorities and Human Rights* (1996) 28; Thornberry P 'An unfinished story of minority rights' (2001) available at <http://lgi.osi.hu/publications/2001/18/1-3.PDF> (accessed 28 July 2011) 49. Strydom 'International Standards for the Protection of Minorities and the South African Constitution' (2002) 10 describes the thinking behind this post-war liberal approach to the protection of minorities as follows: 'The state could now claim neutrality and be equally indifferent in its attitude to the political recognition of cultural differences and the use of ethnic or other criteria in the distribution of goods and the granting of rights.'

<sup>40</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 27.

<sup>41</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 27.

<sup>42</sup> See Thornberry 'An unfinished story of minority rights' (2001) 50. Apart from the general multilateral treaties to be discussed here, a number of bilateral and multilateral treaties between a small number of states have also been concluded since WWII to ensure the protection of specific minorities; see Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 30-31; De Varennes *Language, Minorities and Human Rights* (1996) 31 fn.

Another provision in the Charter which is of relevance to minorities is that in relation to self-determination.<sup>43</sup> Article 1(2) of the Charter provides in this respect that one of the purposes of the United Nations is -

[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.<sup>44</sup>

This was the first time that self-determination was explicitly made part of the international law system.<sup>45</sup> It has since been confirmed as a principle of international law by the International Court of Justice, treaties such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights,<sup>46</sup> the African Charter on Human and Peoples' Rights, as well as by many authors.<sup>47</sup> Self-determination has however generally been interpreted in restrictive terms. Especially two UN General Assembly Resolutions which have attempted to give content to this right have confirmed this specific interpretation. Resolution 1514 (XV) of the General

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<sup>43</sup> The notion of self-determination derives from the modern notion of subjectivity, which found expression in the French and American revolutions, where the people asserted their right of self-government; see Thornberry 'An unfinished story of minority rights' (2001) 869.

<sup>44</sup> See also art 55. There was already a debate about the inclusion of such a clause in the Covenant of the League of Nations, but this was rejected by the major powers.

<sup>45</sup> Thornberry 'Self-determination, Minorities, Human Rights' (1989) 871.

<sup>46</sup> Section one of both these Conventions provide the following: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

<sup>47</sup> Dugard *International Law: A South African Perspective* (2005) 103-4. See also *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 par 114.



Assembly UN, New York, 14 December 1960<sup>48</sup> shows that self-determination was to be understood in relation to colonial independence and not as a notion to be relied on by minority groups within the borders of states:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.
5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.
6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.
7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

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<sup>48</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV) of 14 December 1960, available at

Self-determination was in other words to be exercised by a people, which were not to be understood as referring to an ethnic group, but to the whole people of a territory.<sup>49</sup> The existing boundaries between (colonial) states were to be respected in the attainment of independence.<sup>50</sup> Resolution 2625 of 1970<sup>51</sup> is to similar effect. It calls for a speedy end to colonialism in light of the principle of

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<http://www2.ohchr.org/english/law/independence.htm> (accessed 1 August 2011).

<sup>49</sup> Thornberry 'Self-determination, Minorities, Human Rights' (1989) 875; Dugard *International Law* (2005) 106. A Resolution adopted the next day - United Nations General Assembly Resolution 1541 (XV), Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter of the United Nations (15 December 1960) available at <http://www.ilsa.org/jessup/jessup10/basicmats/index.php> (accessed on 2 August 2011), spelt out in Principle VI that there were three possible ways in which self-government could be attained by a non-self-governing territory: (1) emergence as a sovereign independent state; (2) free association with an independent state; and (3) integration with an independent state. Dugard *International Law* (2005) 97 points out that UN practice shows a definite preference for independence in attaining self-government.

<sup>50</sup> Thornberry 'Self-determination, Minorities, Human Rights' (1989) 875. This is known as the principle of *uti possidetis juris*. *Uti possidetis* (literally: as you possess, or, more extensively, as you possessed, you will henceforth possess) is a Roman law doctrine which provides that after a conflict, the one which occupies a certain territory becomes its legal owner, unless provided otherwise by treaty. At the time of decolonization, it became known as the principle of *uti possidetis juris* and now meant that new States will come into operation with the same boundaries they had when they were administrative units within the territory of the colonial power; see Dugard *International Law* (2005) 130-2.

<sup>51</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Resolution 2625, General Assembly UN, New York, 24 October 1970, available at [http://www.oosa.unvienna.org/pdf/gares/ARES\\_25\\_2625E.pdf](http://www.oosa.unvienna.org/pdf/gares/ARES_25_2625E.pdf) (accessed 2 August 2011).

self-determination of peoples. The Resolution nonetheless notes towards the end that -

[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

A careful reading of these two resolutions can however lead to a different conclusion: territorial integrity would be regarded as sacrosanct *only if* the requirement of *internal* self-determination is present.<sup>52</sup> The principle of territorial integrity is in other words applicable only to those states where the government represents the entire people in accordance with the principle of internal self-determination. In the event of the absence of internal democracy, minorities would therefore have the right of secession. In accordance with this interpretation, the Resolution can thus be said to advocate the development of internal self-determination and pluralist systems of governance as only in this way would the right to self-determination be assured to all peoples. The general formulation of this right to self-determination in paragraph 2 of Resolution 1514 could furthermore be read as indicating that it applies to all people, i.e. not only those in colonies, and that it is permanently available, that is, that it would also

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<sup>52</sup> Thornberry 'Self-determination, Minorities, Human Rights' (1989) 876, referring to Rosenstock; also Henrard K *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (2000) Dordrecht: Martinus Nijhoff Publishers 302-4.

be available *after* decolonization.<sup>53</sup> Such a reading appears to be supported by the Helsinki Final Act of the Conference on Security and Co-operation in Europe which clearly spells out the relation between individual human rights, minority protection and self-determination as follows:

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development (Principle VIII).<sup>54</sup>

Events in Europe and Africa since the 1990s have again raised the question of the right to secession in international law, as well as the relation between self-determination, minority protection and human rights. Although sovereignty and territorial integrity remain the central principles of international law, it is now, although still somewhat hesitantly, recognised that secession is possible as a last resort.<sup>55</sup> When a minority is oppressed, and its existence threatened, it in other

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<sup>53</sup> Thornberry 'Self-determination, Minorities, Human Rights' (1989) 876-7 nonetheless cautions against such a reading of the Declaration, pointing out that this was not supported by the drafting history.

<sup>54</sup> Conference on Security and Cooperation in Europe Final Act (1975) available at <http://www.osce.org/mc/39501> (accessed 17 June 2011).

<sup>55</sup> Henrard *Devising an Adequate System of Minority Protection* (2000) 301-4; Dugard *International Law* (2005) 107-8. See also *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 par 126: 'The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.'; also at par 122, 134 and 138.

words becomes a people and can claim a right to external self-determination.<sup>56</sup> Conversely, and as noted above, a principle of adequate minority protection or internal self-determination has developed. These interlocking principles for example appear from the Vienna Declaration and Programme of Action, World Conference on Human Rights of 25 June 1993,<sup>57</sup> which notes the following:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.

Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.

In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

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<sup>56</sup> Henrard *Devising an Adequate System of Minority Protection* (2000) 302, 305.

<sup>57</sup> Available at <http://www2.ohchr.org/english/law/vienna.htm> (accessed 2 August 2011).

The UN General Assembly's Declaration on the Occasion of the Fiftieth Anniversary of the United Nations<sup>58</sup> is to similar effect. It likewise provides for the territorial integrity of states, provided that such states conduct 'themselves in compliance with the principle of equal rights and self-determination of peoples'.

An international norm of internal self-determination can in other words be said to have developed, which is fully in line with the protection of individual human rights and minority protection.<sup>59</sup> It recognizes the right of minorities to political participation and other forms of self-realisation within the existing structures of a multinational state.<sup>60</sup> External self-determination can in other words be said to be

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<sup>58</sup> Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, UN General Assembly Resolution 50/6, 24 October 1995, available at <http://habitat.igc.org/open-gates/a50r6.htm> (accessed on 2 August 2011).

<sup>59</sup> Henrard K 'Language rights and minorities in South Africa' (2001) 3:2 *International Journal on Multicultural Societies* 43 speaks in this regard of an 'interrelation between individual human rights, minority rights and the right to self-determination'. See in this regard also *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 par 130: 'There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a "people" to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.'

<sup>60</sup> Dugard *International Law* (2005) 106. There are of course various ways in which minorities can receive recognition within the structures of a state, for example by granting territorial or non-territorial autonomy to such groups, with further representation on a higher level; by providing for the right to equality as well as for cultural, religious and linguistic rights in a Bill of Rights; and through the recognition of minority languages; see in general Fessha YT *Ethnic Diversity and Federalism* (2010) Surrey: Ashgate.

subject to certain limitations, requiring a specific form of treatment of minorities. This duty to protect minorities can also be seen in the changing rules for the recognition of new states. According to the European Community's Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union',<sup>61</sup> these new states are required to, inter alia, show 'respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights' as well as to provide guarantees for 'the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE'.<sup>62</sup>

We now turn to the international norms that have developed specifically regarding the protection of language rights. In this respect, a number of

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<sup>61</sup> Brussels, 16 December 1991.

<sup>62</sup> See European Community 'Declaration on the 'Guidelines on the Recognition of new States in Eastern Europe and the Soviet Union' (16 December 1991) available at [intl.law.univie.ac.at/uploads/media/D\\_85n.doc](http://intl.law.univie.ac.at/uploads/media/D_85n.doc) (accessed on 7 June 2011); and also *Devising an Adequate System of Minority Protection* (2000) 304. See further Dugard *International Law* (2005) 88-90 who points out that this rule of recognition already surfaced with the non-recognition of Rhodesia in 1965. Dugard is nonetheless of the view that, based on state practice, this cannot as yet be said to be a rule of recognition. He also points to the unfairness and inconsistency of a rule which would expect such protection from new states, but not from existing states (but see at 101-2 on the doctrine of non-recognition of states, where Dugard offers no objection to using this rule). It could be noted, in response to the latter argument, in line with what was stated above, that even though members states who oppress minorities may not lose state recognition, they would open themselves to a claim of secession. Understood thus, the 'inconsistency' would be diminished.

international treaties, especially in Europe, have shown the way. As we will see, and as Henrard perceptively points out, the norm that has developed in this regard require both formal and substantive equality. The system of minority protection which is required, Henrard<sup>63</sup> notes –

consists of a conglomerate of rules and mechanisms enabling an effective integration of the relevant population groups, while allowing them to retain their separate characteristics, or in other words ‘integration without forced assimilation’. Such a system is based on two pillars or basic principles, namely the prohibition of discrimination on the one hand, and measures designed to protect and promote the separate identity of the minority groups on the other. Minority protection *sensu lato* [in the broad sense] thus encompasses not only non-discrimination measures but also all kinds of ‘special’ measures designed to protect and promote the separate identity of minorities.

### **4.3 The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities**

Despite the decision not to include any explicit provision for the protection of minorities as such in the UN Charter, the UN Commission on Human Rights was specifically given the function by the Economic and Social Council of protecting minorities. This led to the establishment by the Commission in 1947 of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. In its first session, the Sub-Commission sought to attain clarity on the relation between the prevention of discrimination and the protection of minorities. This was in anticipation of the drafting of the Universal Declaration of Human

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<sup>63</sup> Henrard ‘Language rights and minorities in South Africa’ (2001) 43.



Rights.<sup>64</sup> The Sub-Commission distinguished as follows between these two notions:

1. Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish.
2. Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population. The protection belongs equally to individuals belonging to such groups and wishing the same protection. It follows that differential treatment of such groups or individuals belonging to such groups is justified when it is exercised in the interest of their contentment and the welfare of the community as a whole.

If a minority wishes for assimilation and is debarred, the question is one of discrimination and should be treated as such.<sup>65</sup>

The protection of minorities in other words required more from states than simply not discriminating against them: positive action had to be taken by states to support the continued existence of such groups. In a subsequent Memorandum by the Secretary it was noted in this respect that this would for example require the establishment of schools for a minority group where education is provided in the mother tongue of such group. From the perspective of formal equality it would not be viewed as discriminatory when all learners study in the same (dominant) language. Substantive equality, as set out by the Sub-Commission would take account of the fact that such a situation would be unfair, as learners from the dominant group would be receiving education in their mother tongue,

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<sup>64</sup> Thornberry *International Law and the Rights of Minorities* (1991) 125.

<sup>65</sup> Quoted from Thornberry *International Law and the Rights of Minorities* (1991) 125.

whereas those from a minority group would not, thereby placing them at a disadvantage.<sup>66</sup> Such measures could furthermore not be of a temporary nature, but had to be continuous, in order to ensure the maintenance of a distinct identity.<sup>67</sup> As Thornberry and others have pointed out, the two forms of protection are not mutually exclusive, but complement each other. Non-discrimination is an essential first step in the protection of minorities.<sup>68</sup> The Sub-Commission was unsuccessful in its attempts to have a provision on minority protection included in the Universal Declaration on Human Rights, but did succeed in this respect insofar as the Covenant on Civil and Political Rights is concerned.<sup>69</sup>

#### **4.4 Article 27 of the International Covenant on Civil and Political Rights<sup>70</sup>**

As already indicated above, the issue of minority protection was controversial after both the First and the Second World Wars. Arguments in favour of such

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<sup>66</sup> Thornberry *International Law and the Rights of Minorities* (1991) 126.

<sup>67</sup> Thornberry *International Law and the Rights of Minorities* (1991) 126.

<sup>68</sup> Thornberry *International Law and the Rights of Minorities* (1991) 126-7; Thornberry P 'Minority Rights' 307-90 in *Collected courses of the Academy of European Law*, Volume 6, Book 2 (1997) The Hague: Kluwer Law International 328.

<sup>69</sup> Thornberry *International Law and the Rights of Minorities* (1991) 129, 133-4. In 1999 the name of the Sub-Commission was changed to the Sub-Commission on the Promotion and Protection of Human Rights. In 2006, the Commission on Human Rights was furthermore abolished and replaced by the Human Rights Council, which in turn created a Human Rights Council Advisory Committee in the place of the Sub-Commission.

<sup>70</sup> 999 UNTS 171. Adopted and opened for signature by General Assembly resolution 2200A (XXI) of 16 December, 1966

protection did not carry the day in the adoption of the UN Charter (1945) and the Universal Declaration of Human Rights (1948).<sup>71</sup> In the drafting of the International Covenant on Civil and Political Rights by the Human Rights Commission, the issue again came to the fore. A number of draft proposals, including that of the Sub-Commission,<sup>72</sup> were considered by the Commission on Human Rights.<sup>73</sup> Agreement was eventually reached to adopt the draft article of the Sub-Commission, with a small amendment as proposed by Chile.<sup>74</sup> The draft of the Human Rights Commission was adopted by the General Assembly without amendments. Article 27 of the Covenant provides as follows:

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

The interpretation of article 27 has proved to be almost as controversial as its inclusion in the Covenant. The focus here will be on two issues: the scope of

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<sup>71</sup> Adopted by General Assembly Resolution 217A (III) of 10 December 1948. See De Varennes *Language, Minorities and Human Rights* (1996) 133-4 on the controversy surrounding minorities in these documents.

<sup>72</sup> The draft read as follows: 'Persons belonging to ethnic, religious or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their religion, or to use their own language.'

<sup>73</sup> The Sub-Commission was tasked with investigating means of minority protection by the UN in 1948, and in this respect proposed that the best method for such protection would be the inclusion of a provision on minority protection in the envisaged International Covenant; see Thornberry *International Law and the Rights of Minorities* (1991) 149-51; Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (1979) 31-3.

application of the article and the nature of the obligations imposed by it. Before coming to these issues, a few words need to be said about the Convention itself, and its application in South Africa. The Convention was adopted on 16 December 1966, and entered into force on 23 March 1976. South Africa signed the Covenant on 3 October 1994, and ratified it on 10 December 1998.<sup>75</sup> The Covenant requires of states to give effect to its provisions by protecting the rights in the Convention in their national law, and to provide for effective remedies in the case of violations. A Committee on Human Rights was established to ensure compliance on the international level. This entails the consideration of reports from states parties, as well as the consideration of communications from other states parties alleging a violation in terms of article 41.<sup>76</sup> An Optional Protocol provides for individuals to submit complaints directly to the Human Rights Committee when they have exhausted all domestic remedies.<sup>77</sup>

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<sup>74</sup> Chile was one of the states which believed that it did not have any ‘minorities’; see Thornberry *International Law and the Rights of Minorities* (1991) 154.

<sup>75</sup> See United Nations ‘Treaty Collection: International Covenant on Civil and Political Rights’ available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (accessed on 29 July 2011).

<sup>76</sup> South Africa has agreed to this provision: ‘The Republic of South Africa declares that it recognises, for the purposes of article 41 of the Covenant, the competence of the Human Rights Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant.’

<sup>77</sup> See Dugard *International Law* (2005) 318-320. South Africa acceded to the Optional Protocol on 28 August 2002; see United Nations ‘Treaty Collection: Optional Protocol to the International Covenant on Civil and Political Rights’ available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-5&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en) (accessed on 29 July 2011).

#### 4.4.1 Scope of application

The first issue to be discussed here relates to the meaning of the phrase '[i]n those states in which ethnic, religious or linguistic minorities exist' in article 27. In the negotiation process, many states expressed the view that the issue of minority protection was not applicable to them because its inhabitants could for a variety of reasons not be said to be 'minorities'. Some viewed the issue of minority protection as a European (and perhaps Asian) problem and that it was not applicable to newly established states. Such recognition of the existence of minorities would, according to this view, undermine the attainment of national unity and security in these new states.<sup>78</sup> It was in this respect contended by some states that it was only in instances of lengthy conflicts between nations or in the case of transfers of territory from one state to another, that 'minorities' in the sense of article 27 could be said to exist.<sup>79</sup> New immigrants and indigenous groups, in line with this restrictive interpretation, would not be covered by article 27.<sup>80</sup> Minorities had to be clearly defined and have existed for a long time, so the argument.<sup>81</sup>

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<sup>78</sup> Thornberry *International Law and the Rights of Minorities* (1991) 154-5; Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 33.

<sup>79</sup> Thornberry *International Law and the Rights of Minorities* (1991) 154.

<sup>80</sup> Thornberry *International Law and the Rights of Minorities* (1991) 156.

<sup>81</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 33.

The Capotorti report<sup>82</sup> rejected these restrictive interpretations of article 27 by noting that the existence of minorities cannot be left to the subjective discretion of a state. According to Capotorti, an objective approach should be adopted in determining the existence of a minority in a specific state. Capotorti however provided a definition of a minority for purposes of article 27, which has in its turn been accused of being too restrictive:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

The definition would seemingly exclude foreign nationals and stateless persons from its protection, as well as groups which are, although a minority, in a dominant position.<sup>83</sup> De Varennes is however of the view that neither the drafting history nor the wording of article 27 supports an interpretation which would exclude any of these groups.<sup>84</sup> De Varennes finds support for his wider reading of article 27 (in this respect) in recent decisions and general comments of

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<sup>82</sup> A committee, headed by Prof Francesco Capotorti was appointed by the Sub-Commission to investigate the implementation of article 27.

<sup>83</sup> Such an interpretation would possible exclude the white, Afrikaans-speaking community in South Africa; see *Gauteng Provincial Legislature, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) par 68.

<sup>84</sup> De Varennes *Language, Minorities and Human Rights* (1996) 138 attributes this narrow definition to Capotorti's allegedly erroneous reading of article 27 as at the same time placing financial obligations on states.

the Human Rights Committee.<sup>85</sup> The decisions in question show that indigenous communities do qualify as minorities;<sup>86</sup> that whether a group qualifies as a minority is to be determined solely numerically, with reference to the state party's population as a whole (and not for example a province in a state);<sup>87</sup> and that the issue of non-dominance is irrelevant.<sup>88</sup> The General Comments of the

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<sup>85</sup> De Varennes *Language, Minorities and Human Rights* (1996) 140-5. For a similar discussion of these cases and General Comments of the Human Rights Committee see also Scheinin M 'The United Nations International Covenant on Civil and Political Rights: Article 27 and other provisions' in Henrard K & Dunbar R (eds) *Synergies in Minority Protection* (2008) Cambridge: Cambridge University Press 25-30. One of the cases mentioned in this respect is that of *Diergaardt v Namibia* Communication no 760/1997, UN Doc CCPR/C/69/D/760/1997 (2000). The case concerns the claims of an indigenous community that the Namibian government was guilty of a violation of a variety of their rights in terms of the Covenant, inter alia art 27. The Committee however found no violation of art 27 as it was not satisfied that the link between the way of life of the community and the land (cattle raising) gave rise to a distinctive culture – a requirement laid down in earlier case law. The Committee nevertheless found that there had been a violation of art 26 (right to equal protection, inter alia on grounds of language) insofar as the government had given an instruction to its officials not to respond to oral or written communications from the community in Afrikaans, even when officials were capable of doing so.

<sup>86</sup> See in this respect *Lovelace v Canada* Communication no. R.6/24, U.N. Doc Supp. No. 40 (A/36/40 at 166 (1981)); *Kitok v Sweden* Communication no. 197/1985, CCPR/6/33/D/197/1985 (1988); and *Ominayak (Lubicon Lake Band) v Canada* Communication no. 167/1984 (26 March 1990) U.N. doc. Supp. No 40 (A/45/40 at 1 (1990)).

<sup>87</sup> See *Ballantyne, Davidson, McIntyre v. Canada* Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).

<sup>88</sup> See *Ballantyne, Davidson, McIntyre v. Canada*; see also Strydom 'International Standards for the Protection of Minorities and the South African Constitution' (2002) 13.

Human Rights Committee<sup>89</sup> expressly note that aliens, whether or not permanent residents, who form part of a minority, can rely on article 27. The article, as we saw above, protects the rights of individuals rather than minorities as such. Nonetheless, article 27 retains the idea of a group insofar as it requires that the individual who claims the protection of article 27 must belong to a group which shares ‘in common a culture, a religion, and/or a language’.<sup>90</sup> A tangible link in other words has to be shown to exist between the individual and the cultural, religious, or linguistic group in question.<sup>91</sup> In the case of language, this would presumably entail having to show that one’s mother tongue or primary language corresponds with that of the linguistic minority in question.<sup>92</sup>

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<sup>89</sup> Human Rights Committee, General Comment 15, The position of aliens under the Covenant (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994) available at <http://www1.umn.edu/humanrts/gencomm/hrcom15.htm> (accessed 2 August 2011); and Human Rights Committee General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the ICCPR, No 23(50) (art 27) UN Doc CCPR/C/21/Rev 1/add 5 (26 April 1994) available at [http://www.ccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.21.Rev1.Add5\\_\(GC23\)\\_En.pdf](http://www.ccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.21.Rev1.Add5_(GC23)_En.pdf) (accessed on 2 August 2011).

<sup>90</sup> General Comment no 23 (1994) par 5.1. Thornberry *International Law and the Rights of Minorities* (1991) 173 notes that the rights in art 27 ‘are a hybrid between individual and collective rights because of the “community” requirement: the right of a member of a minority is not exercised alone; enjoyment of a culture, practice of religion, and use of language presupposes a community of individuals endowed with similar rights.’

<sup>91</sup> De Varennes *Language, Minorities and Human Rights* (1996) 145-9.

<sup>92</sup> De Varennes *Language, Minorities and Human Rights* (1996) 147-9.



#### 4.4.2 State obligations

The second important issue to be discussed here is the nature of state obligations under article 27. Does article 27 in other words simply provide a negative right in the sense that the state must refrain from interfering with the rights of members of the minority group in question, or does it, in line with the definition of the Sub-Commission referred to earlier, also impose an obligation on the state to take positive steps to ensure the continuing existence of that specific group?<sup>93</sup>

The Capotorti report expressed itself in favour of the second reading. If the article were to be understood as simply one of non-prohibition, Capotorti argued, the right to enjoy one's own culture would lose much of its meaning.<sup>94</sup> This was because of the huge resources, both human and financial, which are required for full cultural development.<sup>95</sup> There are few, if any groups in the world, who have the resources to carry out this task themselves.<sup>96</sup> It was therefore essential that the article should be read as not requiring simply formal equality, but the real equality of persons belonging to minority groups (in comparison with the majority). The state should therefore take legislative and administrative measures

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<sup>93</sup> For general discussion of the different readings, see De Varennes *Language, Minorities and Human Rights* (1996) 150-7. De Varennes appears to favour the first reading, based on the wording and drafting history of the clause.

<sup>94</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 36.

<sup>95</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 36.

<sup>96</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 37.

to enable the achievement of the objectives of the article.<sup>97</sup> ‘Active and sustained intervention’ on the part of states is thus required, if the right is not to be inoperative.<sup>98</sup> Thornberry likewise argues in favour of a ‘positive’ reading of the article. He characterises the *laissez faire* reading as follows:

On such interpretations States need only allow minorities to exercise their rights in freedom, there is no obligation to do anything to act positively to protect minority cultures; in a “contest” between a majority and a minority culture, the State is a mere spectator, maintaining its distance, not obliged to render assistance to the weaker party in an unequal struggle.<sup>99</sup>

Should article 27 be read in the above manner, Thornberry furthermore notes, it would add nothing to the Covenant, as it also contains a right in article 26 not to be discriminated against, inter alia on the grounds of race, language and religion.<sup>100</sup> Although article 27 is contained in the Covenant on Civil and Political Rights, it is more in the nature of the rights contained in the Covenant on Economic, Social and Cultural Rights, which are generally understood as

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<sup>97</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 37.

<sup>98</sup> Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 37.

<sup>99</sup> Thornberry *International Law and the Rights of Minorities* (1991) 178-9. See also Thornberry at 183: ‘The whole point of inserting a “minorities” article in both past and present treaties on the subject is to secure for members of groups a real and not fictitious equality with members of the majority in a State; equality in fact as well as equality in law. If no adaptations are made by the State to cater for minorities, the “non-dominant” groups will ultimately be required against their will to surrender to dominant groups.’ Thornberry in this respect invokes the decision of the PCIJ in the *Case of Minority Schools in Albania* (1935), PCIJ Ser. A/B, No. 64, 17, which dealt with the obligations imposed by the Minorities Treaties established under the League of Nations.

<sup>100</sup> Thornberry *International Law and the Rights of Minorities* (1991) 180, 184.

being of a programmatic nature and requiring positive action from states.<sup>101</sup> Thornberry nonetheless notes that the obligation on states will necessarily differ depending on the ability of a group to cater for its own cultural, religious and linguistic needs.<sup>102</sup> By extension, the financial resources available to the state would necessarily have to be taken into account as well. The interpretations of Capotorti, Thornberry and others<sup>103</sup> find support in the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (inspired by article 27 of the Covenant).<sup>104</sup> Article 1 of the Declaration provides in this respect as follows:

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.
2. States shall adopt appropriate legislative and other measures to achieve those ends.

Positive state action is likewise prescribed in articles 4, 5 and 8 of the Declaration.<sup>105</sup> Further support for the 'positive' interpretation is to be found in

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<sup>101</sup> Thornberry *International Law and the Rights of Minorities* (1991) 180-1.

<sup>102</sup> Thornberry *International Law and the Rights of Minorities* (1991) 186.

<sup>103</sup> See also Cholewinski R 'State duty towards ethnic minorities: positive or negative?' (1988) 10 *HRQ* 344.

<sup>104</sup> A/Res/47/135, 18 December 1992. See likewise the United Nations Declaration on the Rights of Indigenous Peoples adopted by General Assembly Resolution 61/295 on 13 September 2007, specifically articles 13, 14, 16, 21 and 38. The latter article specifically provides that 'States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration'.

<sup>105</sup> A Working Group for Minorities was established in 1995 to monitor the implementation of the Declaration; for general discussion, see Thio L-A 'The United Nations Working Group on

the 1994 *General Comment No. 23*,<sup>106</sup> issued by the UN Human Rights Committee in paragraph 6:

6.1 Although Article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a 'right' and requires that it shall not be denied. Consequently, a state party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the state party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the state party.

6.2 Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group. In this connection, it has to be

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Minorities' in Henrard K & Dunbar R (eds) *Synergies in Minority Protection* (2008) Cambridge: Cambridge University Press 46. The Working Group was replaced in 2007 by the Forum on Minority Issues. Both the Working Group and the Forum have issued important studies, reports and recommendations on minority issues; see United Nations 'Human Rights: Office of the High Commissioner for Human Rights – The Former Working Group on Minorities' available at <http://www.ohchr.org/EN/Issues/Minorities/Pages/TheformerWGonMinorities.aspx> (accessed 29 July 2011) and Office of the United Nations High Commissioner for Human Rights 'Forum on Minority Issues' available at <http://www2.ohchr.org/english/bodies/hrcouncil/minority/forum.htm> (accessed on 29 July 2011).

<sup>106</sup> Office of the High Commissioner for Human Rights General Comment No. 23: The rights of minorities (art. 27):1994/04/08. CCPR/C/21/Rev.1.Add.5, General Comment No.23. General Comments, available at [http://www.unhcr.ch/tbs/doc.nsf\(Symbol\)fb7fb12c2fb8bb21c/2563ed004f111?opendocument](http://www.unhcr.ch/tbs/doc.nsf(Symbol)fb7fb12c2fb8bb21c/2563ed004f111?opendocument) (accessed on 14 June 2010).

observed that such positive measures must respect the provisions of articles 2.1<sup>107</sup> and 26<sup>108</sup> of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population.<sup>109</sup>

Paragraph 9 likewise emphasises the positive obligation which article 27 imposes on states parties:

The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the

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<sup>107</sup> Article 2.1 of the ICCPR provides the following: ‘Each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.’

<sup>108</sup> Article 26 of the ICCPR provides the following: ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

<sup>109</sup> Paragraph 6.2 is especially important in the South African context, as pointed out by Sachs J in *Gauteng Provincial Legislature, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) par 59-68, 72. Insofar as article 27 requires positive action from the state, this should not be understood as placing an obligation on the state to further the interests of a dominant group so as to retain their privileged position. This seems correct. Sachs J, however appears to follow Capotorti in respect of the scope of application of article 27. As pointed out above, recent developments indicate that a ‘dominant’ group can indeed be entitled to protection under art 27; see also Strydom ‘South African constitutionalism between unity and diversity’ (1997) 397.

Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end.<sup>110</sup>

## **5 The development of comprehensive norms in relation to language rights**

The international documents referred to above, as well as a variety of other Declarations, Charters and Conventions have started to spell out the content of the duty that rests on states in respect of the protection of minority linguistic rights, in addition to that of the prevention of discrimination. International norms in relation to state duties in respect of language rights are in other words in the process of being developed, specifically, as we will see, in Europe. In order to establish precisely what the duties are of the South African government in giving effect to the relevant provisions in relation to language of the South African Constitution, it is essential to enter into a brief discussion of the relevant treaties, documents, reports and other recommendations from institutions.<sup>111</sup> In what follows, these will be analysed insofar as they are of particular relevance for the

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<sup>110</sup> See also Scheinin 'The United Nations International Covenant on Civil and Political Rights' (2008) 30-31.

<sup>111</sup> See the discussion in par 2 above on the use of international law in the interpretation of the South African Constitution. See further Henrard 'Language rights and minorities in South Africa' (2001) 91 pointing out that the similarities between s 31 of the 1996 Constitution and art 27 of the ICCPR, provides a solid ground for invoking the General Comment(s) of the HRC as well as the 1992 UN Declaration on the Rights of persons belonging to Ethnic, Religious and Linguistic Minorities in its interpretation.

rest of the chapters of this thesis. These international instruments spell out the emerging consensus on the protection of the language rights of minorities. The instruments in question will in each instance be discussed under the headings of the organisational structure under the auspices of which they were framed.

## **5.1 The Council of Europe**

The Council of Europe consists of 47 member states, covering almost the whole of the European continent and seeks to further closer co-operation between member states by fostering the principles of the rule of law, human rights and fundamental freedoms for all persons within its jurisdiction. The European Convention on Human Rights was adopted by the members of the Council on 4 November 1950 and entered into force in 1953. The Convention does not protect the rights of minorities or language rights as such, although article 14 of the Convention provides that '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.<sup>112</sup> The Parliamentary Assembly of the Council has issued a number of important Recommendations on the protection of minorities.<sup>113</sup> These Recommendations

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<sup>112</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2000) now provides for a general prohibition against discrimination. Other provisions which have a relation to language rights include article 10 (freedom of expression), article 8 (the right to respect for private and family life), article 6 (the right to a fair trial) and Protocol no 1 (the right to education).

<sup>113</sup> See e.g. Recommendation 928 on the educational and cultural problems of minority languages and dialects in Europe (1981); Recommendation 1134 on the rights of minorities (1990);

clearly contribute to the development of international norms on language rights and can be usefully consulted in this respect. The focus here will however be on the enforceable treaties of the Council adopted in relation to linguistic rights, that is, the European Charter for Regional or Minority Languages (1992) and the Framework Convention for the Protection of National Minorities (1995). The Convention can be said to extend the rights provided for by the European Convention on Human Rights, whereas the Charter follows a novel approach in relation to the protection of minority languages.<sup>114</sup>

### **5.1.1 European Charter for Regional or Minority Languages (1992)**

The European Charter for Regional or Minority Languages (ECRML) was adopted by the Committee of Ministers of the Council of Europe on 25 June 1992 and 25 states have thus far ratified the Charter.<sup>115</sup> The ECRML seeks to

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Recommendation 1177 on the rights of minorities (1992); Recommendation 1201 on an additional protocol on the rights of national minorities to the European Convention on Human Rights (1993) (this recommendation was rejected by governments, instead directing the Committee of Ministers to draft a framework convention on minority rights); Recommendation 1203 on Gypsies in Europe (1993); Recommendation 1255 on the protection of the rights of national minorities (1995); Recommendation 1492 on the rights of national minorities (2001), Recommendation 1623 on the rights of national minorities (2003); and Recommendation 1773 on the 2003 guidelines on the use of minority languages in the broadcast media and the Council of Europe standards: need to enhance co-operation and synergy with the OSCE (2006); see Council of Europe: Parliamentary Assembly, available at <http://assembly.coe.int/defaultE.asp> (accessed 31 July 2011).

<sup>114</sup> See Woehrling J *The European Charter for Regional or Minority Languages: A Critical Commentary* (2005) Strasbourg: Council of Europe Publishing 48.

<sup>115</sup> Eight countries have signed, but not ratified the Charter; see Council of Europe 'European Charter for Regional or Minority Languages' available at



preserve minority languages as an essential part of the European cultural heritage. As Dunbar<sup>116</sup> points out, the adoption of the Charter was not motivated by the need to defuse ethnic tension, but rather ‘by concerns about the threat to cultural diversity that was posed by the impending loss of linguistic diversity in Europe’.<sup>117</sup> This is reflected in the preamble which mentions the danger of the extinction of European languages as an inspiration behind the Charter. In light of this, the Charter does not recognize the speakers of languages or language groups as the bearers of rights, but links state obligations directly to languages.<sup>118</sup> It therefore does not provide rights, either to minorities or to persons belonging to minorities, as in the case of article 27 of the International Covenant on Civil and

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<http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=148&CL=ENG> (accessed 29 July 2011). The Charter came into force on 1 March 1998.

<sup>116</sup> Dunbar R ‘The Council of Europe’s European Charter for Regional or Minority Languages’ in Henrard K & Dunbar R (eds) *Synergies in Minority Protection* (2008) Cambridge: Cambridge University Press 156.

<sup>117</sup> See also Woehrling *The European Charter for Regional or Minority Languages* (2005) 20, 23-24.

<sup>118</sup> See Dunbar R ‘Minority language rights in international law’ (2001) 50 *ICLQ* 99; Dunbar ‘The Council of Europe’s European Charter for Regional or Minority Languages’ (2008) 155; Henrard K ‘Emerging Common European Standard Concerning the Protection of Linguistic Diversity/Linguistic Minorities’ Paper presented at the Conference Debating Language Policies in Canada and Europe 31 March to 2 April 2005 available at <http://www.sciencessociales.uottawa.ca/crfpp/pdf/debat/Henrard.pdf> (accessed 29 July 2011) 24; Woehrling *The European Charter for Regional or Minority Languages* (2005) 27; par 11 Explanatory Report.

Political Rights.<sup>119</sup> The Charter in this respect provides a definition of ‘regional or minority languages’,<sup>120</sup> as well as of ‘non-territorial languages’,<sup>121</sup> which enjoy

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<sup>119</sup> Woehrling J-M ‘The European Charter for Regional or Minority Languages and the principle of non-discrimination’ in Council of Europe *The European Charter for Regional or Minority Languages: Legal challenges and opportunities* (2008) Strasbourg: Council of Europe Publishing 64 eg compares the approach under the Charter to that sometimes adopted in environmental law, that is ‘not to protect the people or groups to which environmental assets belong, but to safeguard the assets themselves. Just as the national diversity of species, landscapes and plants deserves [sic] protection for its [sic] intrinsic value, so the diversity of languages and the value of each language deserves to be recognized.’ Woehrling furthermore notes that the distinction between rights and obligations ‘reflects ideas which are well entrenched in legal systems... A right is a prerogative of the individual, who may assert it against anyone who seeks to take it away. An obligation is an abstractly defined rule which may require particular conduct of an authority or individual. The question of who may have the obligation enforced depends on various factors. In some countries, merely having a personal and actual interest may be enough to secure enforcement. In others, only those for whom the relevant rule creates a right may invoke it and the existence of the right itself may be interpreted quite broadly. The charter establishes obligations.’

<sup>120</sup> Art 1(a): “‘regional or minority languages’” means languages that are (i) traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and (ii) different from the official language(s) of that State; it does not include either dialects of the official language(s) of the State or the languages of migrants’.

<sup>121</sup> Art 1(c): “‘non-territorial languages’” means languages used by nationals of the State which differ from the language or languages used by the rest of the State's population but which, although traditionally used within the territory of the State, cannot be identified with a particular area thereof.’ The obligations in Part II of the Charter do not apply to these languages.

protection under the Charter.<sup>122</sup> States parties have a discretion both in respect of the specific languages to which (some of) the obligations in the Charter are to be applicable<sup>123</sup> and in respect of the specific obligations which are to apply to each of the languages it recognises for purposes of Part III the Charter (art 2).<sup>124</sup> The obligations are set out in terms of a sliding scale with various possibilities from the optimal use of a minority language for a specific purpose, to the mere allowance for the minority language to be used for a specific purpose. In respect of judicial authorities, and specifically criminal proceedings, a state would for example have the following choices (art 9(1)(a)):

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<sup>122</sup> Woehrling *The European Charter for Regional or Minority Languages* (2005) 53 points out that the aim is not in the first place to provide a definition of such languages, but to indicate the scope of application of the Charter.

<sup>123</sup> Certain obligations, set out in Part II, are applicable to all regional or minority languages spoken within the territory of states parties, as well as to non-territorial languages. The obligations in Part III are applicable only to the languages specified by each state party at the time of acceptance, ratification or approval. The languages specified as well as the obligations in respect of languages may subsequently be increased (art 3(2)). Dunbar 'The Council of Europe's European Charter for Regional or Minority Languages' (2008) 170 points out that if a state decides not to designate a language as a minority language to which the obligations in part II would apply 'the state must have reasons for doing so which are compatible with the spirit, objectives and principles of the Charter'.

<sup>124</sup> Art 2(2): 'In respect of each language specified at the time of ratification, acceptance or approval, in accordance with Article 3, each Party undertakes to apply a minimum of thirty-five paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Charter, including at least three chosen from each of the Articles 8 and 12 and one from each of the Articles 9, 10, 11 and 13.'

- i. to provide that the courts, at the request of one of the parties, shall conduct the proceedings in the regional or minority languages; and/or
- ii. to guarantee the accused the right to use his/her regional or minority language; and/or
- iii. to provide that requests and evidence, whether written or oral, shall not be considered inadmissible solely because they are formulated in a regional or minority language; and/or
- iv. to produce, on request, documents connected with legal proceedings in the relevant regional or minority language.

At its best, the record of court proceedings will thus be kept in the minority language.<sup>125</sup> Similar options are provided for inter alia in respect of education on all levels, specifically instruction in or of the minority language (art 8); as well as the use of minority languages in relation to administrative authorities and public services, including such use in the debates of legislative assemblies (art 10). The Explanatory Report notes that states are not allowed to choose arbitrarily between these options, but to choose that option ‘which best fits the characteristics and state of development’ of a specific minority language (par 46). The suitability of a specific option depends to a great extent on the number of speakers of a specific minority language in a specific area. In general it can be said that -

the larger the number of speakers of a regional or minority language and the more homogeneous the regional population, the ‘stronger’ the option which should be adopted; a weaker alternative should be adopted only when the stronger option cannot be applied owing to the situation of the language in question (par 46).

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<sup>125</sup> Provision is likewise made for civil proceedings and proceedings in relation to administrative matters in article 9.

The above is supported by the principle of substantive equality or the need for positive state action, discussed in section 3 above, which as Dunbar notes, lies at the heart of the Charter.<sup>126</sup> Article 7.2 provides in this respect that the taking of such action will not amount to discrimination in relation to majority languages. The Explanatory Report furthermore notes that merely prohibiting discrimination against users of a minority language is an insufficient safeguard: ‘Special support which reflects the interests and wishes of the users of these languages is essential to their preservation and development’ (par 39). Another important principle which appears from a report of the Committee of Experts is that states have a duty to comply with their obligations regarding minority languages under the Charter irrespective of whether minorities can speak the majority language well.<sup>127</sup>

The European Charter is of particular importance in respect of the drafting of language policies in South Africa on the national, provincial and local levels.<sup>128</sup> The Charter shows a growing consensus internationally that language policies are not simply political choices to be made by a majority, but that such policies need to be made in accordance with the principles of substantive equality and

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<sup>126</sup> Dunbar ‘The Council of Europe’s European Charter for Regional or Minority Languages’ (2008) 168.

<sup>127</sup> Dunbar ‘The Council of Europe’s European Charter for Regional or Minority Languages’ (2008) 178. An accused in a criminal trial is under the Charter entitled to use a minority language, even if he or she is capable of speaking the majority language; see Dunbar at 178, 183.

<sup>128</sup> Current policies in South Africa will be considered in chapter 3.

proportionality.<sup>129</sup> This approach is confirmed by the independent Committee of Experts tasked under the charter to ensure its effective implementation.<sup>130</sup>

### **5.1.2 Framework Convention for the Protection of National Minorities (1995)**

The Framework Convention for the Protection of National Minorities (FCNM)<sup>131</sup> was adopted in response to the collapse of communism and the breakup of the Soviet Union as well as events in the Balkan states. Minority protection was considered to be an issue requiring urgent action. In the preamble, states parties indicate their resolve ‘to protect within their respective territories the existence of national minorities’; agree that ‘the upheavals of European history have

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<sup>129</sup> This entails a cost-benefit analysis, taking account of the number of speakers and the resources available. Yet, as Woehrling *The European Charter for Regional or Minority Languages* (2005) 97 points out, the principle of proportionality has to be understood here in a specific sense, so as to prevent larger languages from receiving more aid from the state than smaller languages. The latter approach would clearly fly in the face of the aims of the Convention. It is exactly the weaker languages which should receive more (than proportionate) support.

<sup>130</sup> Henrard ‘Emerging Common European Standard Concerning the Protection of Linguistic Diversity/Linguistic Minorities’ (2005) 27-32; Dunbar ‘The Council of Europe’s European Charter for Regional or Minority Languages’ (2008) 186.

<sup>131</sup> The Framework opened for signature on 2 February 1995 and entered into force on 1 February 1998. 39 member states of the Council have thus far ratified the Convention. Greece, Iceland, Belgium and Luxembourg have only signed the Convention. Andorra, France, Monaco and Turkey have neither signed nor ratified the Convention; see Council of Europe ‘Framework Convention for the Protection of National Minorities’ [http://www.coe.int/t/dghl/monitoring/minorities/default\\_en.asp](http://www.coe.int/t/dghl/monitoring/minorities/default_en.asp) (accessed 22 June 2011).

shown that the protection of national minorities is essential to stability, democratic security and peace in this continent'; and note that 'a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity'. The Framework Convention differs from the Charter insofar as the latter, as we saw above, is aimed at protecting languages as cultural assets, whereas the Framework Convention creates rights for the speakers of minority languages in close association with the protection of human rights.<sup>132</sup> An independent Advisory Committee is tasked with monitoring the implementation of the Convention, with a reporting function to the Committee of Ministers of the Council of Europe (art 26). Despite the wide margin of appreciation which states parties seemingly have under the Convention, the interpretation of the Convention adopted by the Advisory Committee, to the effect that the Convention aims at achieving substantive equality for minorities, means that this margin of appreciation is not unlimited.<sup>133</sup> Henrard<sup>134</sup> further points out in this regard that the Advisory Committee has insisted that in the implementation of the Convention states must adopt clear, sufficiently detailed

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<sup>132</sup> Woehrling *The European Charter for Regional or Minority Languages* (2005) 33-4.

<sup>133</sup> Henrard 'Emerging Common European Standard Concerning the Protection of Linguistic Diversity/Linguistic Minorities' (2005) 24; Henrard K 'Charting the gradual emergence of a more robust level of minority protection: Minority specific instruments and the European Union' (2004) 22:4 *Netherlands Quarterly of Human Rights* 559, 569-70.

<sup>134</sup> Henrard 'Charting the gradual emergence of a more robust level of minority protection' (2004) 570.

legislative frameworks so as not to give too wide a discretion to administrative authorities.

Of significance for our purposes is especially article 1 of the Convention which confirms that '[t]he protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights'. Another important theme, discussed in paragraph 3 above, is touched on by article 4.2 which provides for the taking of active steps in ensuring the equal treatment of minorities as well as article 4.3 which notes that the taking of such positive action shall not constitute discrimination. These measures need to be 'adequate' (art 4(2)), which as the explanatory report points out, entails the incorporation of the proportionality principle (par 39). Tying in further with the issues to be addressed in chapters 3 and 4 of this thesis, specifically the duty that rests on the executive/administration, article 10.2 provides that -

[i]n areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities.

The explanatory report indicates that various factors can be taken account of in relation to the phrase 'as far as possible', in particular, the financial resources of the state party concerned (par 65). The Advisory Committee has nonetheless been critical of numerical thresholds which are imposed at too high a level and has encouraged the recognition of official languages at the sub-state level where



there is a sufficient concentration of minority language speakers.<sup>135</sup> The Committee has in this regard also pointed to the importance of appropriate recruitment and staff training policies to make communication possible with minority language speakers.<sup>136</sup> Of further importance for the executive/administration on all three levels of government is article 11(3) which provides for signage and other topographical indications intended for the public to be in minority languages, in the same areas referred to in article 10(2). In respect of education, to be discussed in chapter 5 of the present thesis, the Convention provides in article 14.2 for the teaching of minority languages *or* for instruction in this language (1) in areas traditionally inhabited by minority language speakers or (2) where there are substantial numbers of minority language speakers, provided, in both instances, that there is a sufficient demand for it. The Convention thus also in this respect appears to give a wide margin of appreciation to states parties in relation to mother-tongue instruction. Henrard points out that the Advisory Committee has nonetheless restricted the discretion of states parties in this regard by pointing to the importance of mother-tongue instruction and for states to provide such instruction.<sup>137</sup> The Advisory Committee has furthermore pointed to the importance of the availability of textbooks in the minority language as well as suitably qualified teachers. Of great importance for the situation in South Africa is the Advisory Committee's stance in relation to

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<sup>135</sup> Henrard 'Emerging Common European Standard Concerning the Protection of Linguistic Diversity/Linguistic Minorities' (2005) 20.

<sup>136</sup> Henrard 'Emerging Common European Standard Concerning the Protection of Linguistic Diversity/Linguistic Minorities' (2005) 21.

<sup>137</sup> Henrard 'Emerging Common European Standard Concerning the Protection of Linguistic Diversity/Linguistic Minorities' (2005) 20-1.

the role of schools in societal integration.<sup>138</sup> In this respect the Committee has emphasised the importance of teaching children the languages spoken in the specific region.<sup>139</sup> Parties to the Convention furthermore agree to ‘create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them’ (art 15). This article can be understood as providing for the internal dimension of self-determination.<sup>140</sup> This form of self-determination can be provided both on a territorial and a non-territorial basis.<sup>141</sup>

## **5.2 The Organization on Security and Co-operation in Europe**

The Organization for Security and Cooperation in Europe (OSCE)<sup>142</sup> is an international organization which now consists of 56 states in Europe, Central Asia and North America.<sup>143</sup> The Organisation was initially started in the 1970s with 35 participating states as a forum for dialogue between the East and the

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<sup>138</sup> Art 5(2) of the Convention however prohibits states parties from pursuing assimilationist policies in respect of minorities against their will. See further chapter 5.

<sup>139</sup> Henrard ‘Emerging Common European Standard Concerning the Protection of Linguistic Diversity/Linguistic Minorities’ (2005) 21.

<sup>140</sup> Henrard ‘Emerging Common European Standard Concerning the Protection of Linguistic Diversity/Linguistic Minorities’ (2005) 22; Henrard ‘Charting the gradual emergence of a more robust level of minority protection’ (2004) 571.

<sup>141</sup> Eide A ‘The Council of Europe’s Framework Convention for the Protection of National Minorities’ in Henrard K & Dunbar R (eds) *Synergies in Minority Protection* (2008) Cambridge: Cambridge University Press 140.

<sup>142</sup> Until 1995 known as the Conference on Security and Cooperation in Europe (CSCE).

<sup>143</sup> The events in Eastern Europe in the second half of the last century were considered to be a threat to world security; this led to an interest in European security in states beyond Europe.

West during the Cold War. The OSCE seeks to facilitate cooperation amongst its members with the aims of security and stability. The treatment of minorities has been recognised as of particular importance in this respect and the OSCE has consequently adopted a number of (non-binding) Declarations on minority protection. These include the Helsinki Final Act (1975),<sup>144</sup> the Madrid Concluding Document (1980), the Concluding Document of the Vienna Meeting (1989), the Charter of Paris for a New Europe (1990), the Document of the Copenhagen Meeting of the Conference on the Human Dimension (1990), the Document of the Cracow Symposium on the Cultural Heritage of the CSCE Participating States (1991), and the Report of the Geneva Meeting of Experts on National Minorities (1991). Of specific importance for our purposes, because of the detail of these documents, are the Hague Recommendations on the Educational Rights of National Minorities (1996) and the Oslo Recommendations on the Linguistic Rights of Minorities (1998).<sup>145</sup> Although

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<sup>144</sup> The Helsinki Final Act was the culmination of the foundational conference that started in July 1973. The Final Act was signed by 35 states in August 1975. The Act contains a broad range of measures drafted to ensure security and cooperation among the signatories. The Act is divided into three baskets: Basket one contains a Declaration of Principles guiding Relations between participating states including Principle VII on human rights and fundamental freedoms. Basket II deals with economic and scientific cooperation and Basket III is devoted to cooperation in humanitarian and other fields, free movement of people including human contacts, freedom of information and cultural exchanges.

<sup>145</sup> Other recommendations of importance for minorities, but which are not directly relevant to the present study include the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999); the Guidelines on the Use of Minority Languages in the Broadcast Media (2003); the Recommendations on Policing in Multi-Ethnic Societies (2006); and the Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations (2008).

these Recommendations are not themselves of a binding nature, they have considerable standing as they amount to expert interpretations of the obligations laid down in respect of language rights in binding international law treaties.<sup>146</sup> They are in the nature of ‘soft law’ in the sense that they lay down certain common standards in relation to language rights.<sup>147</sup>

The Hague Recommendations on the Educational Rights of National Minorities (1996) were drafted by a team of international experts (in international human rights law, linguistics and education) in collaboration with the Foundation on Inter-Ethnic Relations, on request of the OSCE High Commissioner on National Minorities (established in 1992).<sup>148</sup> As Strydom points out, the recommendations were to serve as policy guidelines ‘in accordance with existing human rights instruments which would serve to facilitate the implementation of existing standards’.<sup>149</sup> The Recommendations thus do not create new standards, but assist states in designing implementation policies.<sup>150</sup> The Recommendations are specifically important for chapter 5 of the present thesis, which deals with

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<sup>146</sup> See in this respect Holt S & Packer J ‘OSCE developments and linguistic minorities (2001) 3 *International Journal on Multicultural Societies* 105-6.

<sup>147</sup> Bloed A & Letschert R ‘The OSCE High Commission on National Minorities’ in Henrard K & Dunbar R (eds) *Synergies in Minority Protection* (2008) Cambridge: Cambridge University Press 105-6, 110.

<sup>148</sup> For a general discussion of the functions of the High Commissioner, see Bloed & Letschert ‘The OSCE High Commission on National Minorities’ (2008) 88.

<sup>149</sup> Strydom ‘International Standards for the Protection of Minorities and the South African Constitution’ (2002) 26.

<sup>150</sup> Strydom ‘International Standards for the Protection of Minorities and the South African Constitution’ (2002) 26.

language in education. They attempt to spell out in greater detail the approach to be followed in participating states in relation to minority languages in the educational sector. The Recommendations recognise the importance of education for minorities in maintaining a collective identity, yet it notes that this should not lead to isolation from the broader society. Minorities have at the same time a responsibility of participation and integration in such broader society. The Recommendations stress the importance of mother-tongue education on all three levels of education ‘to the maximum of [a state’s] available resources’ (par 4). Mother-tongue education is furthermore not simply to take place ‘with a view to facilitating an early transition to teaching exclusively in the State language’, as is arguably the case in respect of the indigenous languages in South African public schools, but it should instead be aimed at creating ‘the space that is required for the weaker minority language to thrive’. Submersion-type approaches, also prevalent in South Africa, are specifically addressed in the Recommendations. It is noted that these types of approaches ‘whereby the curriculum is taught exclusively through the medium of the State language and minority children are entirely integrated into classes with children of the majority are not in line with international standards’.

The Oslo Recommendations on the Linguistic Rights of Minorities (1998) was likewise an initiative of the OSCE High Commissioner on National Minorities and was drafted by a committee of international experts. The Recommendations are specifically important for chapters 3 and 4 of this thesis which deal with the implementation of the South African Constitution on the three levels of government (national, provincial and local) as well as in respect of the three state branches (legislative, executive, and judicial). In an explanatory note, the basis

for the Recommendations is spelt out with reference to the notion of human dignity:

Article 1 of the Universal Declaration of Human Rights refers to the innate dignity of all human beings as the fundamental concept underlying all human rights standards. Article 1 of the Declaration states ‘All human beings are born free and equal in dignity and rights...’ The importance of this article cannot be overestimated. Not only does it relate to human rights generally, it also provides one of the foundations for the linguistic rights of persons belonging to national minorities. Equality in dignity and rights presupposes respect for the individual’s identity as a human being. Language is one of the most fundamental components of human identity. Hence, respect for a person’s dignity is intimately connected with respect for the person’s identity and consequently for the person’s language.

As with the Hague Recommendations, it is noted that the Oslo Recommendations do not seek to encourage minorities to isolate themselves from broader society, but that development of a collective identity should go hand in hand with integration into, to be distinguished from assimilation by, broader society.

A number of recommendations are of particular importance to the executive/administration. This includes recommendations 13 and 14, which provides for services to be provided, as well as official documentation to be available in areas where this is warranted by the numbers of speakers of minority languages. Appropriate recruitment and training policies should be developed in this regard. Recommendation 3 is also of relevance here, providing for signage in minority languages, ‘[i]n areas inhabited by significant numbers of persons belonging to a national minority and when there is sufficient demand’. Insofar as legislative bodies are concerned, recommendation 15 provides as follows:

In regions and localities where persons belonging to a national minority are present in significant numbers, the State shall take measures to ensure that elected members of regional and local governmental bodies can use also the language of the national minority during activities relating to these bodies.

Insofar as the judiciary is concerned, the Recommendations refer to the traditional requirements in relation to language to ensure knowledge of an arrest/detention, as well as a fair hearing, and then in addition requires of states to consider using the minority language as language of record in certain circumstances:

In those regions and localities in which persons belonging to a national minority live in significant numbers and where the desire for it has been expressed, States should give due consideration to the feasibility of conducting all judicial proceedings affecting such persons in the language of the minority (no 19).

Lastly, it is recommended that persons belonging to minorities should, in addition to judicial remedies, have access to independent institutions in instances where there has been a violation of their linguistic rights (no 16).

## **6 Conclusion**

In this chapter we saw that international law has developed from the selective protection of certain minority (language) groups to the universal recognition of the rights of persons belonging to (linguistic) minorities. International law furthermore provides not only for the protection against discrimination of persons based on the language they speak, but for an obligation resting on states to take positive measures and to create the conditions necessary for the exercise of language rights. Substantive equality of linguistic groups, in addition to

formal equality, is therefore the aim in international law. Strydom speaks in this regard, following Habermas, of ‘a policy of inclusion that is sensitive to difference’.<sup>151</sup> He continues as follows:

Instead of disinvesting in diversity as is the case in terms of liberalism’s concept of the neutrality of the state, the state must rather invest in diversity.<sup>152</sup>

We furthermore saw that it is not only certain people who are entitled to the protection (in both a negative and a positive sense) of their language rights. The negative protection is available to all, whether or not with an immigration background, indigenous people and even non-marginalised groups, and the majority cannot claim that they are being discriminated against if steps are taken to enhance the rights of minorities. Insofar as positive protection is concerned, only minorities can claim this from the state, and minorities would again include immigrants, whether long-established or recent, indigenous people, and even groups that are not marginalised. As we will see in the discussion of the South African Constitution in Chapter 3, a comparable approach is followed in relation to language rights. Section 6 (the language clause) and section 9 (the equality clause) make provision for both the prohibition of discrimination in relation to language, and for positive measures to be taken to promote the previously marginalised indigenous languages.

Another important development in relation to language protection is to be detected in the European Charter for Regional or Minority Languages. The

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<sup>151</sup> Strydom ‘International Standards for the Protection of Minorities and the South African Constitution’ (2002) 8.

<sup>152</sup> Strydom ‘International Standards for the Protection of Minorities and the South African Constitution’ (2002) 9.



Charter does not protect the rights of persons belonging to minority (language) groups, but protects minority languages as such. This is because of a realisation of the importance of language as a cultural value and of the danger of the extinction of minority and regional languages in Europe. In section 6 of the South African Constitution a similar approach can be detected in respect of languages.<sup>153</sup> The section, one of six foundational provisions, does not accord rights to individuals or to linguistic groups, but seeks to protect languages as such. Section 6 furthermore seeks to promote especially the previously marginalised indigenous languages in a similar way as Part III of the European Charter does. The protection accorded to the Khoi, Nama and San languages as well as to sign language in section 6(5)(a) again corresponds with the protection afforded to minority languages in part II of the European Charter. The Explanatory Report of the Charter as well as its interpretation by the Committee of Experts, have made it clear that states do not have an unbounded discretion in deciding how to give effect to their obligations in respect of minority languages. They must in each instance be guided by what ‘best fits the characteristics and state of development’ of a specific minority language as well as the concentration of speakers within a certain area.

Insofar as the specific protection to be accorded to minority linguistic rights is concerned, a number of lessons can be learnt from the European Charter, the

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<sup>153</sup> See also Council of the European Union ‘Council Resolution of 21 November 2008 on a European strategy for multilingualism’ available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:320:0001:01:EN:HTML> (accessed on 29 June 2011).

Framework Convention and the Recommendations of the High Commissioner on National Minorities. These can be summarised as follows:

- in adopting legislative measures, these should be clear and sufficiently detailed so as not to grant too wide a discretion to administrative bodies in their implementation;
- in adopting language policies, states are to be guided by the principles of proportionality and substantive equality;
- the standards of proportionality and substantive equality mean that in respect of all measures taken in pursuance of language protection (or the failure to do so), these can be evaluated by the independent body tasked with a supervisory function;
- the measures to be taken in protecting minority languages relate to inter alia the use of such languages in debates of legislative assemblies; in interactions between the public and administrative authorities (account of which has to be taken in employment and training policies of staff); in signage; and in the courts, also as language of record;
- mother-tongue instruction should be provided for on all levels of education to the maximum of a state's available resources; such instruction should nonetheless not lead to isolation of the specific language community, but to their integration into broader society;
- access should be provided to independent institutions in addition to the courts, in respect of complaints regarding the violation of linguistic rights.

## **Chapter 3**

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### **The language provisions of the Constitution and their implementation on the different levels of government**

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#### **1 Introduction**

The development of international norms in relation to the recognition of the reality of multilingualism as discussed in chapter 2 has been accompanied by attempts in the municipal law of countries around the world to accommodate the languages spoken within those countries. States around the world have in other words replaced policies of assimilation with policies of linguistic pluralism. The adoption of policies of the latter kind usually means that languages other than the dominant language are not only tolerated, but encouraged on an equitable basis and that there is state support for them. Countries as diverse as Afghanistan, Belgium, India, and Switzerland provide for linguistic pluralism in their Constitutions. Typically,

satisfaction of the demands of minority groups occurs by granting language rights to these minorities in the regions where a high concentration of members of the minority are to be found, or what can be referred to as the ‘territorial principle’.<sup>1</sup> The best examples of this approach are provided by Switzerland and Belgium with their division of the state into separate regions with different official languages.<sup>2</sup> The Canadian Constitution can perhaps be said to predominantly follow what can be referred to as the ‘personality principle’, by attaching language rights not in the first place to territory, but to the (mother-tongue) speakers of languages.<sup>3</sup> The personality principle entails that ‘an individual speaker can, by and large, exercise language rights irrespective of his or her geographical location’.<sup>4</sup> As will appear from the

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<sup>1</sup> Fessha YT ‘A tale of two federations: Comparing language rights in South Africa and Ethiopia’ (2009) 9 *African Human Rights Journal* 504.

<sup>2</sup> Fessha ‘A tale of two federations’ (2009) 508-9. The Belgian Constitution provides that Belgium is a federal state which comprises three regions: the Walloon Region (in which French is spoken), the Flemish Region (in which Dutch is spoken) and the Brussels Region (which is bilingual) (there is also a small German community). The careful language arrangements in the Belgian Constitution have recently been disturbed by the question of self-rule for Flemish and French speakers. Flanders is considering secession for reasons of economy and autonomy; the danger is that Wallonia without Brussels is not a viable state. However Brussels is situated within Flanders and cannot be joined to Wallonia unless Flanders relinquishes part of its territory to Wallonia.

<sup>3</sup> Fessha ‘A tale of two federations’ (2009) 505-8. Canada can perhaps still be described as containing mixture of both approaches seeing that in Quebec French is the only official language, and in New Brunswick, English and French are the official languages.

<sup>4</sup> Fessha ‘A tale of two federations’ (2009) 504.

discussion below, South Africa is still in the process of attaining the right mixture of the two principles.

The diversity of the world's languages is set out in *Ethnologue: Languages of the World*.<sup>5</sup> The table below reflects the number of languages in the different world regions as well as the percentage which those languages constitute of the total number of languages in the world:

Area	Living Languages	
	Number	Percentage
Africa	2 100	30.5
Americas	993	14.4
Asia	2 322	33.6
Europe	234	3.4
Pacific	1 250	18.1
Total	6 909	100

The recognition given to minority languages in Constitutions is however not necessarily a successful counter to the danger which dominant world languages pose to these languages. History shows that multilingualism has to be carefully managed to avoid the danger of linguicism, defined by Skutnabb-Kangas as 'ideologies, structures and practices which are used to legitimate, effectuate, regulate, and reproduce an unequal division of power and resources (both material and

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<sup>5</sup> Lewis *Ethnologue: Languages of the World* (2009).

immaterial) between groups which are defined on the basis of ... language'.<sup>6</sup> This (unfair) domination of certain languages, particularly English, continues at present and is assisted by globalization. This dominance of one language in multilingual states almost invariably has negative implications for the development of other languages. South Africa is faced with the same challenge. English is no doubt the dominant language, but comprehension of this language is extremely low in rural areas and in semi-skilled or unskilled communities.<sup>7</sup> The challenge faced by the language provisions of the Constitution are lucidly set out by Webb:

The main South African languages are deeply embedded in the political history of the country. Colonialism and apartheid have meant that all of the languages have acquired socio-political meanings, with English currently highly prestigious, Afrikaans generally stigmatised, and the Bantu languages with little economic or educational value. In fact, the Bantu languages are said to be viewed by many of their own speakers as symbols of being 'uneducated, traditional, rural, culturally backward people with lower mental powers', and as languages which are 'sub-standard' and less capable of carrying serious thought... . Though the Bantu languages, as well as Afrikaans, are numerically 'major' languages, they are 'minority languages' in language political terms. In terms of power and prestige, English is the major language of the country, with Afrikaans lower on the power hierarchy, and the Bantu languages effectively marginalized.<sup>8</sup>

Through the entrenchment of eleven official languages, initially in the 1993 Constitution, and later in the 1996 Constitution, South Africa has closely followed

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<sup>6</sup> Skutnabb-Kangas T *Linguistic Genocide in Education: Or Worldwide Diversity and Human Rights?* (2000) London: Routledge 369.

<sup>7</sup> Webb VN 'Language policy development in South Africa' (undated) available at <http://www.up.ac.za/academic/libarts/crpl/language-dev-in-SA.pdf> (accessed on 29 June 2011) 8.

<sup>8</sup> Webb 'Language policy development in South Africa' 8.

the developments described above in relation to international law and in other jurisdictions. This chapter starts with a description of the historical development of South Africa from a unitary, bilingual state as a dominion in the British Empire. Thereafter follows an analysis of the 1993 and 1996 Constitutions in relation to the state structure and language, in light of the discussion in chapter 2. This will be followed by an analysis of the steps that have thus far been taken in implementing the language provisions of the Constitution on the national, provincial and local levels of government. The chapter concludes with an analysis of the powers and functions of the Pan South African Language Board (PanSALB) in implementing and monitoring the language provisions of the Constitution.

## **2 South African constitutional development pre-1993**

The chief question at Union regarding the form of the constitution was whether it would be federal or unitary. This question was ultimately resolved in favour of a unitary constitution. Initially federalism was however favoured. The Transvaal wanted to retain its strong financial balance sheet, the Free State and Natal feared being overwhelmed by the bigger provinces and the Cape wanted to retain the voting rights of its indigenous population.<sup>9</sup> Olive Schreiner likewise favoured federalism.<sup>10</sup> In her view, federalism implied smaller states which meant more personal freedom, less interference with local privileges, retention of diversity and of the individual character of constituent states. The eventual choice in favour of

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<sup>9</sup> May HJ *The South African Constitution* (1955) Cape Town: Juta 7-8.

<sup>10</sup> Schreiner O A *Closer Union* (1909) available at <http://webapp1.dlib.indiana.edu/vwwp/view?docId=VAB7036> (accessed on 28 July 2011).

union was driven by the belief that federal states are weak whereas unitary states are characterised by strength.<sup>11</sup> Especially in devising and implementing a uniform policy in relation to the majority black population, a unitary state appeared to be the better solution to the delegates.<sup>12</sup>

The issue of official languages was regarded as an important indication of good faith between English and Afrikaans (initially, Dutch) speakers. The relation between the two languages had been marred by controversy. Not long after the Cape Colony passed from Dutch to English hands in 1806 (after a brief British occupation between 1795 and 1803) the Language Proclamation of 1822 was enacted, providing that English would be the language of communication of the office of the Governor and the only language in the courts of law from 1 January 1827.<sup>13</sup> English thus replaced Dutch as the official language. Eventual co-operation was achieved between English and Dutch as can be seen from the (Cape Colony) Constitution Ordinance Amendment Act (1 of 1882) which allowed members of Parliament to conduct debates in English or Dutch. The Dutch Language Judicial Use Act (21 of 1884) and the Dutch Language Judicial Use Amendment Act (25 of 1908)

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<sup>11</sup> May *The South African Constitution* (1955) 8-9.

<sup>12</sup> May *The South African Constitution* (1955) 9.

<sup>13</sup> Lubbe HJ 'The right to language in court: A language right or a communication right?' (undated) available at [dialnet.unirioja.es/servlet/fichero\\_articulo?codigo=3199505&orden=0](http://dialnet.unirioja.es/servlet/fichero_articulo?codigo=3199505&orden=0) (accessed on 28 July 2011) 378.



furthermore provided for the use of both languages in the courts.<sup>14</sup> This equality between the official languages was repeated in the Act creating the Union with Dutch and English being entrenched in section 137 as official languages which provided the following:

Both the English and Dutch languages shall be official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights, and privileges; all records, journals, and proceedings of Parliament shall be kept in both languages, and all Bills, Acts, and notices of general public importance or interest issued by the Government of the Union shall be in both languages.

Changes to section 137 could be effected only by a two-thirds majority of the members of both Houses of Parliament sitting together (s 152). The fact that these languages were to have ‘equal freedom, rights and privileges’, resolved the fears of both English and Dutch speaking citizens.<sup>15</sup> A similar provision was contained in section 91 of the South Africa Act in respect of provincial legislation,<sup>16</sup> although

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<sup>14</sup> Thomas P ‘Harmonising the law in a multilingual environment with different legal systems: Lessons to be drawn from the legal history of South Africa’ (2008) 14:2 *Fundamina: A journal of legal history* 144 n 94.

<sup>15</sup> The wording of the language provisions in the 1910 South African Act remained essentially unchanged in s 108 of the Republic of South Africa Constitution Act, 1961 and s 89 of the 1983 Constitution.

<sup>16</sup> Section 91 provided the following: ‘An ordinance assented to by the Governor-General-in-Council and promulgated by the Administrator shall, subject to the provisions of this act, have the force of law within the province. The administrator shall cause two fair copies of every such ordinance, one being in the English and the other in the Dutch language (one of which copies shall be signed by the Governor-General), to be enrolled of record in the office of the registrar of the appellate division of

provision was not explicitly made for the promulgation of Ordinances in both official languages, and likewise not for the records, journals and proceedings of a municipal council to be kept in both languages.<sup>17</sup> In respect of local government, the South Africa Act contained no similar provision, though in three of the four provinces (Natal was the exception), provincial ordinances provided that by-laws had to be enacted in both official languages.<sup>18</sup> The position in respect of both provincial and local government was changed in 1955 by the insertion of section 137bis, which provided as follows:

All records, journals and proceedings of a provincial council shall be kept in both the official languages, and all draft ordinances, ordinances and notices of public importance or interest issued by a provincial administration, and all notices issued and all regulations or by-laws made by any institution or body contemplated in paragraph (vi) of section eighty-five [‘[m]unicipal institutions, divisional councils, and other local institutions of a similar nature’] shall be in both official languages.

Throughout the history of South Africa, indigenous languages have had a lower status than those of European origin.<sup>19</sup> In the implementation of so-called ‘grand

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the supreme court of South Africa; and such copies shall be conclusive evidence as to the provisions of such ordinance, and, in case of conflict between the two copies thus deposited, that signed by the Governor-General shall prevail.’

<sup>17</sup> See May *The South African Constitution* (1955) 147. The author however points out that in practice, the promulgation of Ordinances always took place in both English and Afrikaans/Dutch.

<sup>18</sup> In *R v Schaper* 1945 AD 716 it was held that publication only in English did not invalidate municipal by-laws in Natal.

<sup>19</sup> Du Plessis & Pretorius ‘The structure of the official language clause’ (2000) 515.

apartheid', these languages were however accorded official status (in addition to Afrikaans and English) in the ten ethnic 'homelands', four of which eventually attained 'independence' from 'white' South Africa, lasting until 1994.<sup>20</sup> The languages which were so recognised are isiXhosa (in Transkei and Ciskei), isiZulu (in KwaZulu), Setswana (in Bophuthatswana), SeSotho or South Sotho (in Qwaqwa), Xitsonga (in Gazankulu), Sepedi or Northern Soto (in Lebowa), TshiVenda (in Venda), siSwati (in KaNgwane) and isiNdebele (in KwaNdebele). Language was one of the most important criteria in determining the citizenship of black people in relation to the homelands.<sup>21</sup>

South Africa became a Republic in 1961. This had been approved of in a referendum amongst the (white) electorate. The 1961 Constitution loosened the ties with the British Empire as the State President replaced the Crown and as South Africa withdrew from the Commonwealth because of resistance to its racial policies. The structure of government was however retained. The 1983 Constitution implemented elements of consociationalism in government. The tri-cameral parliament and the President's Council were the most important innovations of this

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<sup>20</sup> The Republic of Bophuthatswana Constitution Act, 18 of 1977 (s 5) provided that Tswana, English and Afrikaans were the official languages; English and Xhosa were the official languages of Ciskei (s 8 of the Republic of Ciskei Constitution Act, 20 of 1981; the Transkei Constitution Act 100 of 1976 (s 16) provided that Xhosa was the official language and Sotho, English and Afrikaans could also be used for legislative, judicial and administrative purposes. In addition the Republic of South Africa Constitution Act, 32 of 1961 empowered the State President to recognize any black language as an additional language of a self-governing territory (s 108(3)).

<sup>21</sup> Wiechers M *Verloren van Themaat Staatsreg* 3 ed (1985) Durban: Butterworths 380-2.

third constitution of South Africa. Parliament was formed by the House of Assembly for Whites, a House of Representatives for Coloureds and a House of Delegates for Indians. The legislative process was based on the distinction between 'own' affairs and 'general' affairs. The separate assemblies dealt with legislation based on own affairs while general affairs had to be passed by all three assemblies. Disagreement among the houses of parliament was resolved by the President's Council. The position regarding the official languages remained in substance unchanged during the currency of the 1961 and 1983 Constitutions.

### **3 Democratic constitutionalism and language rights**

#### **3.1 The 1993 Constitution**

##### **3.1.1 Proposals regarding language policy in a post-apartheid state**

A few years before the arrival of democracy in South Africa it was noted that the relegation of the indigenous languages to the black states was the linguistic counterpart of segregation. Neville Alexander argued in 1989 and 1990 that the appropriate response to the artificial creation of ethnic states based on separate languages and ethnic groups was to break down the barriers between people by developing a language policy which had the fostering of national unity as its basis. He therefore proposed the acceptance of Nguni and Sotho as regional languages,<sup>22</sup>

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<sup>22</sup> This proposal is based on the idea that there are two dominant language clusters in South Africa, Nguni (consisting of Zulu, Swazi, Xhosa and Ndebele) and Sotho (consisting of North Sotho, South Sotho and Tswana).

with English as national language.<sup>23</sup> Despite the fear that English would dominate national communication, Alexander thought that the promotion of national unity required a language of communication between citizens and that only English could perform this function. English was thus to serve as link language or common language of communication between citizens.<sup>24</sup> This approach, he argued, would not only demonstrate opposition to the official policy of racial segregation but would also restore the dignity of indigenous language speakers tarnished by apartheid. This suggestion followed in the footsteps of other independent colonies (notably India) which had retained the elite position of those proficient in English at the expense of those who had knowledge only of the indigenous languages. Alexander, as noted, justified this approach on the basis of pragmatic acceptance of the reality of English as a linking language and in conjunction with the fostering of all indigenous languages.<sup>25</sup> This justification differed significantly from the reasons usually given for the retention of the colonial languages as official languages: that of national

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<sup>23</sup> Alexander N *Language Policy and National Unity in South Africa/Azania* (1989) Cape Town: Buchu Books; Alexander N 'The Language Question' 126-46 in Schrire, RA *Critical Choices for South Africa: An Agenda for the 1990s* (1990) Cape Town: Oxford University Press 139-40.

<sup>24</sup> Alexander N *Education and the Struggle for National Liberation in South Africa* (1999) Trenton NJ: Africa World Press, Inc. 193-209.

<sup>25</sup> Alexander 'The Language Question' (1990) 137-8.

unity, national progress, and efficiency of the European languages and the corresponding lack of cost-effectiveness of the colonial languages.<sup>26</sup>

### 3.1.2 The provisions of the 1993 Constitution

The Alexander proposal was eventually not adopted, at least not in exactly the same form. A number of language provisions were included in the 1993 Constitution, the most important of which was section 3, recognizing 11 languages as official languages: Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu. Insofar as the indigenous languages are concerned, this selection, and its re-enactment in the 1996 Constitution, remains controversial. Some argue that this effectively entrenches the divisions created by apartheid, and that it furthermore excludes certain groups which refused being co-opted by the apartheid government.<sup>27</sup> We will not enter into this

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<sup>26</sup> See Bokamba EG 'The politics of language planning in Africa: Critical choices for the 21<sup>st</sup> century' in Putz M (ed) *Discrimination through Language in Africa? Perspectives on the Namibian Experience* (1995) Berlin: Mouton de Gruyter 17.

<sup>27</sup> See Perry T 'The case of the toothless watchdog: Language rights and ethnic mobilization in South Africa' (2004) 4 *Ethnicities* 514-6; Beukes A 'Language policy implementation in South Africa: How Kempton Park's great expectations are dashed in Tshwane' (2008) 38 *Stellenbosch Papers in Linguistics* 15-16. The debate of course relates to the issue whether different languages (specifically those falling in the Sotho or Nguni groups) are indeed distinct languages, or whether they are merely dialects of the same language. As Dunbar R 'Minority language rights in international law' (2001) 50 *ICLQ* 96 points out, 'the distinction between a language and a dialect is often based on political and historical rather than linguistic reasons'. Laponce JA 'Minority Languages and Globalization' (2004)

difficult debate here, a debate which involves categorising systems of signs as either free-standing languages or as dialects (variants within the same language). As Woehrling points out, the subjective viewpoints of speakers of the specific ‘language’ usually determines whether it is one or the other, but these viewpoints are in turn influenced by political factors.<sup>28</sup> Disputes about such issues should, as Woehrling points out with reference to the practice under the European Charter, be resolved in as inclusive a manner as possible.<sup>29</sup>

Section 3(1) furthermore provided that conditions shall be created for the official languages’ ‘development and for the promotion of their equal use and enjoyment’. Section 3(2) attempted to accommodate the fears of especially Afrikaans speakers by providing that, at least in the transitional period (that is, until the coming into effect of the ‘final’ constitution), existing language rights and the status of languages would not be diminished. An Act of Parliament was furthermore envisaged which would regulate the rights and status of languages. Section 3(2) provided that such legislation may provide for the national extension of the rights and status of the ‘new’ official languages. In line with the principles of proportionality and substantive equality identified in chapter 2, section 3(9) provided that the legislation to be enacted, as well as official policy and practice in relation to language had to comply with the following principles:

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available at <http://www.cpsa-acsp.ca/papers-2004/Laponce.pdf> (accessed 24 June 2011) 6, invoking Marshal Lyautey, notes similarly that ‘language’ is a ‘dialect with an army and a navy’.

<sup>28</sup> Woehrling *The European Charter for Regional or Minority Languages* (2005) 63.

<sup>29</sup> Woehrling *The European Charter for Regional or Minority Languages* (2005) 63.

- (a) The creation of conditions for the development and for the promotion of the equal use and enjoyment of all official South African languages;
- (b) the extension of those rights relating to language and the status of languages which at the commencement of this Constitution are restricted to certain regions;
- (c) the prevention of the use of any language for the purposes of exploitation, domination or division;
- (d) the promotion of multilingualism and the provision of translation facilities;
- (e) the fostering of respect for languages spoken in the Republic other than the official languages, and the encouragement of their use in appropriate circumstances; and
- (f) the non-diminution of rights relating to language and the status of languages existing at the commencement of this Constitution.

The other provisions of section 3 were likewise in line with the developing international norms discussed in Chapter 2. Section 3 in this respect provided for regional differentiation in relation to policy and practice regarding language (s 3(4)), as well as for provincial legislatures (of which nine were established) to adopt any language as an official language for that province.<sup>30</sup> The proviso was that the status and rights of languages existing at the time of the enactment of the Constitution could not be diminished (s 3(5)). Insofar as the functioning of government is concerned, on both the provincial and the national levels, the Constitution authorized parliament and the provincial legislatures to enact legislation for the use of official languages for this purpose. Account had to be taken in this regard of

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<sup>30</sup> Nothing was said in the section about local government. In *Louw v Transitional Local Council of Greater Germiston* 1997 (8) BCLR 1062 (W) the applicant was as a result unsuccessful in challenging a resolution to the effect that only English would be used by the council; for discussion, see Matela S 'Language rights: a tale of three cases' (1999) 15 *SAJHR* 386-388.



‘questions of usage, practicality and expense’ (s 3(8)). Members of the public, in line with developments elsewhere, as pointed out in chapter 2, would have the right to use and to be addressed in any official language of his or choosing in dealings with the public administration on both the national and the provincial level, wherever practicable (s 3(3) and 3(6)). Members of Parliament would have the right to address Parliament in any of the official languages (s 3(7)). The establishment of a Pan South African Language Board (PanSALB) was furthermore envisaged which would promote respect for and further develop the official languages as well as other languages used in the country, also those used primarily for religious purposes. PanSALB would furthermore be consulted and be given the opportunity to make recommendations in relation to the enactment of legislation as referred to above.

A number of other sections of the 1993 Constitution likewise provided for the protection of language rights in line with the earlier discussion. These included section 8 (equality), which prohibited unfair discrimination on the ground of inter alia language (s 8(2)), and section 31 (language and culture) providing for the right of every person ‘to use the language and to participate in the cultural life of his or her choice’. The 1993 Constitution furthermore contained language provisions in relation to education (s 32), litigation (s 107), and in the case of arrest and detention (s 25).

### **3.1.3 Assessment**

The language provisions contained in section 3 combined the viewpoints of the two dominant parties at the constitutional negotiations. The National Party sought to

protect the position of Afrikaans and succeeded in doing so (despite the acceptance of eleven official languages) through the inclusion in the Constitution of the principle that legislation, official policy and practice relating to the official languages was subject to the principle of non-diminution of rights relating to language and the status of languages existing at the commencement of the Constitution. The ANC had as objectives the promotion of national unity and the prevention of the (further) use of language for domination or division.<sup>31</sup> Sachs<sup>32</sup> in this vein justified the acceptance of eleven official languages on the basis of the inclusiveness of citizenship:

The peopling of our country has been such that we have a multiplicity of languages used in a great number of different situations. Language utilization and status reflect cycles of conquest and reconquest. The situation is a product of historical conflict and interaction, not of constitutional prescription. Accordingly, the whole approach of the drafters of the constitution was to construct a set of functional principles around the existing reality, rather than to attempt to subordinate the reality to a simple controlling principle. This is one of those areas where, within the framework of common citizenship and a shared endeavour to make South Africa a decent and prosperous country for all, we could declare that diversity, not unity, is strength.

In order to ensure that all languages were constitutionally recognized and that ignorance of a particular language should not bar individual progress, it was decided that all languages should have equal status and that there should not be only one official language.

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<sup>31</sup> ANC Constitutional Committee *Constitutional Principles & Structure for a Democratic SA: Discussion Document* (1991).

<sup>32</sup> Sachs A 'The language question in a rainbow nation' (1997) 20 *Dalhousie LJ* 6.

The provisions as to multilingualism are to be welcomed in light of the discussion in chapter 2, even though the short lifespan of the 1993 Constitution, and the giving of attention to what were likely perceived as more pressing issues, meant that not much was done insofar as implementation is concerned. The legislation envisaged in section 3(2) was never enacted, although the PanSALB Act was adopted in 1995. A somewhat pessimistic, but not unrealistic assessment would be that despite the praiseworthy provisions of the Constitution, in practice the pre-democracy model of official bilingualism was continued under the guise of multilingualism.

## **3.2 The 1996 Constitution**

### **3.2.1 Compliance with constitutional principles**

In line with the agreement between the two major political forces in the negotiations for a post-apartheid constitutional democracy, the 1993 Constitution contained so-called ‘constitutional principles’, which the ‘final’ Constitution needed to comply with. The most important of these for our purposes is Constitutional Principle XI which provided that ‘[t]he diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged’.<sup>33</sup>

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<sup>33</sup> In order to facilitate the participation in the transition of conservative white Afrikaners, Constitutional principle XXXIV was later added to provide for the possibility of some form of self-determination for a community who desires this.

### 3.2.2 The Provisions of the 1996 Constitution

The ‘final’ 1996 Constitution in many respects corresponds with the provisions of the 1993 Constitution in relation to language rights.<sup>34</sup> The most important provision is section 6, which again recognises the same 11 languages,<sup>35</sup> though no longer in alphabetical order (s 6(1)).<sup>36</sup> It is perhaps not insignificant to note that section 6 itself appears in chapter 1, with the heading ‘Founding Provisions’. The state is exhorted in stronger terms than in the 1993 Constitution, to take positive action to ensure the elevation of the status of the historically neglected indigenous languages

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<sup>34</sup> Henrard ‘Language rights and minorities in South Africa’ (2001) 84 points to the similarity between section 6 of the 1996 Constitution and the European Charter, which as we saw in chapter 2 above, does not grant rights to individuals or collectivities directly (as users of languages), but focuses on languages per se.

<sup>35</sup> The one exception was that Sesotho sa Leboa (Northern Sotho) was replaced by Sepedi, a dialect of Northern Sotho; for discussion, see Perry ‘The case of the toothless watchdog’ (2004) 514.

<sup>36</sup> One of the objections at the certification of the 1996 Constitution was that the languages spoken by South Africans of Indian descent should have been included as an official language. The Constitutional Court held however that Constitutional Principle XI required the protection of language diversity and that the entrenchment of eleven official languages had achieved this. Furthermore, these languages were not in danger of extinction and therefore there was no need to extend the official languages; *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) paras 209-11. For critique, see Strydom H & Pretorius L ‘On the directives concerning language in the new South African Constitution’ in Deprez K & Du Plessis T (eds) *Multilingualism and Government* (2000) Pretoria: Van Schaik Publishers 119 fn 2; and Du Plessis & Pretorius ‘The structure of the official language clause’ (2000) 512 fn 23.

and to advance their use (s 6(2)).<sup>37</sup> National and provincial governments may also decide on the use of official languages for purposes of government, with the following (extended list of) considerations to be taken account of in deciding on the particular languages to be used: ‘usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned’ (s 6(3)(a)). Whereas no mention was made in this context of municipalities in the 1993 Constitution, they are now mentioned in s 6(3)(b) which provides that ‘Municipalities must take into account the language usage and preferences of their residents’. Strydom and Pretorius view the separate treatment of municipalities as motivated by the fact that national and regional language demographics may not necessarily be repeated on the local level. Nevertheless, they correctly point out that municipalities are subject to exactly the same obligation as national and provincial government to promote multilingualism.<sup>38</sup>

The status of the two official languages in the pre-democratic era is no longer entrenched.<sup>39</sup> In the enactment of legislation and other measures to regulate and

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<sup>37</sup> Du Plessis & Pretorius ‘The structure of the official language clause’ (2000) 516 contend that this injunction applies not only to the nine indigenous languages mentioned in section 6(1), but also to the Khoi, Nama, San and South African sign language.

<sup>38</sup> Strydom & Pretorius ‘On the directives concerning language in the new South African Constitution’ (2000) 522-3.

<sup>39</sup> A challenge to this change in the Certification judgment was unsuccessful, with the court pointing out that its task did not involve testing the 1996 Constitution against the 1993 Constitution, but against the constitutional principles and that the provisions at stake fully complied with these principles; see *Ex Parte Chairperson of the Constitutional Assembly* par 212.

monitor the use of official languages (also envisaged in the 1993 Constitution, but not realised), section 6(4) provides that ‘all official languages must enjoy parity of esteem and must be treated equitably’. The requirements of ‘parity of esteem’ and ‘equity’ differ from what is found in the 1993 Constitution, where section 3(1) provided for the creation of conditions for the development of all 11 official languages ‘and for the promotion of their *equal* use and enjoyment’ (italics added, see further below on PanSALB; and section 5.2.2). The establishment of a Pan South African Language Board, which became a reality with the PanSALB Act of 1995, is confirmed (s 6(5)). No provision is made in section 6 for the right to use and to be addressed in any official language of choice, as was the case with section 3(3) of the 1993 Constitution. This does not however mean that the right no longer exists. In the First Certification judgment, the Constitutional Court held that section 30 of the 1996 Constitution<sup>40</sup> was to be read as entrenching this right.<sup>41</sup> Insofar as the rest of the Constitution is concerned, the same prohibition against unfair discrimination on the basis of language is to be found here (s 9(3)). Provision is furthermore made for cultural, religious and language communities to ‘(a) enjoy their culture, practise their religion and use their language and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil

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<sup>40</sup> Section 30 provides as follows: ‘Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.’

<sup>41</sup> *Ex Parte Chairperson of the Constitutional Assembly* par 213. See also *Lourens v President van die Republiek van Suid Afrika en Andere* (49807/09) [2010] ZAGPPHC 19 (16 March 2010) 3.

society' (section 31).<sup>42</sup> Language rights in education are also provided for (s 29) as well as rights in relation to language of arrested, detained and accused persons (s 35).<sup>43</sup>

### 3.2.3 Assessment

The acknowledgment of linguistic pluralism in the 1996 Constitution, and the requirement that the use of the historically marginalised languages must be advanced and their status elevated,<sup>44</sup> are fully in line with the international law developments described in chapter 2. As we saw there, when a government recognises the language of a minority as official language it thereby acknowledges

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<sup>42</sup> Henrard 'Language rights and minorities in South Africa' (2001) 84-5 points to the similarities between s 31 and art 27 of the International Covenant on Civil and Political Rights. See also Strydom 'International Standards for the Protection of Minorities and the South African Constitution' (2002) 19.

<sup>43</sup> Freedom of expression (s 16) could also possibly be mentioned here. It is however doubtful whether, in light of the great number of other language provisions in the constitution, language rights will feature prominently under this heading.

<sup>44</sup> In the manner in which languages is listed, that is, by listing first those languages which are not widely used, prominence can furthermore be said to be given to these languages; see Strydom H 'Minority rights issues in post-apartheid South Africa' (1996-1997) 19 *Loyola of Los Angeles International & Comparative Law Journal* 898. If this is indeed the objective, the assessment of usage made in the section is nonetheless somewhat inexact, at least if this is based on 'home language'. The 2001 census reveals e.g. that Sepedi (the language mentioned first) is the fourth most frequently spoken home language (9.4% of the total population).

the minority's right to maintain its identity and not to submit to assimilation.<sup>45</sup> Although the recommendation by Alexander of English as a linking language<sup>46</sup> has not been accepted in principle, English has in practice been allowed to play a dominant role in official communication. It has therefore effectively come to play the role envisaged for it by Alexander, becoming the South African *lingua franca*. As noted in the introduction, the dominance of world languages such as English is a recurring theme in the recognition of language rights, because of its threat to the development of multilingualism. If indigenous languages are to be developed, a way has to be found to elevate the use of the indigenous languages while still according English its proper place as a world language. The obvious danger is that even though multilingualism is accepted in principle, English will dominate the other languages, resulting in erosion of indigenous languages and hegemony of the international language. This threat shows the wisdom of specifically including in the Constitution the state obligation of developing the indigenous languages. While the incorporation of linguistic pluralism in the legal structures of a state by way of a constitution or legislation is a necessary first step, development of multilingualism needs to be underpinned by a rigorous implementation plan. This need has been anticipated by

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<sup>45</sup> Conversely, when a state, in reaction to its burgeoning multilingualism, declares one language as official language, as was the case with English in California in 1986 (through Proposition 63), the legitimacy of diversity is denied; see LA Law Library 'California Ballot Propositions 1980-1989' available at <http://www.lalawlibrary.org/research/ballots/1980/1986.aspx#NOVEMBER> (accessed 4 August 2011).

<sup>46</sup> Discussed in paragraph 4.1 above.



the inclusion in the South African Constitution of the obligation on national and provincial governments to regulate and monitor the use of official languages.<sup>47</sup>

#### **4. Democratic Constitutionalism and the Division of powers**

The advent of democracy in South Africa created the opportunity for the issue of federalism to be considered anew. The term had been tainted by the strategy of granting independence to 'black homelands', according to ethnicity. Consequently the ANC had difficulty in accepting federalism as part of the constitutional framework.<sup>48</sup> The term 'federalism' had become associated with resistance to transformation or at the worst was considered tantamount to political and social segregation or *apartheid*. Eventually a compromise was reached in the adoption of the 1993 Constitution and the four existing provinces were increased to nine, and accorded a degree of autonomy. The division of powers between the provinces and the central government does not however appear to have been influenced by any perceived need to protect minority languages. The decision was rather a matter of political compromise between the centralist ANC and the federalist NP and IFP as well as of pragmatism. The position in relation to the 1996 Constitution is similar, where the notion of co-operative government came to prominence.<sup>49</sup> Nevertheless,

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<sup>47</sup> Section 6(4).

<sup>48</sup> Richard S & Murray C 'Multi-Sphere Governance in South Africa: An Interim Assessment' (2001) 31:4 *Publius: The Journal of Federalism* 68.

<sup>49</sup> This principle has been described as 'a vast cooperative of all governments of all levels, together with all group and individual interests of society, in a complex pluralistic relationship of sharing,

the relative geographic concentration of linguistic groups makes the provinces and municipalities the ideal vehicle for the promotion of minority languages.<sup>50</sup>

The Constitutional Principles<sup>51</sup> contained in the 1993 Constitution detailed the model of government required in the 1996 Constitution by providing for three distinct spheres of government;<sup>52</sup> that national and provincial governments shall have exclusive and concurrent powers;<sup>53</sup> that the principle of subsidiarity shall apply;<sup>54</sup> and that certain criteria should be laid down for intervention by the national government into the affairs of the provinces.<sup>55</sup> These Principles were given effect to in Chapters 3, 4 and 6 of the 1996 Constitution which provides for national, provincial and local spheres of government<sup>56</sup> as well for co-operative government,

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reciprocity, mutuality and coordination'; see Davis R *The Federal Principle: A Journey through Time in Quest of Meaning* (1978) Berkeley: California University Press 182-3.

<sup>50</sup> See also Fessha 'A tale of two federations' (2009) 512.

<sup>51</sup> As noted earlier, the 1993 Constitution contained constitutional principles which had to serve as a guide for the adoption of the 1996 Constitution.

<sup>52</sup> Constitutional principle XVI.

<sup>53</sup> Constitutional principle XIX.

<sup>54</sup> Constitutional principle XXI

<sup>55</sup> Constitutional principle XXI (2) provides that '[w]here it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.'

<sup>56</sup> Section 40(1).

consisting *inter alia* of the mutual obligation not to encroach on the integrity of government in another sphere and co-ordination of executive as well as legislative actions with each other.<sup>57</sup> This also applies to local government, which is recognised as a distinctive sphere of government with original legislative powers (ss 40, 151). The relevant provisions of Chapter 4 provides for the legislative procedure in relation to those matters with regard to which provincial and national legislatures have concurrent legislative powers. The powers of the national and provincial legislatures are contained chiefly in sections 44 and 104. Other important provisions include the enumeration of the areas of concurrent national and provincial legislative powers;<sup>58</sup> the enumeration of the areas of exclusive provincial legislative competence;<sup>59</sup> and the power of the national legislative authority to override provincial legislation. This power is limited to various requirements which are outlined in the Constitution.<sup>60</sup> Finally, national legislation prevails over provincial legislation regarding a concurrent matter if certain criteria similar to that in section 44(2) are present.<sup>61</sup> According to Schedule 4, ‘Language policy and the regulation of official languages (to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence)’ is a matter of concurrent provincial and national legislative competence.<sup>62</sup> In matters of

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<sup>57</sup> Section 41(1).

<sup>58</sup> Schedule 4 of the Constitution.

<sup>59</sup> Schedule 5 of the Constitution.

<sup>60</sup> Section 44(2) of the Constitution.

<sup>61</sup> Section 146(2) of the Constitution.

<sup>62</sup> See Schedule 4.

concurrent legislative competence, the onerous procedure laid down in section 76 must be adopted, in order to protect the interests of the provinces. This section makes provision inter alia for the intervention of a Mediation Committee if agreement cannot be reached between the National Assembly and the National Council of Provinces on the contents of a Bill to be enacted.<sup>63</sup>

The enactment of the official languages legislation will furthermore have to comply with the requirements laid down by the Constitutional Court in the *Doctors for Life* decision<sup>64</sup> for public participation. In considering official languages legislation, the various language groups will certainly be interested in the outcome of parliamentary deliberations and an opportunity must in terms of this decision be given to those language groups interested in influencing the content of this legislation. In the *Doctors for Life* decision, it was contended that the NCOP had failed to provide for public participation in relation to four health statutes.<sup>65</sup> Ngcobo J who delivered the majority judgment came to the conclusion that the failure to provide for public participation in the form of public hearings relating to the Choice on Termination of

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<sup>63</sup> The South African Languages Bill [B-2011], available at <http://196.22.136.92/redblock/satalewet/wp-content/uploads/2011/07/NATIONAL-LANGUAGE-BILL.pdf> (accessed on 4 August 2011) indicates that it is to be dealt with in terms of s 76 of the Constitution.

<sup>64</sup> *Doctors for Life International v The Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

<sup>65</sup> The Choice on Termination of Pregnancy Amendment Act 38 of 2004; the Sterilization Amendment Act 3 of 2005; the Traditional Health Practitioners Act 35 of 2004; and the Dental Technicians Amendment Act 24 of 20004.

Pregnancy Amendment Act and the Traditional Health Practitioners Act resulted in their invalidity. The decision was based on the doctrine of co-operative government which, as we saw above, requires institutional co-operation and communication between national and provincial legislatures. Section 42(4)<sup>66</sup> of the Constitution specifically requires co-operation between the provinces and the National Council of Provinces (NCOP). The NCOP ensures that national policy responds to provincial interests while engaging the provinces and the provincial legislatures in the consideration of national policy. At stake in the decision was the phrase ‘facilitate public involvement’ in section 59(1)(a),<sup>67</sup> section 72(1)(a)<sup>68</sup> and section 118(1)(a)<sup>69</sup> of the Constitution. The Constitutional Court had to determine in this respect whether in enacting the legislation under consideration the correct legislative procedure had been followed. The court viewed the phrase as constituting a constitutional obligation based on the constitutional commitment to democracy and the principles of accountability and transparency. Ngcobo J pointed out the following in this regard:

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<sup>66</sup> Section 42(4) of the Constitution provides as follows: ‘The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.’

<sup>67</sup> Section 59(1) provides as follows: ‘The National Assembly must (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees’.

<sup>68</sup> Section 72(1) provides as follows: ‘The National Council of Provinces must (a) facilitate public involvement in the legislative and other processes of the Council and its committees’.

<sup>69</sup> Section 118(1) provides as follows: ‘A provincial legislature must (a) facilitate public involvement in the legislative and other processes of the legislature and its committees’.

[T]he duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.<sup>70</sup>

## **5 The Implementation of Multilingualism in South Africa**

### **5.1 The development of indigenous languages**

As pointed out above, the South African Constitution in section 6(2) stipulates that the state must take steps to stimulate the use and enhance the status of the indigenous languages. This has been referred to as a ‘development directive’ requiring the state to enhance the status of languages by increasing their ‘economic, social and cultural value’.<sup>71</sup> This provision entails recognition of the reality that in the event of different languages sharing the same territory, the language of social mobility and economic advancement usually takes precedence in the higher functions of education, employment, government and mass media, while languages with lower status are used in more intimate functions such as family, friendship,

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<sup>70</sup> Paragraph 145.

<sup>71</sup> Du Plessis & Pretorius ‘The structure of the official language clause’ (2000) 516.

community and pre-school or primary education.<sup>72</sup> Factors that hasten language shift include the ‘ideology of contempt’ that users of dominant languages often have for languages that are perceived to be subordinate, as well as ‘prestige transfer’, whereby the mere fact of use of a language by successful persons lends prestige to that language.<sup>73</sup> Without state intervention, language shift in relation to the indigenous languages will ensue since these languages are generally considered to be languages of lower status and are used minimally in the higher language functions. The ultimate result of language shift is language death; this occurs when the lesser-used indigenous languages are relegated to such an extent that they fall into disuse. According to UNESCO –

[i]t is estimated that, if nothing is done, half of 6000 plus languages spoken today will disappear by the end of this century. With the disappearance of unwritten and undocumented languages, humanity would lose not only a cultural wealth but also important ancestral knowledge embedded, in particular, in indigenous languages.

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<sup>72</sup> Fishman JA *The Rise and Fall of the Ethnic Revival: Perspectives on Language and Ethnicity* (1985) Berlin: Mouton de Gruyter 43.

<sup>73</sup> Dorian NC ‘Western language ideologies and small-language prospects’ in Grenoble LA & Whaley LJ *Endangered Languages: Language Loss and Community Response* (1998) Cambridge: Cambridge University Press 7-9.

However, this process is neither inevitable nor irreversible: well-planned and implemented language policies can bolster the ongoing efforts of speaker communities to maintain or revitalize their mother tongues and pass them on to younger generations.<sup>74</sup>

This perhaps explains why the drafters of the South African Constitution were concerned not only about the indigenous official languages, but also about endangered languages such as the Khoi, Nama and San languages. This concern is the basis for the constitutional obligation to elevate the status and advance the use of nine indigenous languages and the obligation placed on PanSALB to promote and create conditions for the development of the critically endangered languages. Elevation of the status of the nine indigenous languages requires that corpus planning (the rules relating to structure, vocabulary, spelling and script) of these languages occurs so that it will be possible to use all the indigenous languages not only in private conversation but also in education, in the economy and in the various branches of the state in administration, judicial proceedings and the legislatures. Regarding the critically endangered languages, similar steps are called for to ensure their use at least in education and in interaction between members of these communities and administrative authorities.

## **5.2 Determination of national and provincial official languages**

According to section 6(4) of the Constitution, national and provincial governments are obliged to regulate and monitor the use of the official languages by legislative

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<sup>74</sup> UNESCO 'Endangered Languages' available at <http://www.unesco.org/new/en/culture/themes/cultural-diversity/languages-and-multilingualism/endangered-languages/> (accessed on 28 June 2011).



and other measures. Section 6(4) furthermore requires that official languages must enjoy parity of esteem and must be treated equitably. Currie<sup>75</sup> compares the approach in the 1996 Constitution with its predecessor and notes that section 6(4) avoids all mention that the official languages must be treated equally. The 1910, 1961 and 1983 constitutions, as we saw, provided for the equality of treatment of Afrikaans and English and the 1993 Constitution required of the state to create conditions for the promotion of the equal use and enjoyment of the official languages.<sup>76</sup> Currie understands the requirement of equitable treatment as referring to treatment ‘that is just and fair in the circumstances’, which, he contends, can be read as tying in with section 6(2), requiring that special consideration must be given to the promotion of the historically neglected languages.<sup>77</sup> This still does not give much guidance as to what exactly is required, and Du Plessis and Pretorius add the gloss that what is at stake is ‘equitable treatment of languages as *official* languages’.<sup>78</sup> As will be discussed in more detail in chapter 4, and as also contended by the authors, this requires the significant use of all official languages in the official domain.<sup>79</sup> The term ‘parity of esteem’, according to Currie, has minimal legal significance. It clearly does not require the equal treatment of all official languages. In the end, in his view, it means little more than that all the official languages should

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<sup>75</sup> Currie I ‘Official languages and language rights’ in Woolman, S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2002) Cape Town: Juta 65-6.

<sup>76</sup> Section 3(9)(a) of the 1993 Constitution.

<sup>77</sup> Currie ‘Official languages and language rights’ (2002) 65-6.

<sup>78</sup> Du Plessis & Pretorius ‘The structure of the official language clause’ (2000) 520.

<sup>79</sup> Du Plessis & Pretorius ‘The structure of the official language clause’ (2000) 520.

be taken seriously.<sup>80</sup> The combined effect of the requirements in section 6(4), parity of esteem and equitable treatment, in Currie's reading, thus appears to be that the official languages must be treated fairly in the circumstances but that they need not be accorded the same treatment.

Malan<sup>81</sup> reads the requirements of parity of esteem and equitable treatment as having greater legal significance. According to him, it prohibits arbitrary treatment of any language, and specifically the arbitrary diminution in the use and status of any official language.<sup>82</sup> He agrees in this respect with Rautenbach and Malherbe<sup>83</sup> who argue that the use of one language as an 'anchor' language, with other languages being used rotationally or sporadically, would conflict with this requirement.<sup>84</sup> Du Plessis and Pretorius also attach more significance to the notion of 'parity of esteem'. They read it as a 'developmental directive for official language policy':

In the light of the marked differences in historical privilege and levels of development, parity of esteem is not a state of affairs needing only to be affirmed, but a distant goal to be achieved. At the

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<sup>80</sup> Currie 'Official languages and language rights' (2002) 65-7.

<sup>81</sup> Malan K 'Observations and suggestions on the use of the official languages in national legislation' (2008) 23 *SAPR/PL* 59.

<sup>82</sup> Malan 'Observations and suggestions on the use of the official languages in national legislation' (2008) 63.

<sup>83</sup> Rautenbach I and Malherbe EFJ *Staatsreg* (2004) Durban: Butterworths 106.

<sup>84</sup> Malan 'Observations and suggestions on the use of the official languages in national legislation' (2008) 64; see also Malan K 'Observations on the use of official languages for the recording of court proceedings' (2009) *TSAR/ Journal of South African Law* 148.

very minimum, the achievement of this objective requires a bona fide attempt to ensure that all official languages are used on a regular basis in all the core aspects of the official domain. This may mean the structured and progressive upgrading of the use of previously excluded or underdeveloped languages in key phases of the process of legislation, in courts and in the administration.<sup>85</sup>

A similar, but somewhat stronger reading comes to the fore when section 6(1) is read with section 9(2) and (3) of the Constitution (the equality and affirmative action clauses). It could then be said that the Constitution indeed provides for ‘parity of esteem’ and ‘equitable treatment’ of the official languages, but that this is for a transitional period only.<sup>86</sup> Ultimately, full equality between all official languages must be attained. It is however submitted that it would be unrealistic to aim towards the full equality of all official languages. The provisions of section 6 of the Constitution appear to recognise, like the European Charter does in respect of regional and minority languages, that the situation in respect of each language is different. This requires the contextual assessment of each language in determining the state’s obligations in relation to it. In some respects, all official languages need to be treated equally, in other respects, inter alia because of the different number of speakers of each language this will not be the case. To expect for example that the historically marginalised languages (or Afrikaans) would be able to play the role of *lingua franca* within government departments throughout South Africa, as English does at present, is unfeasible.

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<sup>85</sup> Du Plessis & Pretorius ‘The structure of the official language clause’ (2000) 520..

<sup>86</sup> See also Malan ‘Observations and suggestions on the use of the official languages in national legislation’ (2008) 62 who refers to s 6(2) as an affirmative action clause in relation to the indigenous languages.

This nevertheless does not mean that the constitutional obligations in respect of especially the indigenous languages may be ignored. Section 6 can be said to lay down a ‘principle of progression’, similar to the Canadian Charter, which can be used by the court as criterion in measuring the action taken by the government at a specific point in time. In *Société des Acadiens v. Association of Parents*,<sup>87</sup> Wilson J in a minority judgment held the following in this regard:

I do not believe ... that any falling short of the goal [of equality of status of the two official languages] at any given point of time necessarily gives a right to relief. I agree with those who see a principle of growth or development in s. 16,<sup>88</sup> a progression towards an ultimate goal. Accordingly the question, in my view, will always be - where are we currently on the road to bilingualism and is the impugned conduct in keeping with that stage of development? If it is, then even if it does not represent full equality of status and equal rights of usage, it will not be contrary to the spirit of s. 16.<sup>89</sup>

Section 6(3) of the South African Constitution furthermore provides that national and provincial governments may use particular official languages for the purposes of government, but have to use at least two official languages.<sup>90</sup> The provision stipulates various factors to be taken account of in deciding on this issue. Du Plessis

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<sup>87</sup> [1986] 1 S.C.R. 549 par 140, also at 180.

<sup>88</sup> Section 16(1) of the Canadian Charter of Rights and Freedoms provides the following: ‘English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.’

<sup>89</sup> As will be pointed out below (and see also chapter 4), this interpretation of the language provisions of the Charter was adopted by a majority of the court in *R v Beaulac* [1999] 1 SCR 768.

<sup>90</sup> S 6(3) of the Constitution.

and Pretorius classify these criteria as demographic (usage and regional circumstances), economic (practicality and expense) and attitudinal (the balance of the needs and preferences of the population as a whole or in the province concerned) in nature.<sup>91</sup> They contend that the stipulation that at least two languages are to be chosen does not mean that the use of two languages will in all instances satisfy the requirements of section 6.<sup>92</sup> Circumstances may be such that more than two languages would have to be used. According to Currie,<sup>93</sup> ‘usage’ in section 6(3)(a) refers to the ‘objective demographic incidence’ of language use; where the use of a particular language is for example too low, the determination of that language as an official language would not be required.<sup>94</sup> The same would apply to local government, insofar as their language policy is to be based on ‘usage’ (s 6(3)(b)).<sup>95</sup> The term ‘regional circumstances’ refers to particular circumstances prevailing in the region which impact on ‘the provision of services in multiple languages’ by the administration, while the terms ‘practicality’ and ‘expense’ have a bearing on factors which may inhibit the full use of languages operating in the region.<sup>96</sup> De Varennes<sup>97</sup>

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<sup>91</sup> Du Plessis & Pretorius ‘The structure of the official language clause’ (2000) 521-2.

<sup>92</sup> Du Plessis & Pretorius ‘The structure of the official language clause’ (2000) 522.

<sup>93</sup> Currie I ‘Official languages and language rights’ in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2002) Cape Town: Juta 65-13 to 14.

<sup>94</sup> Currie points out that the choice of official languages in the Constitution of the Western Cape (Afrikaans, English and isiXhosa) and in the Constitution of KwaZulu-Natal (Zulu, English and Afrikaans) was based on this criterion.

<sup>95</sup> See also Currie ‘Official languages’ (2002) 65-14.

<sup>96</sup> Currie ‘Official languages’ (2002) 65-14.

<sup>97</sup> De Varennes *Languages, Minorities and Human Rights* (1996) 93, 97.

further points out that the concentration of users of minority languages would usually provide a reason for the provision of minority language services in that area, but that practical considerations such as a lack of human and financial resources may deter the provision of such services. Similar kinds of provisions (as section 6(3)(a)) can be found in the Framework Convention for the Protection of National Minorities,<sup>98</sup> and according to De Varennes, section 6(3) is effectively the principle of proportionality in operation.<sup>99</sup>

Section 6 thus appears to pull in different directions, on the one hand clearly affirming the principle of multilingualism, and, on the other, “diluting” this principle by emphasising the need to take account of practical considerations, such as cost-effectiveness. This is not however strange in provisions of this nature, as pointed out in the discussion in chapter 2. Strydom and Pretorius make out a strong case for the need to interpret section 6 as an integrated whole and not simply as the sum of its (disconnected) parts.<sup>100</sup> They therefore point to the importance of the designation of all 11 languages as ‘official’ languages (see also chapter 3). This entails the recognition of the principle of multilingualism and the rejection of the classical 19<sup>th</sup> century model of a single state language, with other languages playing a secondary role or no role at all (at 113). They therefore conclude that –

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<sup>98</sup> Discussed in chapter 3, paragraph 3.2.

<sup>99</sup> De Varennes ‘Language rights in South Africa’ (2010) 10-11.

<sup>100</sup> Strydom & Pretorius ‘On the directives concerning language in the new South African Constitution’ (2000) 112. See also Du Plessis & Pretorius ‘The structure of the official language clause’ (2000) 524-6.

[i]f, as has been argued, section 6 contains a clear instruction to recognise language diversity and equity, then the idea of taking into account qualifying factors is not to release the state from its duty to promote multilingualism. ... [P]ractical considerations cannot be put on the same level as the constitutional commitment to the promotion of language equity, diversity and development (at 114).

The above reading corresponds with the analysis in chapter 2 of this thesis as well as with the contextual and purposive approach relied on by the Constitutional Court in respect of the interpretation of the Constitution itself, as well as of remedial legislation.<sup>101</sup> This approach is not restricted to the Bill of Rights, but extends to the whole Constitution. The Court in this respect often takes heed of the constitutional and legislative scheme in arriving at a specific interpretation.<sup>102</sup> This approach was borrowed from the Canadian Supreme Court.<sup>103</sup> It is therefore interesting to note that a majority of the Canadian Supreme Court in *R. v. Beaulac* [1999] 1 S.C.R. 768, rejected the restrictive approach which was in some earlier cases adopted in respect of language rights in the Canadian Charter of Rights and Freedoms and held that the purposive approach is the (only) correct approach to be followed in relation to

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<sup>101</sup> See e.g. *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* (CCT69/06) [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC) (6 June 2007) par 53.

<sup>102</sup> See e.g. *Democratic Alliance and Another v Masondo NO and Another* (CCT29/02) [2002] ZACC 28; 2003 (2) BCLR 128; 2003 (2) SA 413 (CC) (12 December 2002) par 7; *Head of Department: Mpumalanga Department of Education, and Others and Hoërskool Ermelo* 2010 (2) SA 415 (CC) par 45 and further.

<sup>103</sup> See *S v Zuma and Others* (CCT5/94) [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA) par 15.

language rights (par 25).<sup>104</sup> In taking account of the specific criteria mentioned in section 6(3) and (4), sight should furthermore not be lost of the principles of substantive equality and proportionality.

### 5.2.1 Statistics

The 2001 South African census can in light of the above, be of at least some assistance in determining the languages to be used in terms of section 6(3)(a), as it purports to reflect the ‘home language’ of the respondents. Insofar as the national picture is concerned, the table below reflects the incidence of home language as a percentage of the national total:

<b>SOUTH AFRICAN LANGUAGES 2001</b>			
	<b>Language</b>	<b>Number of speakers</b>	<b>% of total</b>
1	IsiZulu	10,677,315	23.82%
2	IsiXhosa	7,907,149	17.64%
3	Afrikaans	5,983,420	13.35%
4	Sesotho sa Leboa	4,208,974	9.39%
5	English	3,673,206	8.20%
6	Setswana	3,677,010	8.20%
7	Sesotho	3,555,192	7.93%
8	Xitsonga	1,992,201	4.44%
9	SiSwati	1,194,433	2.66%
10	Tshivenda	1,021,761	2.28%
11	IsiNdebele	711,825	1.59%
12	Other	217,291	0.48%
	<b>TOTAL</b>	<b>44,819,777</b>	<b>100.00%</b>

<sup>104</sup> See further, chapter 4.



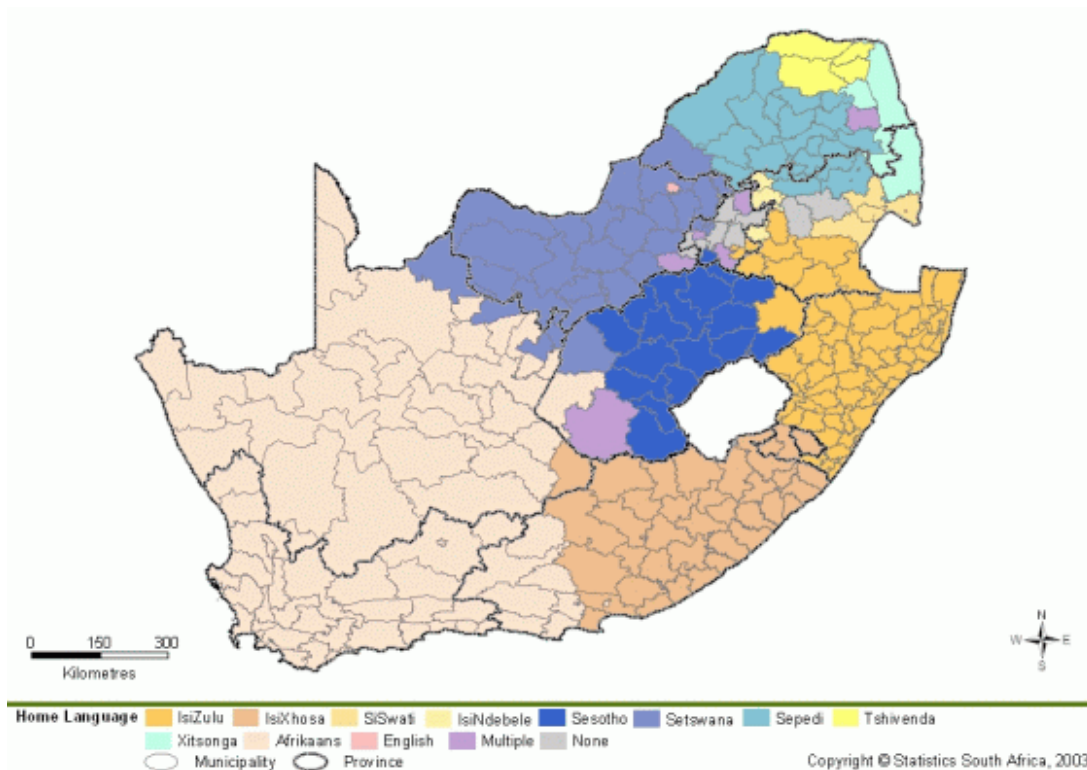
Insofar as the provinces are concerned, the home languages spoken most frequently within each province are as follows:

### Home language within provinces

Language	EC	FS	Gau	KZN	Lim	Mp-l	NC	NW	WC
Afri	9.3	11.9	14.4	1.5	2.3	6.2	68.0	7.5	55.3
English	3.6	1.2	12.5	13.6	0.5	1.7	2.5	1.2	19.3
IsiNdebele	0.1	0.4	1.9	0.2	1.5	12.1	0.1	1.3	0.0
IsiXhosa	83.4	9.1	7.6	2.3	0.3	1.5	6.2	5.8	23.7
IsiZulu	0.8	5.1	21.5	80.9	0.7	26.4	0.3	2.5	0.2
Sepedi	0.0	0.3	10.7	0.1	52.1	10.8	0.1	4.2	0.0
Sesotho	2.4	64.4	13.1	0.7	1.3	3.7	1.1	5.7	0.7
Setswana	0.0	6.8	8.4	0.1	1.6	2.7	20.8	65.4	0.1
SiSwati	0.1	0.3	1.4	0.1	1.1	30.8	0.1	0.6	0.0
Tshivenda	0.0	0.1	1.7	0.0	15.9	0.2	0.0	0.5	0.0
Xitsonga	0.0	0.3	5.7	0.0	22.4	3.8	0.0	4.7	0.0
Other	0.2	0.2	1.0	0.4	0.3	0.3	0.7	0.6	0.4
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

The map below indicates the incidence of home language in the different municipalities, that is, the dominant language per municipality:<sup>105</sup>

<sup>105</sup> Statistics South Africa 'Census 2001: Digital Census Atlas' available at <http://www.statssa.gov.za/census2001/digiAtlas/index.html> (accessed 4 August 2011).



It will immediately be noted that no attempt is made to establish the number of speakers of the Khoi, Nama and San languages, nor of sign-language speakers.

Section 4(3) of the PanSALB Act provides the following:

All organs of state shall afford the Board such assistance as may reasonably be required for the protection of the Board's independence, impartiality, dignity and effectiveness in the exercise, carrying out and performance of the Board's powers, duties and functions.

In light of PanSALB's duties in respect of the critically endangered languages, it appears imperative that the census, which is scheduled for 2011, should also provide statistics in relation to the use of these languages.

In the 2001 census, the person concerned was asked which language he or she speaks most often in the household. Other ways of determining the incidence of

language use is to ask about the language the person concerned learnt to speak as a child or the languages which a person can speak with other persons about daily matters. As the hypothetical example below shows, there can be more than one 'home language', and one's 'home language' is not necessarily the same language as the language which is used in public interaction. The question asked in the SA census is preferable to asking about a person's mother-tongue. The latter term is notoriously ambiguous. As Skutnabb-Kangas and McCarty<sup>106</sup> point out, mother tongue can mean '[I]anguage(s) one learns first, identifies with, and/or is identified by others as a native speaker of; sometimes also the language that one is most competent in or uses most'. All these interpretations of 'mother tongue' indicate that this notion is to a large extent a matter of individual choice. Individuals' answer to a question in this regard may be influenced by social circumstance rather than fact. Dramatic evidence of this has been found in an examination of the census data of India. The census revealed that the growth in numbers of people who indicated Sanskrit as their 'mother tongue' had increased by almost a thousand percent in one decade. The only possible explanation for this is that, because of changed social circumstances, it had become acceptable to associate oneself as a member of one language community rather than another.<sup>107</sup> A similar explanation has been given of a dramatic increase in non-English mother-tongue speakers in the US in the

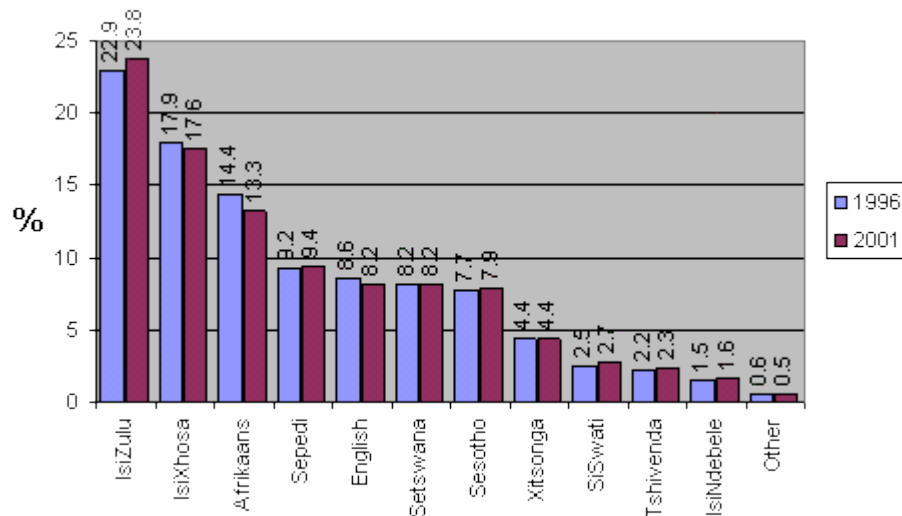
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<sup>106</sup> Skutnabb-Kangas T & McCarty TL 'Key concepts in bilingual education: Ideological, historical, epistemological, and empirical foundations' in Cummins J & Hornberger N (eds) *Encyclopedia of Language and Education* Volume 5 Bilingual Education 2 ed (2007) New York: Springer 7.

<sup>107</sup> Skutnabb-Kangas & McCarty 'Key concepts in bilingual education' (2007) 7.

1970s.<sup>108</sup> This shows that the mother tongue of an individual can change dramatically and statistics which use this criterion should therefore be regarded with some caution. As the following table shows, there was no dramatic increase in the figures regarding any of the official languages when the 1996 and 2001 censuses are compared:

Percentage of speakers per language in South Africa (1996 and 2001):<sup>109</sup>



Because of the peculiar circumstances in South Africa the identification of one's home language is likewise subject to perception. Webb<sup>110</sup> gives the following hypothetical example to show that the choice of language is not always self-evident:

<sup>108</sup> Fishman JA *The Rise and Fall of the Ethnic Revival: Perspectives on Language and Ethnicity* (1985) Berlin: Mouton de Gruyter 107.

<sup>109</sup> SALanguages.com available at <http://www.salanguages.com/stats.htm> (accessed on 29 July 2011).

Sipho Khumalo is the fourteen-year-old son of a Zulu father and a Venda mother. His father teaches Public Administration at the Mamelodi campus of Vista University, and his mother looks after the family. They live in Mamelodi, a residential area on the outskirts of Pretoria... The community in Mamelodi in which they live is Pedi-speaking, so Sipho uses Pedi when he visits his closest friends. Sipho is in grade eight ... and the language of the school is English. Since Pretoria has a large Afrikaans-speaking community, it means that there is a lot of exposure to Afrikaans outside his home environment, and Sipho will probably need it someday when he studies at the university or starts to work in a government office in the city. At home Sipho is expected to speak English to his parents, since they expect him to become fully proficient in that language. He accepts the need for this but finds it difficult because he is only exposed to English in the classroom. Travelling by taxi or going to the post office or a municipal office he uses Pedi or Tswana. In the neighbourhood cafes and stores, which are owned by Indian traders, Fanagalo...is used. When he is alone with his mother, they often use Venda in talking to each other, because, she says, Venda is her language of comfort, security and relaxation. In church on Sunday, the sermon is in Pedi, although the preacher is actually an Ndebele. Sipho's grandparents on his father's side come from Mahlabatini in rural Kwazulu/Natal...His grandparents on his mother's side come from Thohoyandou, and speak Venda, a language not related to either Zulu or Pedi, and spoken four hundred kilometres away in the Northern Province. These grandparents know Pedi quite well, and they often laugh at the way Sipho and his friends speak the language, saying that Pretoria has really murdered the language of the Bapedi, which is a great pity since they have such a rich tradition. What Sipho hasn't told them is that some of the boys in his class are originally from Venda, but they have changed their names to sound more Pedi-like, since they are ashamed of their Venda connections.

Although they can be useful in devising a language policy, census figures should therefore be treated with some caution, when relying on them as one of the criteria (demographic incidence) in determining the official languages nationally,

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<sup>110</sup> Webb VN *Language in South Africa: The Role of Language in National Transformation, Reconstruction and Development* (2002) Philadelphia: John Benjamins Publishing Company 63.

provincially and locally. As appears from the above tables, English is ranked only fifth nationally as a home language, and its figures have gone down since the 1996 census (from 8.6%). A survey of PanSALB in 2000 showed that approximately 36% of South Africans understand English; 30% understand isiZulu, 29% understand Afrikaans and 21% understand isiXhosa (page 175). Because of the considerable overlap between Zulu and Xhosa, it can be said that 50% of South Africans understand isiZulu-isiXhosa.<sup>111</sup>

### **5.2.2 Action taken in implementation on the national level**

The Department of Arts and Culture (previously Arts, Culture, Science and Technology) has played the most significant role thus far nationally to implement the requirements of multilingualism in the 1993 and 1996 Constitutions.<sup>112</sup> The Department appointed a Language Plan Task Group (LANGTAG) in December 1995, under the chairmanship of Neville Alexander. The task group had to devise a National Language Plan in light of the requirements of the 1993 Constitution. LANGTAG submitted a report in August 1996, 'Towards a National Language Plan for South Africa'. The report made recommendations inter alia regarding the promotion of multilingualism in education and in the public service. In 2003 a

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<sup>111</sup> Heugh K 'Multilingual Voices – isolation and the crumbling of bridges' (2000) 46 *Agenda* 25.

<sup>112</sup> For the Language Services branch of the department, see Department of Arts and Culture 'Branch Language Services' available at [http://www.dac.gov.za/chief\\_directorates/language\\_services.htm](http://www.dac.gov.za/chief_directorates/language_services.htm) (accessed on 21 May 2011); see further Beukes 'Language policy implementation in South Africa' (2008); and Mkhulisi, N 'The National Language Service and the new Language Policy' in Deprez K & Du Plessis T (eds) *Multilingualism and Government* (2000) Pretoria: Van Schaik 121-129.

National Language Policy Framework was published by the same Department (dated 12 February 2003, officially launched on 18 March 2003).<sup>113</sup> It provides inter alia that local governments are to determine their language use in terms of an enabling provincial language policy framework. It envisages, somewhat vaguely, that -

[t]he official languages will be used in all legislative activities, including *Hansard* publications, as a matter of right as required: provided that in the case of provincial legislatures, regional circumstances will determine the language(s) to be used (par 2.4.4).

Insofar as the use of language in government structures is concerned, the Policy Framework provides for the formulation of working languages of record by each government structure for both internal and external communication. Government structures should insofar as it is practically possible allow persons (in government) to use their language of preference. In the conduct of meetings, translation facilities should be provided where practically possible. In communicating with members of the public, the Policy Framework draws a distinction between official correspondence and oral communication. It provides that -

[f]or *official correspondence* purposes, the language of the citizen's choice must be used. All *oral communication* must take place in the preferred official language of the target audience. If necessary, every effort must be made to utilise language facilitation facilities such as interpreting (consecutive, simultaneous, telephone and whispered interpreting) where practically possible (par 2.4.6.2).

In relation to government publications, the Policy Framework provides for publication in all eleven languages '[w]here the effective and stable operation of

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<sup>113</sup> According to the Implementation Plan, the NLPF was approved by cabinet on 12 February 2003.

government at any level requires comprehensive communication of information' (par 2.4.6.4). Where this requirement is not applicable, at least six languages should be used, that is, at least one from the Nguni group (isiNdebele, isiXhosa, isiZulu and siSwati); At least one from the Sotho group (Sepedi, Sesotho and Setswana); Tshivenda; Xitsonga; English; and Afrikaans (par 2.4.6.5). Where publication in six languages is required, a principle of rotation within the Sotho and Nguni groups is to be applied (par 2.4.6.6). On the international level, the NLPF provides for communication in English, or in the language preferred by the country concerned.

An Implementation Plan of the NLPF has furthermore been adopted, dated 10 April 2003. The Implementation Plan recognises the danger of monolingualism in the following terms:

A major challenge to implementation is current language practices, which are closely linked to the multiple functions of English in post-apartheid South Africa. English is widely used in most domains, i.e. in government structures and in the media (both print and electronic), the workplace, as a lingua franca for inter-group communication, and as the language of the Internet and science and technology. Although English provides access to job opportunities and education, it is at the same time an obstacle to people with a lack of proficiency in the language. In as much as English is viewed as the key to socio-economic mobility and prestige it poses a threat to the use and maintenance of the indigenous languages and the implementation of a policy of multilingualism.

However, proficiency in English is less widespread than expected, and the emergence of a language elite is possible. A national sociolinguistic survey commissioned by PanSALB in 2000 shows that more than 40% of the people in South Africa often do not understand what is being communicated in English. It found that most South Africans are dissatisfied with the way their languages are used in the public sector. The survey also found that the general public in fact perceived the Public Service as inaccessible in terms of language (at 10).



The Implementation Plan envisages (in retrospect, somewhat unrealistically) the phasing in of Multilanguage publication as set out in the NLPF over a period of three years (par 1.6). Insofar as Parliament is concerned, the Implementation Plan boldly sets out the following under the heading ‘Hansard’:

In view of the nature of their legislative activities, Provincial Legislatures and Parliament are, as a matter of right, required to provide services in all the 11 official languages. However, regional circumstances will also determine the language(s) to be used. In other words, provinces do not necessarily have to provide for all the 11 official languages. Hansard offices in Parliament and in the various provinces play a crucial role in supporting this mandate. It is thus imperative that these offices work closely with Language Units and the other related structures (par 2.2).

It also envisaged (again, unrealistically in retrospect) that a National Language Act would come into effect by September 2003. On 30 May 2003 the South African Languages Bill was published for public comment in the Government Gazette.<sup>114</sup> The Bill set out to cover all three spheres of government (legislature, executive and judiciary) as well as all three levels of government (national, provincial and local) (clauses 4 and 5). The most controversial, but also most commendable provision was probably clause 5. It provided that the default position would be the use of all 11 official languages in government documents (5(2)). Only where this was not feasible, could six languages be used, in which event the different Nguni and Sotho languages could be rotated. This second option could in turn be departed from ‘when the relevant organ of state or other institution can show that it is reasonably

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<sup>114</sup> Notice 1514 of 2003; available at <http://www.polity.org.za/article/draft-south-african-languages-bill-2003-06-30> (accessed on 2 August 2011).

necessary to follow an alternative policy in the interest of effective governance or communication'. This third approach had to be implemented in consultation with PanSALB and had to comply with sections 6(3)(a) and 30 of the Constitution (clause 5(4)). The Bill furthermore envisaged the establishment of a language unit in each national government department and in each province to facilitate implementation of the envisaged Act (clauses 6 and 7). Provincial governments were required to support local governments in the implementation of the Act (clause 6(2)). The Minister was given the function of specifically promoting the indigenous languages and sign language(s), also through cross-border projects (s 8). Language units on the national level were required to report to Parliament once a year, and provincial language units to the provincial legislature concerned as well as to the National Council of Provinces; all language units would be required to report to PanSALB (clause 10). The Bill specifically made provision for the granting of remedies in the event of non-compliance with its provisions or with the policies contained in the NLPF. It provided that '[a]ny person acting on his or her own behalf or any person, body of persons or institution acting on behalf of its members or members of a language group or any organ of state may apply to a Court for an appropriate remedy'. A court would be able to grant any order which is appropriate and just in the circumstances, including –

- (a) an interim order;
- (b) a declaratory order;
- (c) an interlocutory order or interdict;
- (d) an order for the payment of any damages;
- (e) an order for the implementation of special measures to address the situation complained of;

- (f) an order requiring the respondent to undergo an audit of language policies and practices;
- (g) an order to comply with any provision of this Act, or a finding, recommendation or decision of the Pan South African Language Board;
- (h) an appropriate order of costs against any party to the proceedings (clause 11(3)).

The Bill showed good intentions, but was flawed in numerous respects. Clause 5, although commendable in principle, was so vaguely formulated that it did not comply with the international norms pointed to in Chapter 2. We saw there that it is required of legislation dealing with language policies to be sufficiently clear and detailed so as not to give too broad a discretion to administrative authorities. Clause 5 breached this international norm in every respect. Instead of giving effect to the (understandably) broad provisions of the Constitution, it repeated these verbatim. It also granted too wide a discretion to the relevant Minister in clause 5(6). The Bill was furthermore not detailed enough in its attempts to give effect to section 6 of the Constitution. The Bill contained no provision in relation to the use of the official languages in Parliamentary debates and committee meetings, and also no provision regulating the reporting of such debates or meetings. The Bill spoke broadly about ‘government documents’ but did not say anything specifically about the language to be used for Bills, Acts of Parliament or treaties which the government signs and/or parliament ratifies. It likewise did not specifically mention the language(s) to be used in the enactment of delegated legislation such as rules, regulations and proclamations. The language to be used for general government notices or advertisements was also not mentioned. Also absent was any mention of the language to be used in the websites of public bodies, policies, press releases, forms generally used by the public, as well as for important documents such as driving licences, passports and visas, birth certificates, death certificates, marriage and

civil partnership certificates. The language to be used in reports to parliament was not mentioned either. No mention was made of the language to be used in education. The Bill did mention, in the context of the powers of functions of the envisaged language units, the language(s) to be used in oral or written interaction between the public and administrative authorities on the national level, and in the internal operation of government departments (s 7). In this respect the Bill passed the buck, and at the same time violated the developing international norms identified in chapter 2. No provision was furthermore made for the training of staff to enable effective communication with the public or for employment practices to correspond with the language provisions of the Constitution. No mention was made of the language to be used in signage. The Bill mentioned in clause 5(5) that it would be applicable to the ‘judicial functions in government in the national sphere’, but it gave no detail as to what this would mean for the courts, such as the language to be used in giving oral evidence, pleadings, and as language of record. The enforcement of the Act was left to the envisaged language units, PanSALB and the courts. The provisions omitted from the Languages Bill are ones typically to be found in the Language Acts of other jurisdictions<sup>115</sup> as well as in international treaties relating to minority languages. In short, the Bill made little serious attempt to give effect to the provisions of section 6 of the Constitution. The Bill did not however proceed any further through the legislative process and in 2007 the Cabinet decided that the Minister of Arts and Culture should, in collaboration with the Minister

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<sup>115</sup> See specifically the Canadian Official Languages Act available at <http://laws-lois.justice.gc.ca/eng/acts/O-3.01/FullText.html> (accessed on 28 June 2011).

of Justice, investigate non-legislative means to give effect to section 6 of the Constitution.<sup>116</sup>

The process has since been taken a step further through court intervention. In *Lourens and the President of the Republic of South Africa* an application was made for an order firstly that the respondents<sup>117</sup> finalize and promulgate a South African Language Act as required by the Constitution, alternatively that national legislation be enacted in which the use and monitoring of official languages is provided for. The basis for the application was section 6(4) of the Constitution. Du Plessis J held that an order directing the enactment of a national languages Act was not possible in light of section 6(4) of the Constitution which simply refers to legislative *and other measures* to be taken (at 5). The respondents contended that they had through the taking of various measures in fact complied with the requirements of section 6. The steps taken included the completion of the National Language Policy Framework, the establishment of a Language Practitioners' Council (as well as a Bill in this regard), the enactment of the Pan South African Language Board Act as well as other practical measures such as the provision of translation services by the Department of Arts and Culture. Reference was also made by the respondents to the South African Schools Act 84 of 1996 which provided that school governing bodies

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<sup>116</sup> *Lourens v President van die Republiek van Suid Afrika* (2010) 6; Du Plessis T 'n Taalwet vir Suid-Afrika? Die rol van sosiolinguistiese beginsels by die ontleding van taalwetgewing' (2010) 7:2 *Litnet Akademies* 79-82.

<sup>117</sup> The President, Parliament, the Minister of Arts and Culture, the Minister of Justice & Constitutional Development and the Pan South African Language Board (no order was sought against PanSALB).

could determine a school's language policy<sup>118</sup> as well as section 32 of the Magistrates' Court Act which provides for the use of English and Afrikaans in the courts. The court regarded these steps as either irrelevant or inadequate in light of the requirements of the Constitution. The Department was therefore found to be in default of its obligations in terms of section 6(4). A declaratory order was issued in this regard, as well as a mandatory order, requiring the Minister of Arts and Culture as the minister in charge of the department under which the section 6(4) responsibility fell, to fulfil the government's constitutional obligations within two years of the order. The other orders asked for (a language audit of government departments as well as an order compelling Parliament to enact legislation in all 11 official languages) was not granted by the court in light of the provisions of the Constitution and other legislation, which contained no provision allowing for such orders to be made.<sup>119</sup>

At the time of the completion of the present study, it was reported that the Cabinet had approved a new South African Language Bill, to be submitted to Parliament.<sup>120</sup>

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<sup>118</sup> See further chapter 5.

<sup>119</sup> See further chapter 4.

<sup>120</sup> See Statement on the Cabinet meeting of 22 June 2011 available at <http://www.gcis.gov.za/newsroom/releases/cabstate/2011/110623.htm> (accessed 4 August 2011). The report in this regard reads as follows: '4.1 The South African Language Bill, 2011 The promulgation of the use of South African Official Languages Bill, 2011 will respond directly to the obligation imposed by section 6 of the Constitution. The Bill only provides for the regulation and monitoring of the use of official languages by national government.'

A few comments on the 2011 Bill will have to suffice.<sup>121</sup> The Bill is much less ambitious than its 2003 predecessor. A formalistic attempt is made to give effect to the obligation imposed by section 6(4) of the Constitution, in light of the *Lourens* decision. The 2011 Bill simply delegates all powers to the Minister and to government departments, national public entities and national public enterprises to decide on language policy in general and for the department, entity or enterprise concerned in particular. No substantive standards or criteria are laid down in the Bill, apart from that already to be found in the Constitution. The Bill furthermore only caters for national government departments, national public entities and national public enterprises. It in other words does not extend to the provinces or to municipalities, and also contains no reference to the legislature and the judiciary. No remedies are specifically provided for in the Bill – each department, entity and enterprise has to provide for a complaints mechanism in its language policy (clause 4(2)(f)). One of the few commendable features of the Bill is the fact that it provides for a fair amount of openness in relation to language policies: these have to be adopted within 18 months after the coming into effect of the Act, and then need to be published in the Government Gazette as soon as reasonably practicable, but at least within 90 days after their adoption (clause 4(2)(h)). Such policies must be available on request and a summary of such policy must be displayed in all offices of the department, entity or enterprise (clause 4(3)). The Bill moreover provides for the establishment of a national language unit within the Department of Arts and

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<sup>121</sup> South African Languages Bill [B-2011], available at <http://196.22.136.92/redblock/satalewet/wp-content/uploads/2011/07/NATIONAL-LANGUAGE-BILL.pdf> (accessed on 4 August 2011).

Culture (clause 5), as well as for the establishment of a language unit within each department, entity and enterprise (clause 7) to advise the Minister or Department, as well as to monitor and promote the official languages. The criticism voiced above concerning the 2003 Language Bill in light of its failure to comply with developing international norms in relation to language protection applies even more so to the 2011 Bill.

### **5.2.3 Action taken in implementation on the provincial level**

A number of provinces have thus far adopted language policies. These include the Western Cape (2004),<sup>122</sup> Gauteng (2005),<sup>123</sup> and the Eastern Cape (2009).<sup>124</sup> The Free State (2006)<sup>125</sup> and the Northern Cape (presumably 2010)<sup>126</sup> have at this stage

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<sup>122</sup> See Western Cape provincial government ‘Western Cape language policy’ available at <http://www.capegateway.gov.za/eng/publications/policies/W/99328> (accessed on 29 July 2011).

<sup>123</sup> See Gauteng provincial government ‘National Language Policy Framework’ available at [http://humanities.ufs.ac.za/dl/userfiles/Documents/00001/773\\_eng.pdf](http://humanities.ufs.ac.za/dl/userfiles/Documents/00001/773_eng.pdf) (accessed on 11 June 2011).

<sup>124</sup> The policy is not available online, but it was kindly sent to me by the provincial government.

<sup>125</sup> See Free State provincial government ‘Draft Free State Provincial Government Language Policy’ [http://www.fs.gov.za/departments/sac/library/DEPART/fs\\_language\\_policy.htm](http://www.fs.gov.za/departments/sac/library/DEPART/fs_language_policy.htm) (accessed on 29 July 2011). A second (undated) draft of this policy has also since been published, available at [http://humanities.ufs.ac.za/dl/userfiles/Documents/00001/772\\_eng.pdf](http://humanities.ufs.ac.za/dl/userfiles/Documents/00001/772_eng.pdf) (accessed 31 July 2011).

<sup>126</sup> See Department of Arts & Culture Annual Report 2009-2010 available at [http://www.dac.gov.za/publications/annual\\_report/2009\\_2010/annual\\_2009\\_2010.html](http://www.dac.gov.za/publications/annual_report/2009_2010/annual_2009_2010.html) (accessed 29 July 2011) 49; and Jenkins H Speech by the Premier of the Northern Cape Province on the occasion of the Premier’s Budget Vote held on 8 April 2011 at the Provincial Legislature, Kimberley,



only draft language policies. The Language Policy Framework of the Gauteng Province is dated 14 September 2005. The province is unique in terms of the diversity of official languages spoken, as indicated in the above tables. For this reason it does not, as is the case in other provinces, adopt a smaller number of the 11 official languages as provincial official languages, but instead notes that it aims to ensure the equitable treatment of all 11 official languages (par 5(b)). The policy provides for the language choice of members of the public to be respected in as far as possible in their interactions with government. In the case of both internal and external communication, the language(s) to be used 'will be guided by functional multilingualism, i.e. the purpose and context of the communication, the availability of resources and the target audience' (par 9.2). The language of internal record is however English, and translations in other official languages and in Braille will, unless exceptional circumstances require automatic translation 'into any number of the other 10 official languages', only be made available upon request (par 9.1). Records of debate of the provincial legislature will (continue to be) produced in at least four languages (par 9.1). The policy does not specify which languages are to be used. In general it can be said that the policy is not great on detail. It for example makes no mention of the language(s) which may be used in legislative debates and does not say in which language(s) provincial legislation will be enacted. The discretion given to administrative officials is also extremely wide. The Eastern Cape Provincial Language Policy Framework provides for four official languages:

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available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=17765&tid=31987>.

(accessed on 9 June 2011). The draft policy itself is not as yet available online.

Afrikaans, English, isiXhosa and Sesotho (section 3.1.1). The Free State province, as noted, is in the process of adopting a language policy. A first draft was published in 2006, which designated Sesotho, Afrikaans and English as the official languages of the province.<sup>127</sup> The Free State provincial legislature, in terms of a resolution adopted, uses three official languages - Sesotho, Afrikaans and English - for its sessions, committee meetings and public hearings.<sup>128</sup>

Two provinces have thus far enacted legislation to regulate and monitor their use of language in accordance with section 6(4) of the 1996 Constitution. These are Limpopo (formerly the Northern Province) and the Western Cape. In addition, KwaZulu-Natal has adopted the KwaZulu-Natal Parliamentary Official languages Act, 10 of 1998, which regulates the use of official languages in the legislature of the province.<sup>129</sup> The latter Act also regulates the publication of regulations, notices etc by the provincial government, and its scope of application therefore extends beyond the provincial legislature. The use of official languages in the Western Cape is regulated by its provincial Constitution, the Western Cape Provincial Languages Act 13 of 1998, and the language policy of 2004. Provision is made for three official languages - Afrikaans, English and isiXhosa – which are declared to have equal status.<sup>130</sup> This corresponds with the 2001 census, where respondents have indicated

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<sup>127</sup> The second draft policy includes isiXhosa as an official language.

<sup>128</sup> See Du Plessis & Pretorius 'The structure of the official language clause' (2000) 507. The second draft policy does not mention specifically the language to be used in the legislature.

<sup>129</sup> See further chapter 4.

<sup>130</sup> Constitution of the Western Cape, 1998, s 5(1).

their home languages as follows: English (19.3%), Afrikaans (55.3%) and isiXhosa (23.7%). The June 2004 language policy provides that any of the three languages may be used in the provincial legislature in debates and in committees. Debates are to be recorded in the language(s) in which the debate took place, and need to be translated into the other official languages within a reasonable period after such debate. Legislation, official reports and resolutions of the legislature and its committees need to be published in all three official languages. Bills introduced in the legislature need to be available in at least two of the three official languages, and is to take place on a rotational basis. Motions introduced in the legislature are to be in all three official languages, but it can also be translated later where it is drawn up in only one language. Official notices of the provincial government must be published in all three official languages, and where published in a newspaper, in the language of the newspaper concerned. Insofar as dealings with the public are concerned, the official language of choice of the member(s) of the public is to be used. This can also happen by way of interpreters, translators and other technical means. International communication would be in English, or the preferred language of the country concerned. Insofar as internal communication is concerned, the policy provides for consensus to be reached within departments, whilst allowing officials to use their language of preference. The latter also applies to local government. Local government must further develop their own language policies in light of the preferences of their residents. The policy furthermore specifically provides for signage in respect of offices, facilities, road signs and direction signs. The Western Cape Provincial Languages Act 13 of 1998 provides that debates in the legislature may take place in any of the official languages and that records of debates must be

kept in the official language in which the debate took place.<sup>131</sup> Legislation must be made available in all three official languages, but where it was initially drawn up in only one language, it can be made available within a reasonable time in the other two official languages. All three the official languages must be used in official notices published in the Provincial Gazette.<sup>132</sup> In communication with the public the preference of the member of the member of the public must be respected and accommodated in as far as is reasonably possible.<sup>133</sup> The language used to identify provincial offices must be in the language of preference of the community concerned.<sup>134</sup> The Act furthermore establishes a Language Committee to monitor the implementation of the Act and the language policy as well as to promote multilingualism (ss 6 to 21). The Western Cape appears to be the province which has done the most to implement the language provisions of the 1996 Constitution. It is also the only province whose official website is available in all its official languages.<sup>135</sup> Translation of legislation has however proved to be a problem. From a survey in 2008 by the Western Cape language committee of all Western Cape

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<sup>131</sup> Section 2.

<sup>132</sup> Section 3.

<sup>133</sup> Section 4.

<sup>134</sup> Section 5.

<sup>135</sup> See Western Cape Government 'Overview' available at [http://www.capegateway.gov.za/eng/your\\_gov/3576](http://www.capegateway.gov.za/eng/your_gov/3576) (accessed 29 July 2011).

provincial departments it furthermore appeared that much still needs to be done in the departments to implement the provinces' language policy.<sup>136</sup>

The Limpopo Languages Act 7 of 2000 designates the following six languages as official languages ('official languages which may be used for the purpose of Government'): Sepedi, Afrikaans, English, Tshivenda, Xitsonga and Isindebele (s 4). We saw above that in the 2001 census Sepedi (Northern Sotho) is spoken by 52.1% of the residents of the province, Afrikaans by 2.3%, English by 0.5%, Tshivenda by 15.9%, Xitsonga by 22.4%, and IsiNdebele by 1.5%. Any of the official languages may be used in sittings of the legislature, and translation services will be made available (s 6(1)). The Act is not clear in relation to the number of languages in which provincial legislation is to be published. Section 6(3) provides that '[a]ll legislation, official reports and resolutions of the Legislature and its Committees shall be made available in all official languages', with the proviso that 'the Legislature may make practical arrangements to cause legislation... drawn up in one official language to be available, within a reasonable period, in the other official languages'. It appears that section 6 was partly copied from the Western Cape Languages Act. Section 7(1) then however provides that Acts of the province 'shall be published in the *Gazette* in any two of the languages referred to in section 4'. No similar provision is to be found in the Western Cape Languages Act. Proclamations, regulations, by-laws, rules and notices are again to be published in all official

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<sup>136</sup> See Department of Cultural Affairs and Sport 'Strategic Plan for the fiscal years 2010-2015' available at [http://www.capecapegateway.gov.za/Text/2010/3/dcas\\_strat\\_plan.pdf](http://www.capecapegateway.gov.za/Text/2010/3/dcas_strat_plan.pdf) (accessed on 20 June 2011) 40.

languages in terms of section 7(2). Section 5 of the Act provides in somewhat vague terms for the determination of one or more working languages: ‘One or more languages may be used in all internal communication or documentation not aimed at the public.’ Section 8 is to be commended for providing in very broad terms for communication with members of the public in any of the official languages, depending on preference, as well as the use of translators where the official cannot speak the language in question. Section 9 provides for the internal operation of the Executive Council: the Council can use any of the official languages for documentary purposes, but a member can request a translation thereof. Sections 10 to 23 of the Act provide for the establishment and sets out the functions of a provincial language committee, its main function being to monitor the implementation of the Act. The language committee also has investigative powers in terms of section 16(2).

#### **5.2.4 Action taken in implementation on the local level**

A number of municipalities have adopted language policies or have published draft policies available online,<sup>137</sup> including Ethekewini (Durban),<sup>138</sup> Mangaung

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<sup>137</sup> A useful general website to consult in this regard is University of the Free State Unit for Language Facilitation and Empowerment ‘Database Language Policies’ available at <http://humanities.ufs.ac.za/content.aspx?id=217> (accessed on 29 July 2011).

<sup>138</sup> Available at <http://www.durban.gov.za/durban/government/policy/language-1/eThekwini%20Language%20Policy.pdf> (accessed 28 July 2011)

(Bloemfontein), Maluti-a-Phofung (formerly Qwa-Qwa Municipal District),<sup>139</sup> West Coast District Municipality,<sup>140</sup> Overstrand,<sup>141</sup> Nelson Mandela Metropolitan Municipality (Port Elizabeth/Uitenhage/Despatch), Emnambithi/Ladysmith,<sup>142</sup> the City of Cape Town and the Tshwane Metropolitan Council (Pretoria).<sup>143</sup> Ethekwini has chosen English and isiZulu as its official languages, based on the results of the 2001 census of languages spoken in the province of KwaZulu-Natal, and in general provides for the equal treatment of these two languages insofar as the internal operation as well as interaction with the public is concerned. The language policy of Mangaung Local Municipality distinguishes between municipal languages and administrative languages. Sesotho, English and Afrikaans are designated as municipal languages and Setswana and isiXhosa as administrative languages. The administrative languages are languages which are not widely used throughout the municipal area, but whose users are mostly located within specific areas, *in casu*

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<sup>139</sup> Available at [http://humanities.ufs.ac.za/dl/userfiles/Documents/00001/778\\_eng.pdf](http://humanities.ufs.ac.za/dl/userfiles/Documents/00001/778_eng.pdf) (accessed 10 June 2011).

<sup>140</sup> Available at <http://www.westcoastdm.co.za/Documents/Language%20Policy.pdf> (accessed 10 June 2011)

<sup>141</sup> Available at [http://www.overstrand.gov.za/index2.php?option=com\\_docman&task=doc\\_view&gid=438&Itemid=161](http://www.overstrand.gov.za/index2.php?option=com_docman&task=doc_view&gid=438&Itemid=161) (accessed 10 June 2011).

<sup>142</sup> Available at <http://www.ladysmith.co.za/docs/policy/2008/language.pdf> (accessed 10 June 2011).

<sup>143</sup> According to the PANSALB Annual Report 2009-2010 available at <http://www.pansalb.org.za/ARcompr.pdf> (accessed 29 July 2011) 91 and 101, 102, 108, PanSALB has been assisting municipalities in establishing language policies.

Thabu Nchu and Mangaung Township.<sup>144</sup> The policy provides that ‘[a]ll By-laws, official reports, agendas and resolutions of the Municipal Council and its committees must be made available in all the municipal languages’ (s 3(3)). The same applies to official notices, publications, advertisements and tenders of the Municipality. They ‘must be published or issued in all the municipal languages and may also be issued in the administrative languages when required’ (s 4(1)). The ‘working language of record’ in the municipality is English (s 10). In general, officials and councillors are encouraged to learn the three official languages, and the attendance of language courses will be sponsored by the municipality (s 11 and 15). A municipal language committee is furthermore established to monitor, implement and revise the language policy (s 17). The language policy of the City of Cape Town provides that any of the three official languages, that is, Afrikaans, English and isiXhosa, can be used in council and committee meetings and that translation services will be provided (s 5(1)). Furthermore ‘[a]ll policies introduced/adopted, by-laws, and resolutions of the Council and its Committees must be available in all three official languages’ (s 5(2)). A language services unit is established to provide translation services (s 11(1)). The policy furthermore provides for a language audit, to be done every four years, to determine the language use and preference of residents (s 11(6)). A language committee, consisting of 6 councillors, is also established to monitor and implement the language policy (s 12). The Tshwane language policy (2007) proposes the recognition of six languages as official

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<sup>144</sup> Section 2 of the Mangaung Local Municipality language policy. The definition section provides that the administrative languages are to be used in Thaba Nchu and Manguang Township respectively.



languages based on a 2004 Gauteng language audit.<sup>145</sup> From a Free State Report on Local Government, it appears that adopting a language policy often happens in an informal manner, and even without notification to the public.<sup>146</sup> Especially at smaller municipalities, it seems that the costs involved in providing a multilingual service as well as a shortage of professional translators and interpreters are a problem.<sup>147</sup>

The Department of Local Government (in collaboration with the GTZ) has furthermore produced a discussion document - Guidelines for implementing multilingualism in local government: 2008-2011 – aiming to promote multilingualism in local government (hereafter ‘DLGGL’). The DLGGL provides the framework for the promotion of multilingualism, which is based on inter alia the following texts:

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<sup>145</sup> Afrikaans, English, Sepedi (Northern Soth), Xitsonga, Setswana and isiZulu.

<sup>146</sup> Strydom & Pretorius ‘On the directives concerning language in the new South African Constitution’ (2000) 115-19. In a study of municipal language policies in the Western Cape in 2000, Cilliers I ‘A limited empirical study of language policy and planning at local authorities in the Western Cape’ (2000) available at <http://www.capegateway.gov.za/Text/2003/languagepolicyandplanningatlocalauthorities2000eng.pdf> (accessed 10 June 2011) 7 noted that insofar as policy documents exist in this regard, these are ‘simply statements declaring either Afrikaans or English as the official working language of the municipality’.

<sup>147</sup> Strydom & Pretorius ‘On the directives concerning language in the new South African Constitution’ (2000) 116.

- (a) The provisions of the 1996 Constitution, in particular sections 6(3)(b)<sup>148</sup> and section 152<sup>149</sup> of the Constitution.
- (b) The National Language Policy Framework which aims to facilitate equitable access to government services, ensure redress for the previously marginalized official languages and promote good language management for efficient public service administration.<sup>150</sup>
- (c) The Municipal Systems Act<sup>151</sup> which requires of municipalities to communicate with communities about mechanisms to encourage community participation as well as the rights and duties of communities taking into account the language preferences in the community as well as the special needs of people who are illiterate.<sup>152</sup>

The DLGGL notes that a multilingual approach in local government ‘contributes towards meaningful communication between communities and local government,

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<sup>148</sup> Section 6(3)(b) of the Constitution provides as follows: ‘Municipalities must take into account the language usage and preferences of their residents.’

<sup>149</sup> Section 152 of the Constitution provides as follows: ‘The objects of local government are (e) to encourage the involvement of communities and community organizations in the matters of local government.’

<sup>150</sup> The National Language Policy provides that local governments have to determine the language usage and preferences of their communities within an enabling provincial language policy framework. Local authorities have to develop and implement a multilingual policy in consultation with their communities (section 2.4.3).

<sup>151</sup> Act 32 of 2000.

<sup>152</sup> Section 18 of the Municipal Systems Act.

promotes public participation in local government, and can lead to better service delivery' (at 11). According to the DLGGL, invoking guidelines for language planning and policy development by PanSALB, a broad range of matters should be covered by a language policy (at 31-2). These include spoken and written communication, both internal and external; the language of record, that is, for agendas, minutes, etc; labour related matters, e.g. job interviews and disciplinary hearings; workplace training and capacity development; translation and editorial services; monitoring, evaluating and revising of the language policy; the financing of a language policy; public consultation in relation to language matters; the promotion of the historically neglected indigenous languages; and the development of the linguistic skills of officials. To monitor and implement such a comprehensive language policy, as well as to fulfil other language-related functions, the DLGGL proposes that a municipal language unit be established in every municipality (at 49-51). The starting point in developing a language policy, according to the DLGGL, is a sociolinguistic audit, which should determine the language proficiency, language use and language preference of residents of the municipality (at 32-4).

Implementation of the language policy will no doubt encounter obstacles. The DLGGL refers in this regard to an unpublished paper by Du Plessis, which lists potential stumbling blocks such as attitudes people have about the suitability of languages for particular purposes, resistance from those in leadership positions based on a lack of awareness of the importance of language for training purposes and in work performance; an unwillingness, for the same reason, to budget for the promotion of multilingualism; a lack of personnel to implement language

programmes; and a general resistance to multilingualism (at 37). This opposition to multilingualism is illustrated by a survey among Western Cape municipalities to determine the implementation of the official languages of the Western Cape in these municipalities (at 37-38). The survey found inter alia that a third of the municipalities were ignoring the (constitutional requirement of a) language policy; that signage in district municipalities was still done only in Afrikaans and English; that no provision was made for interpretation at police stations; that only 12.5% of municipalities had adopted a language policy for internal communication; and that only 25% of municipalities made use of interpreters during meetings.

### **5.3 The monitoring and protection of language rights: The Pan South African Language Board**

The Pan South African Language Board (PanSALB) is a creature of the 1993 Constitution, more specifically section 3(10), which provides for its establishment through an Act of Parliament. It was envisaged that PanSALB would promote the principles in section 3(9) of the Constitution and the development of all the official languages as well as other languages used in South Africa. PanSALB would furthermore be consulted in the enactment of the language legislation envisaged in section 3. In the 1996 Constitution, recognition is given to the establishment of PanSALB in section 6(5),<sup>153</sup> which reads as follows:

A Pan South African Language Board established by national legislation must -

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<sup>153</sup> Schedule 6, item 20 of the 1996 Constitution provides for PanSALB to continue its functions.

- (a) promote, and create conditions for, the development and use of-
  - (i) all official languages;
  - (ii) the Khoi, Nama and San languages; and
  - (iii) sign language; and
- (b) promote and ensure respect for -
  - (i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and
  - (ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

The Pan South African Language Board Act<sup>154</sup> refers in its preamble to the recognition of the principle of multilingualism in the 1993 Constitution as well as the consequent need for measures ‘designed to achieve respect, adequate protection and furtherance of the official South African languages’; measures ‘for the advancement of those official languages which in the past did not enjoy full recognition’, the promotion of ‘the full and equal enjoyment of the official South African languages’, as well as the promotion of ‘respect for the other South African languages used for communication and religious purposes’. It was noted earlier that the 1996 Constitution, in section 6(4) provides for equity and parity of esteem in relation to the official languages, whereas section 3(1) and 3(9)(a) of the 1993 Constitution envisaged the (eventual) equality of the official languages. Presumably due to an oversight, when the PanSALB Act was amended in 1999 to bring it in line with the 1996 Constitution, the ‘equality’ clause in the preamble as well as in

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<sup>154</sup> Act 59 of 1995.

section 3(a)(i) of the Act (setting out the objectives of PanSALB),<sup>155</sup> were not amended.<sup>156</sup> The retention of the equality requirement in the Act need not however necessarily be understood as an oversight. One option would be for the PanSALB Act to be amended; the other is for it to be read in line with the 1996 Constitution

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<sup>155</sup> Such objective being '[t]he creation of conditions for the development and for the promotion of the equal use and enjoyment of all the official South African languages'.

<sup>156</sup> See also Parliament of the Republic of South Africa 'Report of the ad hoc Committee on the Review of Chapter 9 and associated institutions' (31 July 2007) available at <http://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf> (accessed on 28 July 2011) 120-1 which notes 'a serious discrepancy between the provisions of the Constitution and the provisions of the Pan South African Language Board Act regarding the main objective of the Board'. The Parliamentary Committee furthermore expressed alarm at the idea that an objective of PanSALB should be to ensure the equal status of all official languages: '[T]he "equal" use and enjoyment of all [official] languages in South Africa would have enormous and far-reaching social, political, business and resource implications and would not be possible' (at 121). This somewhat alarmist comment seems to be motivated by the dominant ideology amongst the political elite in South Africa of English monolingualism. The Act furthermore continues to provide (in s 3(a)(vi) for (ensuring) the non-diminution of rights relating to language and the status of languages (as provided for in the 1993 Constitution) as an objective of PanSALB. The 2006-2007 Annual Report of PanSALB (available at <http://www.pansalb.org.za/zines.html> (accessed on 29 July 2011) sets out its vision as achieving 'the equal status and use of all the official languages of South Africa as well as the Khoe and San languages and South African Sign Language'. The 'equal treatment of all languages in South Africa' was said to be one of the values of PanSALB (Annual Report 4). In the 2009-2010 Report the vision of PanSALB is now said to be '[t]o promote and create conditions for the development and use of all official languages, the Khoi, Nama and San languages as well as South African Sign Language.'

which, as we saw, can be read as requiring the ‘substantive equality’ of all the official languages. This does not mean equal treatment in every respect.

The Board was under the 1993 Constitution appointed by the Senate, but is now appointed by the Minister of Arts and Culture (s 5).<sup>157</sup> The Board consists of between 11 and 15 members who should be representative of the official languages spoken in South Africa, and who should be persons with expertise in interpretation, translation, terminology and lexicography, language and literacy teaching and language planning. At least one of the members should be ‘a legal expert with special knowledge of language legislation’ (s 5(1)(a)(iv)). In terms of section 8 of the Act, the Board can make recommendations with regard to any proposed or existing legislation, practice and policy dealing with language matters at any level of government; it may request any organ of state to supply it with information on any measures relating to language policy and language practice; and may advise any organ of state on the implementation of any proposed or existing legislation, policy and practice dealing with language matters. In addition, the Board must actively promote an awareness of multilingualism as a national resource; it may monitor the observance of the constitutional provisions regarding the use of language; monitor

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<sup>157</sup> Perry ‘The case of the toothless watchdog’ (2004) 505 argues that this amendment and others reduce the Board to a sub-department of government under the responsibility of the responsible Minister. He points in this regard to the fact that the Board is no longer referred to as ‘independent’ in s 6(5) of the 1996 Constitution, compared to s 3(10) of the 1993 Constitution; and the fact that the Act has been amended so that PanSALB is no longer accountable to Parliament, but to the Department of Arts and Culture.

the contents and observance of any existing and new legislation, practice and policy dealing with language matters on any level of government; assist with and monitor the formulation of programmes and policies aimed at fostering the equal use of and respect for the official languages; and may investigate on its own initiative or on receipt of a written complaint, any alleged violation of a language right, language policy or language practice.<sup>158</sup> The Board furthermore has the function of fostering respect for languages spoken in the Republic other than the official languages, the encouragement of their use in appropriate circumstances as well as furthering the development of the official South African languages.<sup>159</sup>

In the case of complaints of the violation of language rights, PanSALB has wide powers in investigating the matter, attempting to settle disputes, and recommending corrective action to be taken by an organ of state. It can even provide a complainant with financial assistance to approach a court for relief.<sup>160</sup> This is however where the power of PanSALB stops. In *Pan South African Language Board v Member of the Executive Committee for Roads, Transport and Community Safety, North West*

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<sup>158</sup> See s 8(1)(i) and s 11.

<sup>159</sup> See further Marivate C ‘The mission and activities of the Pan South African Language Board’ in Deprez K & Du Plessis T (eds) *Multilingualism and Government* (2000) Pretoria: Van Schaik 130-7.

<sup>160</sup> The Chairperson expresses his concern in the report (at 3) that most complaints come from one language community (which appears to be a reference to speakers of Afrikaans language; see also Perry ‘The case of the toothless watchdog’ (2004) 512, which he (the Chairperson) attributes to a lack of awareness on the side of speakers of the indigenous languages); see further at 151-60 for a list of the complaints received by PanSALB during the reporting period. See also PanSALB Annual Report 2006-2007 (at 48-51).



*Province and Another*<sup>161</sup> it was held that PanSALB does not have *locus standi* to approach a court on its own in the case of an allegation that a language right has been violated. *In casu* an organisation had lodged a complaint with PanSALB because of a decision by the North-West provincial government that number plates for motor vehicles may only be in English. PanSALB then approached the High Court for an order declaring the actions of the provincial government to be unconstitutional and unlawful; and also to allow for the display of number plates in Afrikaans and Setswana. The court held that ‘the general tenor of the Language Board Act militates against the Board litigating on complaints or on behalf of complainants’ (par 22). The Act thus envisaged that the Board should achieve its objectives through diplomacy rather than court action (par 26). The current legal position has created great difficulties for PanSALB, as appears from its 2009-2010 Annual Report. Its hope that this will be addressed by the enactment of the proposed Languages Act should be taken heed of by Parliament. The report notes the following in this regard:

One of the most challenging impediments to the execution of our mandate is the fact that our country has not yet adopted a Language Act. PanSALB hopes such legislation will put us in a position to enforce compliance. We currently experience many instances where public institutions do not even respond to our queries about linguistic human rights violations. Apart from publishing the names of such institutions in the Government Gazette, we have little recourse (page 5).<sup>162</sup>

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<sup>161</sup> 2007 (11) BCLR 1258 (B).

<sup>162</sup> See also Perry ‘The case of the toothless watchdog’ (2004) 505; and Du Plessis T ‘Language visibility, language rights and language policy. Findings by the Pan-South African Language Board

An alternative approach is to be found in the Canadian Official Languages Act which provides for a Commissioner of Official Languages whose powers are very similar to that of PanSALB in investigating complaints about the violation of language rights. The Commissioner, however, has the additional power in terms of section 78 of the Canadian Official Languages Act to apply to court for a remedy in relation to complaints investigated by the Commissioner, and also to intervene in proceedings where the status of the official languages are at stake. The *PanSALB v MEC* case should not however prevent PanSALB from intervening as amicus curiae in court proceedings.<sup>163</sup>

To conclude, it appears that there has been uncertainty about the division of roles in respect of the implementation of section 6 of the Constitution between PanSALB

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on language rights complaints between 1997 and 2005 (2009) available at [http://dialnet.unirioja.es/servlet/fichero\\_articulo?codigo=3199387&orden=0](http://dialnet.unirioja.es/servlet/fichero_articulo?codigo=3199387&orden=0) (accessed 10 June 2011).

Du Plessis (at 196) ascribes the dwindling number of complaints submitted to PanSALB to its ineffectiveness in dealing with language complaints. A revised version of the paper was published as Du Plessis T 'Die Pan-Suid-Afrikaanse Taalraad en die regulering van taalsigbaarheid in Suid-Afrika – 'n ontleding van taalregteklages' (2009) 27(2) *Southern African Linguistics and Applied Language Studies* 173–188.

<sup>163</sup> See Woolman S & Aullo JS 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2002) Cape Town: Juta 24F-14 to 15 for a similar argument about the Commission for the Promotion and Protection the Rights of Cultural, Religious and Linguistic Communities (CRCL).

and the Department of Arts and Culture, leading to tension between them.<sup>164</sup> The Parliamentary Committee investigating Chapter 9 institutions recommended in this respect that the lexicographical functions of PanSALB should be transferred to the Department of Arts and Culture (at 129). Contrary to this recommendation, an agreement has apparently now been reached between the Department and the Board to the effect that the Department will no longer be involved in the development of dictionaries; this will be the function of PanSALB.<sup>165</sup> The Parliamentary committee furthermore recommended the closure of PanSALB provincial offices, regarding these offices as a wastage of resources (at 128). This recommendation, which presumably refers to the appointment of provincial language committees in terms of section 8(8)(a) of the Act,<sup>166</sup> has (fortunately) not been implemented. The provincial language offices can play an important role in ensuring that the provinces and municipalities implement the provisions of the Constitution, insofar as the provinces have not established their own language committees.<sup>167</sup> A similarly important role is

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<sup>164</sup> See Parliament of the RSA 'Report of the ad hoc Committee on the Review of Chapter 9 and associated institutions' (2007) 125; Beukes 'Language policy implementation in South Africa' (2008) 22.

<sup>165</sup> Interview with Mr Swepu, the Acting CEO of PanSALB on 9 June 2011.

<sup>166</sup> PanSALB has in this regard published Norms and Rules for Provincial Language Committees; see Board Notice 92 of 2005.

<sup>167</sup> This is the case only in respect of the Western Cape; Interview with Mr Swepu on 9 June 2011. See further the 'Strategic Plan for the fiscal years 2010-2015 of the Western Cape Department of Cultural Affairs and Sport' 33 which notes the following: 'The Department has oversight over the Western Cape Language Committee, which is recognised by PANSALB as its provincial language committee for the Western Cape as set out in the legislation.'

played by the National Language Bodies and National Lexicographical Units established by PanSALB (see s 8(8)(b) and (c); and see the Annual Report 2009-2010).<sup>168</sup> The Parliamentary Committee furthermore saw an overlap in the functions of the Commission for the Promotion and Protection the Rights of Cultural, Religious and Linguistic Communities (CRCL) and PanSALB (at 127). The CRCL's objectives include the promotion of 'respect for the rights of cultural, religious and linguistic communities' (s 185(1)(a) of the Constitution).<sup>169</sup> The Committee recommended in this respect that PanSALB be incorporated into the CRCL, with the combined body fulfilling the role specifically of promoting the indigenous languages (at 127, 129, 140-1). PanSALB however appears to be finding its feet, and is involved in a range of activities to promote multilingualism.<sup>170</sup> At the time of writing, it appears that PanSALB is the more efficient and active body of the two, so that incorporation into the CRCL does not appear sensible.<sup>171</sup> Furthermore, and as was pointed out in chapter 2, the notion of internal self-determination in international law requires of the state to enable minority groups to participate effectively in cultural, social and economic life as well as in public affairs.<sup>172</sup> The

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<sup>168</sup> PanSALB has in this regard published Norms and Rules for National Language Bodies; see Board Notice 94 of 2005.

<sup>169</sup> See also s 4(a) and 5(1)(a) of the CRCL Act. For discussion of the CRCL, see Woolman and Aulo 'Commission for the Protection of the Rights of Cultural, Religious and Linguistic Communities' (2002) 24F.

<sup>170</sup> See PanSALB Annual Report 2009-2010.

<sup>171</sup> See PanSALB 2009-2010 report (at 34) on collaboration between itself and the CRCL.

<sup>172</sup> See also s 235 of the 1996 Constitution.

CRCL could play a significant role in this respect.<sup>173</sup> The parliamentary committee moreover favoured the establishment of an umbrella human rights body, to be called the South African Commission on Human Rights and Equality, which would incorporate the above-mentioned two bodies as well as the current Human Rights Commission, the Commission for Gender Equality, and the National Youth Commission (at 39). As far as could be established, no steps have thus far been taken to implement this recommendation. At first sight there appears to be little argument against an umbrella human rights body as proposed by the parliamentary committee. Language rights are after all human rights. However, as we saw in chapters one and two, although language rights are human rights, (minority) languages are also today recognised by international law as valuable in themselves, that is, beyond the ostensible wishes of their speakers. Amalgamating PanSALB with an umbrella human rights body would reduce language to an individual right. PanSALB is well suited to protect language in both senses, and it should not be reduced to simply another human rights body. Consideration should furthermore be given to strengthening its independence and extending its powers in relation to initiating litigation on behalf of complainants or in its own name whenever language

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<sup>173</sup> See in this respect the criticism of Strydom 'International Standards for the Protection of Minorities and the South African Constitution' (2002) 18 about the South African intellectual debate on human rights matters being 'largely informed by an Anglo-American approach with the result that the individualistic perspective and the concept of the neutral state play a significant role'.

rights are being violated. In this respect its budgetary allocation would have to enable it to undertake this function.<sup>174</sup>

## **6 Conclusion**

The first part of this chapter covered familiar terrain, tracing the history of South Africa in respect of state structures and the recognition of language rights. The fact that (parts of) South Africa was at different times colonised by different colonial powers meant that not one, but two colonial languages were imported. It was shown that until 1994, South Africa followed the traditional model of recognising (only) the colonial languages as official languages. In this respect it thus catered simply for the interests of the ruling class. The policy of apartheid nonetheless led to the recognition of some of the indigenous languages in the so-called self-governing territories. In the process, Afrikaans became stigmatised as the language of the oppressor. With the adoption of the 1993 and 1996 Constitutions, in the spirit of inclusiveness, and in line with the developments in international law discussed in chapter 2, all these languages plus the colonial languages were recognised as official. Also in line with the developments in international law, an obligation was placed on the state to take practical and positive measures to elevate the status and advance the use of the indigenous languages. The state structure decided on in the 1993, and specifically the 1996 Constitution, is that of co-operative government, a mixture between a unitary and a federal state. This state structure, with its devolution of powers to the provincial and local levels makes possible the

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<sup>174</sup> See PanSALB Annual Report 2006-2007 (at 37).

implementation of the territorial principle in relation to language matters in the provinces and municipalities, in addition to the personality principle, which applies on the national level. The present state structure as well as the principle of participatory democracy which underlies the Constitution furthermore has important implications for the process to be followed in the (eventual) enactment of the national legislation in relation to language envisaged in both the 1993 and 1996 Constitutions.

In the analysis of section 6 of the 1996 Constitution, it was pointed out that the section should be read as an integrated whole and not simply as the sum of its parts. In this respect it was argued, following the analysis in chapter 2, that the principles of substantive equality and proportionality should be the overriding criteria in guiding the government on all three levels in the adoption of language policies. The concentration of language speakers in a specific area is no doubt an important factor, and so are cost factors, but these should in all instances be read subject to subsections (1) and (2) which declare all 11 languages ‘official’ languages and which call for resolute action to be taken in advancing the indigenous languages. It was contended that Statistics South Africa has an important role to play in determining the prevalence of language use, but that it should not restrict itself to the official languages. To enable PanSALB to properly fulfil its constitutional obligations, figures would also have to be provided for at least the Khoi, Nama and San languages, as well as of the users of sign language. In municipalities with Nama, San and Khoi language speakers, specific attention should be given to the accommodation of these speakers

In evaluating the steps that have thus far been taken, it is clear that on all three levels of government there have been attempts to implement the provisions of the Constitution in relation to language. On the national level, a language policy has been adopted, but legislation has not as yet been enacted to give effect to this policy. On the provincial level, a number of provinces have thus far adopted language policies and two provinces have enacted legislation. It is not easy to obtain information about language policies in municipalities. It appears that in many instances language policies are of an informal nature. The language policies of some of the larger municipalities, metropolitan municipalities and district municipalities are however available online and show a commitment to multilingualism. The Department of Local Government as well as PanSALB have taken steps in assisting municipalities in the adoption of comprehensive language policies. It appears that the multilingual policy of the Constitution is providing problems especially on national level where 11 languages are official as well as in provinces and municipalities where large concentrations of speakers of a variety of the official languages are concentrated. It furthermore appears that, especially when it comes to legislation and official documentation, even in areas which show a commitment to multilingualism and with few official languages, problems with implementation are experienced. From the discussion of the powers and functions of PanSALB it appears that this body has the potential of playing an important role in ensuring the adoption of language policies in line with the Constitution as well as their implementation on all three levels of government. PanSALB is however in need of



greater powers to enforce compliance. Urgent attention should be given to this in the envisaged South African Languages Act.<sup>175</sup>

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<sup>175</sup> The Bill as it stands does not increase the powers of PanSALB in any way. The only mention of PanSALB (in clause 13) is that it needs to be consulted by the Minister in making regulations in terms of the Bill.

## **Chapter 4**

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### **The application and implementation of the language provisions of the Constitution in respect of the three branches of government**

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#### **1 Introduction**

In the preceding chapter, section 6 of the Constitution was analysed in relation to the measures which are required to comply with its provisions by the three levels of government, that is, on the national, the provincial and the local levels. In this chapter we will look in more detail at the way in which such language policy and other measures relate to the three branches of government, that is, the legislature, the executive and the judiciary. Insofar as the legislature is concerned, the language requirements are typically important insofar as committee meetings, debates, resolutions, motions, the introduction of Bills, and the passing of legislation are concerned. If more than one (language) version of legislation exists, a further question of importance is which of the versions will be authoritative in the case of differences between them or in the case of

conflict. Because of its history of official bilingualism from 1910 to 1994, a considerable body of case law has developed in South Africa in this respect. In the case of the executive and administration, a range of questions come to the fore, such as the choice of a language for the internal operation of departments, the language(s) of record keeping and official documentation, as well as the language of oral interaction with members of the public. Coming to the judiciary, the main questions are the languages to be used in court, the language to be used in keeping a record of the proceedings, as well as the language in which the judgment is recorded. The analysis to be undertaken here will be informed by the discussion in chapter 2 of the developing international norms in respect of minority languages. In the discussion of the legislature, the EU practice will also be referred to. Although the EU is a regional organisation and not a country, it provides a good point of reference in this respect with its recognition of 23 official languages. In the discussion of the judiciary, comparative jurisprudence, especially in Canada, will furthermore play a role. Although there are no doubt major differences between South Africa and Canada in respect of their respective language communities and the constitutional and legislative frameworks catering for them, the two apex courts have adopted very similar approaches to the interpretation of their Constitutions, which makes comparison useful in this respect.

## **2 Legal effect and scope of application of section 6**

Although the exact legal effect of the designation of a language or languages as ‘official’ is unclear,<sup>1</sup> when a provision designating a language or languages as such is contained in an enforceable and supreme constitution, such designation cannot be without legal effect. This language or these languages would at least have to be used for the essential functions of all three

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<sup>1</sup> Currie ‘Official languages and language rights’ (2002) 65-5.

branches of government.<sup>2</sup> Section 6 of the 1996 Constitution is not clear on its scope of application. It provides in fairly clear terms that all three levels of ‘government’ (national, provincial and local) need to comply with its terms. It does not however clearly spell out to which extent its provisions apply to the branches of government other than the executive, that is, to the legislature(s) and to the judiciary. The position is somewhat similar in respect of the South African Languages Bill of 2003. Section 4(1), which provided for its scope of application, seems to exclude the legislature and the judiciary. Yet in section 5, setting out the language policy to be applied, reference was made to ‘the legislative, executive and judicial functions of government’.<sup>3</sup> When read with other provisions of the Constitution, for example section 43(a) which provides that ‘the legislative authority of the national sphere of government is vested in Parliament’,<sup>4</sup> it appears that ‘government’ in section 6 is to be understood in the broad sense as including all three branches.

According to Currie, when a language is designated as an ‘official’ language, this necessarily binds all three branches of government – legislative, executive and judicial (65-5).<sup>5</sup> Some

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<sup>2</sup> Strydom & Pretorius ‘On the directives concerning language in the new South African Constitution’ (2000) 112-13; Malan ‘Observations and suggestions on the use of the official languages in national legislation’ (2008) 62; Malan ‘Observations on the use of official languages for the recording of court proceedings’ (2009) 146-7; Du Plessis & Pretorius ‘The structure of the official language clause’ (2000) 510; Strydom ‘International Standards for the Protection of Minorities and the South African Constitution’ (2002) 25.

<sup>3</sup> The 2011 SA Languages Bill expressly provides that it is applicable only to national government departments, national public entities and national public enterprises (clause 3).

<sup>4</sup> See in this respect also *Lourens v President van die Republiek van Suid Afrika* 11.

<sup>5</sup> Currie ‘Official languages and language rights’ (2002) 65-5. See also Strydom & Pretorius ‘On the directives concerning language in the new South African Constitution’ (2000) 113.

support for this view can be found in the interpretation by the courts of official language provisions of earlier constitutions. Section 137 of the Union Constitution provided the following in this respect:

Both the English and Dutch [Afrikaans, since 1925] languages shall be official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights and privileges; all records, journals, and proceedings of Parliament shall be kept in both languages, and all Bills, Acts, and notices of general public importance or interest issued by the Government of the Union shall be in both languages.

In *Swart, NO and Nicol, NO v De Kock and Garner*,<sup>6</sup> Centlivres CJ interpreted the requirement that the official languages should be ‘treated on a footing of equality’ in the above provision as conveying ‘an instruction to *the State in its legislative, executive and judicial spheres* to treat both languages on a footing of equality’.<sup>7</sup> Schreiner JA, in a minority judgment, however expressed the view that section 137 ‘provides protection primarily and essentially against the legislative and executive action of the State. And the duty of the Courts is to ensure that the protection of the guarantee is made effective’.<sup>8</sup> It would not be difficult to reconcile these two seemingly conflicting *obiter* views. The official language provisions of the 1996 Constitution clearly cannot leave the judiciary unaffected. As we will see below, this has been acknowledged by the courts in grappling with the implications of the language provisions of the Constitution on their own functioning. In the *Lourens* decision, for example, as pointed out in chapter 3, the government sought to convince the court that it had in fact complied with its obligations in terms of section 6 of the 1996 Constitution by referring to section 6(1) of the Magistrates’ Court Act

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<sup>6</sup> *Swart, NO and Nicol NO v De Kock; Swart NO and Nicol No v Garner and Others* 1951 (3) SA 589 (A) 600F.

<sup>7</sup> Emphasis added.

<sup>8</sup> At 611G.

which allows for the use of any of the official languages in proceedings before the courts and which provides that the evidence would be recorded in that specific language. Du Plessis J noted that the latter provision could be regarded as part of the government's obligation to regulate the use of official languages, but that this would amount to a mere 'drop in the ocean' (at 8-9). It would thus appear that in regulating the use of official languages in terms of section 6, attention would have to be given to its application in respect of the legislature, the executive and the judiciary. This should ideally be done in a single piece of legislation, in line with the Canadian example.<sup>9</sup>

### **3 The use of official languages by the legislature**

#### **3.1 Parliament**

As we saw in Chapter 5, from 1910 until 1994, Afrikaans and English had equal status in parliament, which meant that any of the languages could be used in parliamentary debates and that records of such debates and of the proceedings of parliament were kept in both languages. Bills, Acts, and notices of general public importance or interest were published in both official languages. In signing a Bill, the (somewhat arbitrary) practice was followed that the President would sign alternatively the English or the Afrikaans version, both of which formed part of the adoption process. In the case of seeming differences between the two versions, the courts would first attempt to reconcile these differences, for example by way of the so-called highest common factor approach;<sup>10</sup> if there was an irreconcilable conflict between the two versions, the one that

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<sup>9</sup> See the Canadian Official Languages Act (R.S.C., 1985, c. 31 (4th Supp.)) Part III available at <http://laws-lois.justice.gc.ca/eng/acts/O-3.01/FullText.html> (accessed 29 June 2011).

<sup>10</sup> See De Ville JR *Constitutional and Statutory Interpretation* (2000) Interdoc Consultants 116-17.

was signed by the President would prevail. From 1994, until the coming into effect of the ‘final’ constitution in 1997, legislation continued to be enacted in Afrikaans and in English. This was in accordance with the non-diminution clause of section 3(2) of the 1993 Constitution.<sup>11</sup> The indigenous languages were not used for this purpose.<sup>12</sup> Section 65 regulated the position regarding conflicts between different language versions of an Act in a similar way as in previous constitutions.<sup>13</sup> The same rules of interpretation were therefore applicable as under the pre-democratic dispensation, and were also invoked in interpreting the 1993 Constitution.<sup>14</sup>

Since 1998, Parliament has started using the indigenous languages in enacting legislation. As a rule, statutes are however adopted in only one language (English), and thereafter translated into another official language, on a rotational basis.<sup>15</sup> Afrikaans is now mostly used in instances of amendment of legislation where the Afrikaans version of the original legislation was signed by

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<sup>11</sup> See Malan ‘Observations and suggestions on the use of the official languages in national legislation’ (2008) 64.

<sup>12</sup> Malan ‘Observations and suggestions on the use of the official languages in national legislation’ (2008) 64.

<sup>13</sup> Section 65 of the 1993 Constitution provided as follows:

- (1) ‘An Act of Parliament ... shall be enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court in such official South African languages as may be required in terms of section 3, and copies of the Act so enrolled shall be conclusive evidence of the provisions of the Act.
- (2) In the case of a conflict between copies of an Act enrolled in terms of subsection (1), the copy signed by the President shall prevail.’

<sup>14</sup> See *Du Plessis and Others v De Klerk and Others* 1996 (5) BCLR 658 (CC); 1996 (3) SA 850 (CC) par 44. The 1993 Constitution was incidentally signed in Afrikaans, which would have meant that it would prevail in a case of inconsistency between the (negotiated) English version and the (translated) Afrikaans version. An Amendment to the Constitution (2 of 1994) was subsequently passed to turn the English version into the more authoritative one for purposes of interpretation.

<sup>15</sup> Malan ‘Observations and suggestions on the use of the official languages in national legislation’ (2008) 65-6.

the President.<sup>16</sup> In the case of new legislation being passed, Afrikaans is as a rule not used. In an imaginary defence of this practice, Malan notes that all members of Parliament can be assumed to have a workable knowledge of English, whereas this is not the case with the other ten official languages. To therefore pass a Bill in one of the other languages would always mean that at least some members would not have been able to read the text before having to pass it.<sup>17</sup> The fact that members of Parliament cannot understand a specific language can of course not be a stumbling block in the enactment of legislation in all official languages.<sup>18</sup> Malan is of the view that the current approach is unconstitutional. According to him, the factors mentioned in section 6(3)(a), specifically that of ‘usage’ and ‘the balance of the needs’ mean that Parliament may not ignore the need for legislation to be passed in Afrikaans for the purposes of teaching law at University (6 law faculties teach in Afrikaans). This is especially important for practising law, which is made difficult when uniform terminology no longer exists because of the current legislative practice.<sup>19</sup> This ‘damaging’ practice is at the same time ‘inequitable’ in terms of section 6(4) (at 67). The practice of rotation can furthermore not have had any significant positive influence on

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<sup>16</sup> Malan ‘Observations and suggestions on the use of the official languages in national legislation’ (2008) 67. In accordance with the rules of interpretation of statutes, ‘[w]here the version of an Amendment to a statute is signed in a different language than the original enactment, the version in which the original enactment was signed will prevail (also with respect to the Amendment Act) in case of conflict between the two’; see De Ville *Constitutional and Statutory Interpretation* (2000) 119.

<sup>17</sup> Malan ‘Observations and suggestions on the use of the official languages in national legislation’ (2008) 66.

<sup>18</sup> In the EU, for example, with 23 official languages, regulations and other legislative documents are published in all official languages, and members of the relevant institutions (the EU Council, European Parliament, and the Commission) cannot be expected to be conversant in all these languages.

<sup>19</sup> See also Loubser M ‘Linguistic factors into the mix: The South African experience of language and the law’ (2003-4) 78 *Tulane Law Review* 128.



the development of the indigenous languages. Malan furthermore argues that the choice of official language (other than English), also of amending statutes, is done on a completely arbitrary basis and cannot therefore be said to comply with the rationality requirement of the Constitution (at 68-71).

Insofar as the signing of a Bill passed by Parliament is concerned, the practice since 1998 has been to sign only the English version, which as we saw above, is also the only one which is considered in passing a Bill.<sup>20</sup> The signing of Bills by the President is regulated by sections 79, 81 and 82 of the 1996 Constitution. Section 82 provides that '[t]he signed copy of an Act of Parliament is conclusive evidence of the provisions of the Act and, after publication, must be entrusted to the Constitutional Court for safekeeping.' This provision seemingly spells the end of the principle of the equality between the different language versions of an Act,<sup>21</sup> and can be read to mean that the signed version (de facto the English version since 1998) is authoritative for purposes of interpretation.<sup>22</sup> Some have nonetheless argued that this need not necessarily be the case and that the other language versions should still play an important role for interpretive purposes.<sup>23</sup> A careful reading of section 81 shows that no limitation is placed on the number of versions of a specific Bill to be signed by the President. Section 82 uses the singular: 'The signed

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<sup>20</sup> See also Du Plessis T 'Taalwetgewing in Suid-Afrika' (2009) 6:3 *Litnet Akademies* 144.

<sup>21</sup> Insofar as the different language versions of the Constitution itself are concerned, the Constitution provides in section 240 that '[i]n the event of an inconsistency between different texts of the Constitution, the English text prevails.'

<sup>22</sup> Currie 'Official languages and language rights' (2002) 65-11; De Ville *Constitutional and Statutory Interpretation* (2000) 115.

<sup>23</sup> Du Plessis L *Re-interpretation of Statutes* (2002) Durban: LexisNexis 220-1; Botha C *Statutory Interpretation* 3 ed (1998) Cape Town: Juta 82.

copy of an Act of Parliament is conclusive evidence...’, but there is no reason why the rule in the Interpretation Act 33 of 1957 that the singular includes the plural (s 6) should not be applied here. Such a reading would fully accord with section 6 of the Constitution. This would in turn mean that all versions of the Act can be relied on for purposes of interpretation.

The current position in relation to the adoption of legislation as discussed above is regulated by the Joint Rules of Parliament (April 2009) as follows:

#### 220. Language requirements for Bills

(1) A Bill introduced in either the Assembly or the Council must be in one of the official languages. The Bill in the language in which it is introduced will be the official text for purposes of parliamentary proceedings.

(2) The official text of the bill must be translated into at least one of the other official languages and the translation must be received by Parliament at least three days before the formal consideration of the bill by the House in which it was introduced.

*[Rule 220 (2) substituted, 18 March 2008 (NA); 19 March 2008 (NCOP)]*

(3) The cover page of a Bill must specify which language version is —

(a) the official text; and

(b) an official translation.

(4) In parliamentary proceedings only the official text of a bill is considered, but the Secretary must ensure that all amendments to the official text are reflected in the official translation or translations before the official text is sent to the President for assent.

*[Rule 220 (4) substituted, 18 March 2008 (NA); 19 March 2008 (NCOP)]*

#### 221. Referral of Bills to President for assent

When the official text of the Bill is sent to the President for assent it must be accompanied by the official translation or translations.

## 222. Subsequent amendments

(1) If an Act passed after the adoption of joint rule 220 is amended, the official text of the amendment Bill amending that Act may be in any of the official languages.

(2) If the official text of the Bill is not in the same language as the signed text of the Act that is being amended, then one of the official translations of the Bill must be in the language of the signed text.

On the face of it the rules seem to comply perfectly with a literal reading of section 6 of the Constitution in that two languages are always used in the enactment of legislation (s 6(3)(a)). Taking account of the parliamentary practice, international common standards<sup>24</sup> and the interpretation proposed in chapter 3, the current approach clearly violates section 6.<sup>25</sup> In *Lourens v President van die Republiek van Suid Afrika* the court was asked for an order compelling Parliament to publish, retroactively, from 1996, legislation in all official languages (at 11). The court was not however prepared to grant such an order, not for reasons of principle, but because of the way in which the order sought was framed. According to the court, parliamentary rules require that Bills be prepared in two official languages: if parliament approves the bill, it is sent to the President for assent. Du Plessis J read sections 81 and 82 as providing that only one Bill, and not multiple translations, is submitted to the President.<sup>26</sup> No constitutional or other provision thus required *Parliament* to translate a bill signed by the President. The task of translating legislation was the responsibility of the executive, and Parliament could therefore not be compelled by the court to do the required translation.

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<sup>24</sup> See chapter 2.

<sup>25</sup> See further below.

<sup>26</sup> No reference was made to Parliamentary Rule 221.

The importance of enacting legislation in (minority) languages was pointed to in earlier chapters. In the EU it is accepted that the requirement of legal certainty requires that legislation be published in all official languages.<sup>27</sup> The South African Constitution, based as it is on the rule of law, requires no less.<sup>28</sup> The least that the recognition of 11 official languages can mean is the enactment of legislation in such languages. This is one of the most important functions of government in the broad sense, and the designation of languages as ‘official’ necessarily means that these languages have to be used for purposes of legislation.<sup>29</sup> The National Language Policy Framework and the 2003 SA Languages Bill can likewise be read as providing that legislation has to be enacted in all 11 official languages.<sup>30</sup> We saw in chapter 3 that the National Language Policy Framework (NLPF) and the 2003 South African Languages Bill envisage a major change

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<sup>27</sup> See e.g. Case C-161/06 *Skoma-Lux sro v Celní ředitelství Olomouc* (11 December 2007) where the Court of Justice held that ‘the principle of legal certainty requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies’ (par 38), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0161:EN:HTML> (accessed on 29 June 2011).

<sup>28</sup> Section 1(c). See in this respect *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* (CCT 77/08) [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) (7 May 2009) par 21.

<sup>29</sup> See also Strydom & Pretorius ‘On the directives concerning language in the new South African Constitution’ (2000) 113; and Du Plessis & Pretorius ‘The structure of the official language clause’ (2000) 509-510 who note that a language is only really an official language if national legislation is published in that language. See also at 511: ‘Since ... legislation creates rights and duties throughout the jurisdiction of the legislature, and ought to be intelligible to people to whom it applies, in principle all acts of the national legislature should be published in all official languages’.

<sup>30</sup> This is however not the case with the 2011 SA Languages Bill.

in the current practice of enacting legislation. According to the NLFP, '[w]here the effective and stable operation of government at any level requires comprehensive communication of information, it must be published in all 11 official languages' (par 2.4.6.4). This can be said par excellence of Acts of Parliament. In terms of the 2003 Bill, the default position was likewise that government documents were to be made available in all eleven official languages (clause 5(2)). This is by no means an onerous requirement, and could be undertaken by Parliament itself as soon as a Bill has been passed, by the relevant department (through its language unit); the Department of Arts and Culture; or by PanSALB.<sup>31</sup>

Insofar as parliamentary business is concerned, the 2003 Language Policy of Parliament regulates the position regarding the use of languages.<sup>32</sup> In terms of the policy, any of the 11 official languages as well as sign language may be used by a member of parliament in debates

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<sup>31</sup> An argument could perhaps be made that Bills should upon introduction be available in all 11 official languages. The decision of the Canadian Supreme Court in *Re Manitoba Language Rights* (1985) [1985] 1 S.C.R. 721 could be invoked here. In this matter the Manitoba legislature had provided for a two-stage legislative procedure in purported compliance with section 23 of the Manitoba Constitution. Section 23 provided as follows: 'Either the English or the French languages may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective records and journals of those Houses: ...The Acts of the Legislature shall be printed and published in both those languages.' The first stage of the procedure was the enactment of the Bill in English; the second stage was the translation of the bill which would then be deposited with the Clerk of the House. The court held that this procedure did not pass constitutional muster (par 133). In further support of the argument, section 1 of the Constitution (the founding value of democracy) can be invoked: members of linguistic groups can only meaningfully contribute to debate if Bills are available in all official languages. Requiring this in respect of 11 official languages may however be too stringent a requirement at this stage. Subsequent translation within a reasonable period should suffice.

<sup>32</sup> The policy is not available online, but was kindly provided by a parliamentary official.

and committee meetings. Translation takes place simultaneously in the other official languages, also for members of the public (par 1). This policy was to be implemented over a period of three to five years. In the first phase (until 2006/2008) translation was to take place in only six languages (in the Sotho and Nguni languages, translation would take place on a rotational basis).<sup>33</sup> The records of parliamentary proceedings are in terms of the policy published in the original language which was used, and would thereafter be translated into all the other official languages (par 2). Members of parliament are to indicate their language preference upon appointment and would thereafter receive all parliamentary papers of the day in that language (par 3). After the phasing-in period, these papers are to also appear on the parliamentary website in all official languages (phase 2 par 4). Members of the public and institutions may address parliament in any of the official languages. Written submissions must be provided to parliament 21 days in advance to ensure timeous translation, and in the case of oral submissions, the language to be used must be indicated 48 hours in advance (par 4.1). In responding to members of the public in writing, parliament must attempt to do so in the language in which it was addressed (par 4.2). In addressing the media, (members of) parliament can do so in any language, but 48 hours' notice must be given of the language to be used. Information to the public about parliamentary activities is to be provided in all the official languages.

In practice however, it appears that the policy is implemented only selectively.<sup>34</sup> English is the dominant language used in parliament. If a member of parliament or a visitor therefore wishes to give a speech in any language other than English, a copy of the speech must be provided to parliament 48 hours in advance. The speech will then be given to the translators who will ensure

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<sup>33</sup> See in this regard the 'Implementation Strategy' of the policy.

<sup>34</sup> This is based on an interview with a parliamentary communications officer.

that the speech is translated into the ten other official languages as well as sign language. Members of Parliament can then indicate in which language they wish to hear the speech and the speech will be simultaneously translated into the language requested. Hansard will record the speech in the language in which it has been presented as well as in English. The same rule generally applies to committee meetings. If a member wishes to make a speech in a language other than English, he or she will have to give notice so that it can be translated into the other official languages. Oral questions in Parliament can be posed in any language but notice again has to be given if a language other than English is to be used. Live translation of the question will then be available in the official languages as well as sign language. Hansard will record the question in the selected language with a translation in English. When parliament sits in Cape Town, documents (regarding parliament in general as well as the discussions of the day) are made available to the public in isiXhosa, English and Afrikaans. When parliament travels to different sites in the Republic the languages used by the people of that area will determine the languages in which the parliamentary documents will be printed. Parliamentary papers are in general available only in English.

The declared policy and, even more so, the policy actually followed by parliament in respect of parliamentary debates, is in clear violation of the Constitution.<sup>35</sup> If Parliament is to be truly multilingual as is required by section 6 of the Constitution, translators must always be available and it should not be necessary for visitors who address parliament, and especially not for members of parliament themselves, to give 48 hours' notice of the official language to be used. The NLFP is explicit about this: 'The official languages will be used in all legislative activities,

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<sup>35</sup> As committee meetings often take place simultaneously, it would be understandable that different rules apply here.

including *Hansard* publications, as a matter of right as required' (par 2.4.4). It is furthermore regrettable that parliament's website is still only available in English.

### **3.2 Provincial Legislatures**

As pointed out in chapter 3, only two provincial governments have thus far enacted language legislation. In addition, KwaZulu-Natal has adopted legislation to regulate the use of official languages in the provincial legislature: The KwaZulu-Natal Parliamentary Official Languages Act 10 of 1998. The Act provides for English, isiZulu and Afrikaans as the official languages to be used in the legislature, and declares that these languages will have equal status and that there will be equal rights and privileges as to their use (s 2(1)). In debates and proceedings of the legislature, any of these three languages can be used (s 2(2)). Section 2(3) provides in extremely vague terms the following:

Without detracting from the parity of esteem of any of the languages contemplated in subsection (1), any records of Parliament shall be printed and published in English and/or isiZulu and/or Afrikaans, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population in KwaZulu-Natal; provided that members' speeches shall be recorded and published in the language in which they are delivered in addition to any translation that may be required.

Bills for public comment as well as legislation being promulgated will be published in Afrikaans, English and isiZulu (s 3(1)). The position is the same regarding proclamations, regulations, rules, notices and forms made or prescribed in terms of provincial laws. The Act in this respect goes wider than its title indicates, by being applicable also to the executive. Members of the public can furthermore communicate with the legislature in any of the three official languages and are entitled to receive services in such language (s 4).



The Western Cape Provincial Languages Act provides for the use of official languages in the legislature in the following terms in section 2:

Use of official languages by Provincial Parliament.—

- (1) The three official languages Afrikaans, English and isiXhosa may be used in any debates and other proceedings of the Western Cape Provincial Parliament and its committees, but reasonable provision must be made for the furnishing of interpreting services during sittings of the Provincial Parliament and any of its committees.
- (2) All official records of debates of the Provincial Parliament must be kept in the official language in which the debate took place, and a translation thereof in either of the other two official languages must be made available, on request, by the Secretary to the Provincial Parliament.
- (3) All legislation, official reports and resolutions of the Provincial Parliament and its committees must be made available in all three official languages, but the Provincial Parliament may make practical arrangements to cause legislation, official reports and resolutions drawn up in one official language to be available, within a reasonable period, in the other two official languages.
- (4) A Bill introduced in the Provincial Parliament must upon introduction be available in at least two official languages, but the Provincial Parliament may make practical arrangements to cause Bills introduced in two official languages to be available, within a reasonable period after such introduction, in the other official language.
- (5) A motion given notice of or moved in the Provincial Parliament must be available in all three official languages, but the Provincial Parliament may make practical arrangements to cause motions drawn up in one official language, to be available, within a reasonable period, in the other two official languages.

The provisions of the Western Cape Languages Act, in respect of legislative proceedings, clearly attempt to treat languages which have been designated as ‘official’ as such. From the province’s website it furthermore appears that Bills are at times introduced in all three the official languages

of the province. It is however a matter of concern that according to the website some legislation (seemingly the majority) is (still) available only in English.

The Limpopo Languages Act provides the following regarding parliamentary proceedings in section 6:

6. Use of official languages by the Legislature.—

- (1) The official languages referred to in section 4 [Sepedi, Afrikaans, English, Tshivenda, Xitsonga and Isindebele] may be used in any debates and other proceedings of the Legislature and its Committees, but reasonable provision shall be made for interpreting services during sittings of the Legislature and any of its Committees.
- (2) All official records of debates of the Legislature and its Committees shall be kept in the official language in which the debate took place, and a translation to either of the other official languages shall be made available on request by the Secretary to the Legislature.
- (3) All legislation, official reports and resolutions of the Legislature and its Committees shall be made available in all official languages, but the Legislature may make practical arrangements to cause legislation, official reports and resolutions drawn up in one official language to be available, within a reasonable period, in the other official languages.
- (4) A Bill shall upon introduction in the Legislature be available in at least two official languages, but the Legislature may make practical arrangements to cause Bills introduced in two official languages to be available, within a reasonable period after such introduction, in the other official languages.
- (5) A motion given notice of or moved in the Legislature shall be available in all official languages, but the Legislature may make practical arrangements to cause motions drawn up in one official language to be available, within a reasonable period, in other official languages.

As noted in chapter 3, section 7 appears to be in tension with section 6 as well as to make a mockery of the designation of languages as official languages. It provides for the publication of a

Bill published for comment and for Acts to be published in only two ('any two') of the six official languages (7(1)). It is essential that if a language is designated as an official language, legislation must be published in that language. 'Proclamations, regulations, by-laws, rules and notices made in terms of any law of the Province' must however be published in all six the official languages ('in the languages referred to in section 4' (s 7(2)).

The Eastern Cape Language policy says nothing specifically about the enactment of legislation. The Gauteng Language Policy Framework is similarly reticent about the legislature, noting only that '[t]he Gauteng Legislature will continue to produce records of debates in at least four official languages' (par 9.1). The Free State (first) draft language policy notes in the introduction that Sesotho, Afrikaans and English 'enjoy special status in ... the Free State Provincial Legislature' and furthermore provides that '[a]ll Free State Bills must be submitted in Sesotho, Afrikaans and English' (par 5.4(e)).<sup>36</sup> No further information is available of the draft Northern Cape language policy.

The conclusion that can hesitantly be drawn from the existing practice in the provinces is that there is an appreciation of the fact that once a language is recognized as official within a province, this means that the language can be freely used in legislative debates and committee meetings of the legislature. It should however also mean that provincial laws should be published in all the official languages.<sup>37</sup> The recognition of more than three official languages in a province can clearly cause difficulties. It is not however as if provinces enact a great deal of legislation at

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<sup>36</sup> The second draft policy now provides for isiXhosa as an additional official language. In respect of Bills, it is provided that these have to be published in at least two official languages (English and another, on a rotational basis) and that an electronic version in the other two official languages should be made available within a reasonable time.

<sup>37</sup> See also Du Plessis & Pretorius 'The structure of the official language clause' (2000) 511.

present. PanSALB or the Department of Arts and Culture could assist where the province does not have the necessary translation services. The policy in the Western Cape and Limpopo regarding Bills introduced in the legislature, that is, allowing for subsequent translation, appears acceptable.<sup>38</sup>

### **3.3 Municipal Councils**

Currie contends that section 6(3)(b) does not require that municipalities use more than one official language, as is the case with national and provincial government. They also appear to only have to consider two factors in deciding on a language policy, namely usage and the preferences of their residents. ‘Usage’ would refer to the demographic language use within the area of the municipality, and if the level of usage is very low, this may justify not offering certain services within that particular language or not providing services within that language at all.<sup>39</sup> Preference of course refers to choice, and it may be that in spite of a high number of home language users being recorded within a specific municipal area, residents would be happy to receive services in another language.<sup>40</sup> Some evidence would nonetheless have to be provided by the municipality if this lies at the basis of its adoption of a language policy which does not give effect to ‘usage’.<sup>41</sup> Read in isolation, reference to these two criteria indeed seems to be that this is all that section 6(3)(b) requires. Read within the context of section 6 as a whole, there can be little doubt that a municipality, in devising a language policy, also needs to take account of the fact that section 6(1) recognises 11 official languages, and that it, as one of the state structures,

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<sup>38</sup> See also Du Plessis & Pretorius ‘The structure of the official language clause’ (2000) 511.

<sup>39</sup> Currie ‘Official languages and language rights’ (2002) 65-14.

<sup>40</sup> Currie ‘Official languages and language rights’ (2002) 65-14.

<sup>41</sup> Currie ‘Official languages and language rights’ (2002) 65-14.

has to comply with section 6(2), which requires the taking of positive measures to promote the historically neglected indigenous languages. In some instances it may indeed be justified to adopt a policy where only one official language is to be used (for certain purposes), however in the majority of municipalities this will not be the case.

As indicated in chapter 5, a number of municipalities have adopted language policies. A few of these will be referred to here, insofar as they relate to Municipal Councils, the legislative arm of a municipality. The language policy of the City of Cape Town (presumably adopted in 2000)<sup>42</sup> follows the policy of the province by recognising Afrikaans, English and isiXhosa as official languages. The policy provides in detail for language use in the Council in par 5:

#### POLICY PROVISIONS FOR THE USE OF THE OFFICIAL LANGUAGES BY THE COUNCIL

- 5.1 Any of the three official languages [of the Province]<sup>43</sup> may be used in any debates and other proceedings of the Council and its Committees. The City must make provision for interpreting services for members from and into the three official languages during sittings of the Council, its Sub-councils and Committees. Sign Language interpreting must be provided, if and when considered necessary;
- 5.2 All policies introduced/adopted, by-laws, and resolutions of the Council and its Committees must be available in all three official languages;
- 5.3 A notice of motion or a formal motion in the Council or its Committees must be available in all three official languages. The City may make practical arrangements to cause motions drawn up in one official language to be available, within a reasonable period, in the other two official languages;

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<sup>42</sup> City of Cape Town 'Language Policy' (27 November 2002) available at [http://humanities.ufs.ac.za/dl/userfiles/Documents/00001/789\\_eng.pdf](http://humanities.ufs.ac.za/dl/userfiles/Documents/00001/789_eng.pdf) (accessed on 31 July 2011).

<sup>43</sup> The brackets indicate a proposed amendment to the policy.

- 5.4 Reports (including attachments thereto) submitted to Council, its Sub-councils and/or Committees must be kept in the original form submitted. However, the recommendations to all reports must be made available in all three official languages;
- 5.5 Notices of all meetings and index to agendas must be in all three official languages.
- 5.6 A recommendation adopted by Council, its Sub-councils and Committees shall for all purposes be regarded as the one expressed in the language in which the written report is submitted for consideration.

The Tshwane language policy adopts six languages as official languages (Afrikaans, English, Sepedi (Northern Sotho), Xitsonga, Setswana and isiZulu). The way in which this relates to the Municipal Council is set out in a number of non-consecutive paragraphs:

- 8.2.3 Any of the official languages of the Municipality may be used in any debates or proceedings of the Council. The Municipality must therefore provide for simultaneous interpreting from and into the official languages of the Municipality.
- 8.4.3 Translation services must be made available on request to translate motions presented at Council meetings into any of the official languages of the Municipality.
- 8.5.1 All official notices, statements, tariffs, by-laws, regulations, policies, advertisements, etc, issued or published by the Municipality for public consumption must be made available in all the official languages of the Municipality, where practicable and financially viable.

The Mangaung language policy, which as we saw recognises Sesotho, Afrikaans and English as official languages, provides in detail for language use by the Municipal Council as follows:

### 3. Proceedings and languages of record of the Municipality

- (1) The municipal languages, and other administrative languages, must be used at all meetings, namely council meetings, committee meetings, ward/constituency meetings, ward committee meetings of the Municipality and provision must be made for professional interpreting services during such meetings, to

be paid for by the Municipality: Provided that the participants will be required to indicate their language preference with the Office of the City Manager and/or chairperson of the proposed meeting(s) upon receipt of the agenda/notice of the meeting or at least 24 hours before the date and time of the meeting.

- (2) (a) All minutes of meetings of the Municipal Council and its committees must be recorded in the municipal languages used at such meetings. A translation thereof must be made available in at least one of the other municipal languages, determined by the limiting factors provided for by section 6 of the Constitution.
- (b) In addition, a summarised translation into English must be made available within a reasonable time after the meeting.
- (3) All By-laws, official reports, agendas and resolutions of the Municipal Council and its committees must be made available in all the municipal languages: Provided that practical arrangements may be made in order to make By-Laws, official reports and resolutions drawn up in one municipal language first and that it is made available in the other two municipal languages within a reasonable period. All documentation received from external sources may remain in its original format i.e. the original language it was written in.

The eThekweni municipality adopts, as we saw, only isiZulu and English as official languages and provides that any of these languages can be used in debates of the Council, in committee meetings, with translation services being made available (par 5.1). Policies, by-laws and resolutions of the Council are furthermore to be published in both languages (par 5.2).

These policies in general show an appreciation of the need to recognise more than one language as official language within a municipality, where this is called for by the language of use and preference of residents. The recognition of more than one official language necessarily means that allowance must be made for the use of all these languages in Council debates and committee meetings, with simultaneous translation services being provided by the municipality. By-laws must furthermore be enacted in all the official languages. It nonetheless appears from the

Tshwane example that where the language policy recognises more than three official languages, there is a risk that only one language will effectively be used for by-laws. The distinction drawn in the Mangaung language policy between municipal and administrative languages may be one way of avoiding the risk of effective monolingualism.

#### **4 The use of official languages by the executive**

The use of official languages by the executive relates to its internal operation, as well as its dealings with the public. In the latter respect it is furthermore important to distinguish between communication with a specific individual and communication with the public in general in the form of proclamations, regulations, rules and notices.

##### **4.1 National government**

Du Plessis and Pretorius<sup>44</sup> note that when a language is an official language, it should be expected that those languages be used in the following capacities:

- As the spoken language of government officials in the exercise of official duties at the national level;
- As the language of written communication between and within government agencies at the national level;
- As the language in which government records are kept at the national level;
- As the language in which laws and regulations governing the nation as a whole are officially written;
- As the language in which forms, such as tax forms and various applications related to the national government, are published.

An official language should in other words have ‘a measure of state usage’ which is such that ‘its position as an official medium of state expression is constantly affirmed’.<sup>45</sup> We saw above that

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<sup>44</sup> Du Plessis & Pretorius ‘The structure of the official language clause’ (2000) 509-10.



the 2003 South African Languages Bill envisaged that the default position in relation to government documents would be publication in all eleven official languages (clause 5(2)). It furthermore provided that ‘no less than six languages shall be used in the national sphere for the purpose of written communication’ (clause 5(5)(a)). The Bill however passed the buck on how exactly other aspects of language use were to be determined. Clauses 6 and 7 in this regard envisaged the setting up of language units within each government department in order to –

- (a) facilitate and monitor the implementation of regulations made in fulfilment of the obligations imposed by this Act;
- (b) take effective and positive measures for the implementation of the national language policy in section 5 in regard to the following:
  - (i) intra and interdepartmental oral communication in all spheres of government;
  - (ii) intra and interdepartmental written communication in all spheres of government;
  - (iii) oral communication with the public;
  - (iv) written communication with the public; and
  - (v) international communication where applicable.
- (c) conduct language surveys and audits relevant to its sphere of activity with a view to assessing the appropriateness of existing language policy and practice, and to make recommendations for the improvement of such policy and practice;
- (d) inform the public, through the effective dissemination of information, of the content and implementation of the language policy of the relevant organ of state;
- (e) do all things incidental to or necessary for the proper fulfilment of the obligations referred to in paragraphs (a) to (d).<sup>46</sup>

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<sup>45</sup> Du Plessis & Pretorius ‘The structure of the official language clause’ (2000) 510.

<sup>46</sup> The 2011 SA Languages Bill, as we saw earlier, gives free reign to government departments to determine a language policy (clause), and provides for the establishment of a language unit in each department to advise on policy and its implementation.

Compared to the 2003 and 2011 Language Bills, the NLFP is a bit clearer about the use of the official languages in the operations of government. It also leaves the determination of working languages to each government structure, but at least provides that in as far as possible, officials should be allowed to use their language of preference, with translation services to be provided. Insofar as communication with members of the public is concerned, it provides the following:

2.4.6.2 Communication with members of the public: For *official correspondence* purposes, the language of the citizen's choice must be used. All *oral communication* must take place in the preferred official language of the target audience. If necessary, every effort must be made to utilise language facilitation facilities such as interpreting (consecutive, simultaneous, telephone and whispered interpreting) where practically possible.

The policy is likewise clearer than the Act when it comes to government publications, insofar as it at least attempts to provide criteria (apart from those mentioned in section 6 of the Constitution) to determine in which instances 11 languages are to be used ('Where the effective and stable operation of government at any level requires comprehensive communication of information'). The NLFP furthermore does not envisage a situation where fewer than six languages will be used, as the Bill does. The same argument as was raised above in respect of Acts of Parliament applies to governmental acts which create rights such as regulations, proclamations, rules and notices. All of these require publication in all 11 official languages. Section 6 of the Constitution, specifically with reference to the principle of proportionality, does not however require that every government document needs to be translated into all 11 official languages. Where the document is mainly for internal purposes, one language should in most instances be sufficient. It is nonetheless necessary that the language requirements in respect of different acts of government as well as of official documents be spelt out in detail in a future National Language Act, as is to some extent done in the Language Acts of the Western Cape and

Limpopo provinces, as well as in the language policies of some provinces, especially the Free State. The Constitution in section 6(4) clearly does not envisage national legislation which effectively leaves it to each governmental department to determine for itself how to implement the language provisions of the Constitution.<sup>47</sup>

## **4.2 Provincial government**

As noted above, the Western Cape Language Act succeeds somewhat better than the South African Languages Bills (of 2003 and 2011) in setting out the requirements in relation to the use of language in respect of the operations of the (provincial) government. The Act specifically provides for the languages to be used in official notices and advertisements (s 3) as well as when communicating with the public (s 4). The Act however fails to mention the language(s) to be used for provincial regulations, reports, forms, policy documents, and guidelines. No mention is made of this in the Language Policy either. From the province's website it also appears that these are mostly available only in English. The Act furthermore says nothing about working languages. The Limpopo Language Act fares a bit better in this respect, as it provides in section 7(2) that '[p]roclamations, regulations, by-laws, rules and notices made in terms of any law of the Province shall be printed and published by Government in the [official] languages'.<sup>48</sup> It furthermore provides for working languages in general (s 5), as well as in respect of the Executive Council of the Province specifically (s 9). It lastly provides specifically for the languages to be used in communication with the public (s 8).

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<sup>47</sup> See also chapter 2 on the need for detailed legislation.

<sup>48</sup> The reference to (municipal) by-laws appears inappropriate in this context.

The Gauteng Language Policy Framework provides that the working language of record will be English, and that documents will be translated upon request into other languages (and in Braille) ‘where practically possible’. Documents will be automatically translated into other languages ‘[w]hen it is deemed crucial’ (par 9.1). One can assume that this also applies to regulations, rules and notices. The policy is also very cautious when it comes to the languages to be used in governmental communication with the public (par 9.2):

The languages used for internal and external communication will be guided by functional multilingualism, i.e. the purpose and context of the communication, the availability of resources and the target audience will determine the choice of languages. The language usage for frontline services such as public hospitals, police stations, social service points, housing offices and the Gauteng Legislature should be sustained, with forms for services issued in at least two indigenous languages or where absolutely necessary in all 11 official languages. It must be stressed that the availability of resources will be one of the most important factors in determining how many languages are used.

In comparison to Gauteng, the Eastern Cape Language Policy is much more detailed and also much more generous in catering for its official languages (par 4.2). It provides for the determination of a language of record by consensus in each government department, as well as for the use of translation facilities in meetings. In communication with the public, the citizen’s language of choice is as a rule to be used. All four official languages are to be used for government publications ‘[w]here the effective and stable operation of government at any level requires comprehensive communication of information’. The Free State (second) draft language policy however takes the prize in respect of detail and generosity in respect of catering for its official languages. It provides that for purposes of internal communication any language which is understood by all participants can be used, and provides for translation services where this is required. Minutes of meetings are to be kept in English for purposes of record. Sign language

interpreting should furthermore be used where necessary. In as far as internal written communication within and between departments is concerned, English is to be used. Provision is made for Braille and large print to be used where required by officials. Despite the official language of record being English, officials can draft documents in any of the official languages, and then request translation of that document into English. Requests can also be made by officials for the translation of documents into any of the official languages. For external oral communication with the public the language of the target audience is to be used, with translation services, including sign language being made available where required. Appointment of staff to offices dealing directly with the public should take account of the language(s) used in the specific area. In the case of written communication with the public, the language to be used is determined by the member of the public. Official documentation of the province (including Bills, regulations and policies) is to be published in English as well as another official provincial language, to be determined on a rotational basis. The document concerned must furthermore be published electronically in the other two official languages within a reasonable time. Certain documents (such as official notices providing public information, information to the public about services offered and official forms to be completed by the public) are to be published in all four official languages. Documents containing essential information to the public, for example in relation to health and good order, and specifically in relation to HIV/AIDS must be published in the four official provincial languages, plus the two other languages spoken widely in the province, that is, Setswana and IsiZulu. Advertisements should be in the language of the target audience. Signage should be either in all four official languages or in the languages mostly used in the area concerned.

### 4.3 Local government

Scrutiny of local government policies of some Metropolitan areas in respect of the exercise of administrative functions, show that they in general attempt to cater for the language preference of residents in the municipality, both in respect of oral and written. When it comes to inter and intra-departmental communication, difficulties however arise in the event of language diversity. The greater the language diversity in the municipal area concerned, the more difficult it in general becomes to lay down fixed rules in respect of languages to be used. Where there are only two official languages, such as in eThekweni (Durban) municipality, the languages are generally given equal status in all respects. Where a greater number of official languages is recognised, as for example in Tshwane, with six official languages, the tendency is to lean in the policy itself towards one language, and to build limitations into the equal use of official languages (e.g. 'where practicable and financially viable'). Even when fewer languages are designated as official, for example in Cape Town and Mangaung, each with three official languages, one finds exceptions as to the equal use of these languages. This is not to suggest that municipalities should therefore adopt only one or two official languages. The tendency described above, at least in the interim, appears unavoidable. There should nonetheless be a progressive movement towards the equal treatment of all languages which are widely used in a municipality, both in respect of the provisions of the policy and their implementation.

## 5 The use of official languages in the courts

### 5.1 The position in South Africa pre-1994

The 1909, 1961 and 1983 South African Constitutions did not explicitly require of the judiciary to comply with the official language provisions.<sup>49</sup> A practice however developed of conducting judicial proceedings in any of the two official languages and to provide for translation where required. This practice still continues today. Insofar as costs are concerned, a distinction has to be drawn between criminal and civil proceedings. In criminal proceedings, translation into a language which the accused understands (irrespective of whether or not the language is an indigenous South African language) is provided at state expense.<sup>50</sup> In the case of civil proceedings, the costs of translation are, unless the court orders otherwise, considered to be costs in the cause. A distinction can thus be drawn, following Malan,<sup>51</sup> between official and non-official language use in the courts. Official use would refer to the language in which the court proceedings are recorded as well as the language in which the judgment is delivered. As we saw, the practice pre-1994 was to use either English or Afrikaans for such official use.<sup>52</sup> Non-official use would refer to the language in which evidence is presented in court, either oral evidence or

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<sup>49</sup> Currie 'Official languages and language rights' (2002) 65-15.

<sup>50</sup> Steytler NC 'Implementing language rights in court: The role of the court interpreter' (1993) 9 *South African Journal on Human Rights* 205-6.

<sup>51</sup> Malan K 'Observations on the use of official languages for the recording of court proceedings' (2009) *TSAR/ Journal of South African Law* 141.

<sup>52</sup> An Afrikaans judgment was delivered for the first time in 1929 and the first Appellate Division judgment in Afrikaans, in 1932; see Loubser 'Linguistic factors into the mix: The South African experience of language and the law' (2003-4) 127.

written evidence (in motion proceedings), and arguments about the merits of the case by a party to the case him- or herself or by a legal representative. Insofar as written evidence in motion proceedings is concerned, the practice has been to use either of the two erstwhile official languages for this purpose.<sup>53</sup> In the case of an accused representing him- or herself, the presentation of argument could happen in any language, and would be translated where necessary at state expense.<sup>54</sup> In civil matters, where a party had no legal representation, oral argument to the court about the merits of the case could be presented in any language, albeit that the expense of translation would generally be costs in the cause.<sup>55</sup> The record (or minutes) of court proceedings, which are of course essential for purposes of the hearing of appeals and, as Malan points out, potentially consists of a mass of material, in terms of the practice hitherto followed, takes place (often by way of translation) into either English or Afrikaans.<sup>56</sup> The position was regulated expressly in the Magistrates' Court Act, although the same practice was followed in the superior courts.<sup>57</sup> Section 6 of the Magistrates' Court Act 32 of 1944 provided and still provides the following in this respect:

6. Medium to be employed in proceedings.—(1) Either of the official languages may be used at any stage of the proceedings in any court and the evidence shall be recorded in the language so used.

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<sup>53</sup> Malan 'Observations on the use of official languages for the recording of court proceedings' (2009) 143. Rule 60 of the Uniform Rules provides for the translation of documents produced in proceedings in a language other than one of the official languages.

<sup>54</sup> Malan 'Observations on the use of official languages for the recording of court proceedings' (2009) 143.

<sup>55</sup> Malan 'Observations on the use of official languages for the recording of court proceedings' (2009) 143.

<sup>56</sup> Malan 'Observations on the use of official languages for the recording of court proceedings' (2009) 143-4.

<sup>57</sup> Malan 'Observations on the use of official languages for the recording of court proceedings' (2009) 144.



(2) If, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given, is one of the official languages or of whether the representative of the accused is conversant with the language used in the evidence or not.<sup>58</sup>

Malan points out that in practice the proficiency of presiding officers in either Afrikaans or English sometimes played a role in determining the language in which a criminal trial would take place.<sup>59</sup> Where the mother tongue of an accused in a criminal trial was Afrikaans or English the trial would as a rule take place in that language. The Judge President of a specific division would usually allocate matters to judges in accordance with their language proficiency. Where the mother tongue of the accused was one of the indigenous languages, the language preference of the judge concerned (that is, Afrikaans or English) would usually determine the language of the proceedings. In certain areas such as the Eastern Cape and Natal, criminal proceedings would however as a rule take place in English, because of the predominance of English (as compared to Afrikaans) in these areas, despite the language preference of the judge concerned. In places like

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<sup>58</sup> In the High Court the position is regulated by Rule 61(1) of the Uniform Rules, providing that '[w]here evidence in any proceedings is given in any language with which the court or a party or his representative is not sufficiently conversant, such evidence shall be interpreted by a competent interpreter, sworn to interpret faithfully and to the best of his ability in the language concerned'. Section 5 of the Small Claims Court Act 61 of 1984, providing for the language medium at proceedings, is of a similar nature: (1) Either of the official languages of the Republic may be used at any stage of the proceedings of a court. (2) If evidence is given in a language with which one of the parties is in the opinion of the court not sufficiently conversant, a competent interpreter may be called by the court to interpret that evidence into a language with which that party appears to be sufficiently conversant, irrespective of whether the language in which the evidence is given is one of the official languages.

<sup>59</sup> Malan 'Observations on the use of official languages for the recording of court proceedings' (2009) 144-145

the Free State, proceedings would as a rule take place in Afrikaans. In civil matters the preference of the parties would usually determine in which language proceedings take place, and cases would again be allocated according to the language proficiency of the judge concerned. As will be argued in more detail below, this practice opens the way to more of the official languages becoming languages of record in future. Of importance in the discussion that follows will be especially *the official language use* in the courts, or the language in which the court proceedings are recorded, as well as the language in which the judgment is delivered.

## **5.2 The 1993 Constitution**

As pointed out in chapter 5, the 1993 Constitution contained two important provisions specifically related to the language in court proceedings: sections 25 and 107. Both of these provisions effectively provided for the continuation of the existing position at the time. Section 25, insofar as it is relevant, provided the following:

Detained, arrested and accused persons

- (1) Every person who is detained, including every sentenced prisoner, shall have the right (a) to be informed promptly in a language which he or she understands of the reason for his or her detention;
- (2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right (a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
- (3) Every accused person shall have the right to a fair trial, which shall include the right (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her.

Section 107(1) of the 1993 Constitution was quite revolutionary insofar as it went beyond section 25(3) by providing for the use of the (South African) language of choice (and not simply a

language which he or she understands) by a party in civil and criminal proceedings. The subsection, as Steytler points out, effectively provides for a language right rather than simply the right to communicate effectively, as is usually provided for by virtue of the right to a fair trial.<sup>60</sup> The subsection also appears to imply that translation would, both in criminal and in civil proceedings, be provided at state expense. Section 107(2) is as remarkable. It opens the door to the use of all official languages as languages of record in court proceedings, currently still a hot issue of debate in South African legal circles, as will appear from the discussion that follows. Section 107(2) furthermore sought expressly to keep in place the privileged position of Afrikaans and English. The whole section provided as follows:

#### 107 Languages

(1) A party to litigation, an accused person and a witness may, during the proceedings of a court, use the South African language of his or her choice, and may require such proceedings of a court in which he or she is involved to be interpreted in a language understood by him or her.

(2) The record of the proceedings of a court shall, subject to section 3, be kept in any official language: Provided that the relevant rights relating to language and the status of languages in this regard existing at the commencement of this Constitution shall not be diminished.

One interesting case reported in this respect during the operation of the 1993 Constitution was that of *Chweu & others v Pretoria Technical College*,<sup>61</sup> which raises a number of issues of importance for civil proceedings. The case involved an application in terms of section 43 of the Labour Relations Act 28 of 1956 (Power of court to order reinstatement of employees or restoration of terms and conditions of employment or abstention from unfair labour practice).

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<sup>60</sup> Steytler N *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa*, 1996 (1996) Durban: Butterworths 359.

<sup>61</sup> [1994] 8 BLLR 52 (IC).

The proceedings in this case were instituted in English, but were met by an answering affidavit in Afrikaans, a language which the applicants and their representative did not understand. This led to a delay in the filing of responding affidavits. The applicant alleged that there was an agreement between the representatives that the answering affidavit would be in English and that the respondent deliberately used Afrikaans, making it impossible for them to respond thereto. The applicants sought a court order that the respondent must provide an answering affidavit in English. The allegation of an agreement about the language to be used was denied by the Pretoria Technical College. The College was furthermore prepared to have its responding affidavit translated into English, but was of the view that the applicant should pay the costs of the translation. The question the court had to answer was whether, in light of the 1993 Constitution, a party could insist that another party uses a particular language in proceedings, and whether, if a party fails to do so, it could be ordered by the court to provide a translation. The presiding officer, Verwey AM, pointed out that the Industrial Court forms part of the Department of Manpower and that in light of s 3(6) of the 1993 Constitution, a right exists, wherever practicable, to choose the language in which to engage with the court. The court would have to try to accommodate all languages in as far as possible. The court's implicit critique of the attitude of the College is to be noted:

Parties are however urged and reminded to maintain a balance between the need for democracy, linguistic emancipation, human decency and the demands of multilingualism on the one hand, and feasibility, on the other. The provisions of s 3(9)(c) of the Constitution is [sic] also important and should continuously be borne in mind, viz that the use of language for purposes of exploitation, domination or division must be prevented. A sympathetic sensitivity towards all South Africans and their respective languages are of cardinal importance (at 57).

Insofar as the question is concerned whether one party may force another party to use a specific language in court proceedings, Verwey AM noted the following:

The private sector although not legally bound by the Constitutional policy on official languages, has a moral obligation to be multilingual. This obligation is imposed by the democratic spirit of the Constitution's language provisions and the express prohibition of unfair discrimination against people on the basis of language. A further moral obligation is placed on the private sector to recognise language as a fundamental human right in its linguistic practice, due to the Constitution's emphasis of fundamental human rights. *In casu* Respondent displayed this kind of positive attitude by converting to English in their papers and letters when Applicants' difficulty with Afrikaans became apparent. Respondent is however not prepared to bear the costs of a translation of their answering affidavit (57-8).

The court thus held that the obligation to respond in a specific language in response to an application could be said to be a moral, but not a legal obligation. A party could not therefore insist that another party use a particular language, and the costs of the translation would *in casu* have to be borne by the applicant. As will be seen below, it has since been proposed that the 'moral obligation' should become a legal one, but that the costs in this regard should be borne by the state.

### **5.3 The 1996 Constitution**

As noted earlier, the 1996 Constitution no longer seeks to retain the rights and privileges relating to the pre-1994 official languages. It furthermore contains no provision similar to section 107 of the 1993 Constitution, although section 171 provides that '[a]ll courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation'. The only provision in the 1996 Constitution which is directly applicable to court proceedings is to be found in section 35, which deals with the rights of arrested, detailed and

accused persons in similar terms as section 25 of the 1993 Constitution. The relevant parts thereof read as follows:

1. Everyone who is arrested for allegedly committing an offence has the right (b) to be informed promptly (i) of the right to remain silent; and (ii) of the consequences of not remaining silent;
2. Everyone who is detained, including every sentenced prisoner, has the right (a) to be informed promptly of the reason for being detained;
3. Every accused person has a right to a fair trial, which includes the right (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
4. Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

To be noted is that the proviso to section 25(3) started with ‘failing this’, whereas section 35(3) is somewhat clearer by saying ‘if that is not practicable’. In order to determine what the Constitution requires in respect of language use in criminal proceedings, section 35(3)(k) has to be read together with the other language provisions of the Constitution, and insofar as civil proceedings are concerned, guidance would likewise have to be obtained from provisions such as sections 6 and 9(3). Thus far the legislature has made no attempt to regulate the approach to be followed in court proceedings in relation to language. From the discussion under paragraph 5.1 it nevertheless appears that the existing statutory provisions are broad enough, in referring simply to ‘the official languages’, to leave scope for interpretation in line with the Constitution. Thus far it is mainly in criminal court proceedings that the courts have had to grapple with the implications of the language requirements of the Constitution.

### 5.3.1 Case law on language and the courts

In *Mthethwa v De Bruin*<sup>62</sup> the accused, a teacher, was charged for theft of a motor vehicle and appeared in a Regional Court in Vryheid, KwaZulu-Natal. The accused insisted, through his attorney (who was incidentally not Zulu-speaking) that the trial proceed in isiZulu, his mother tongue as it was one of the official languages in terms of section 6(1) of the Constitution. The regional magistrate refused the application, and directed that the trial proceed in either English or Afrikaans, whereupon the accused brought an application to the High Court (Natal Provincial Division) seeking a declaratory order that the actions of the magistrate were unlawful and unconstitutional, as well as that he was entitled to be tried in isiZulu. The court, per Howard JP (Mthiyane J concurring) pointed out that the accused, on his own admission, could understand English. The court further accepted evidence to the effect that 98% of the regional court cases within the Vryheid region involve accused and witnesses who are Zulu-speaking, and that the figures are likely the same in the rest of KwaZulu-Natal. The problem with isiZulu becoming the language of record, Howard JP noted, lay in the make-up of court officials: of the 37 Regional Court magistrates in KwaZulu-Natal, 33 had Afrikaans or English as their home language (with little or no knowledge of isiZulu) and only 4 had isiZulu as home language; of the 256 prosecutors, 175 had English or Afrikaans as home language (again with little or no knowledge of isiZulu) and only 81 had isiZulu as home language; of the 41 advocates in the Attorney-General's office, only 6 had isiZulu or isiXhosa as home language. A further problem lay in transcribing the court record into isiZulu, with the court expressing its doubts as to whether the current contractor had staff that could fulfil this function. An added problem was that of appeals and reviews, which are to be heard by at least two judges. Only one of the 22 judges in the

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<sup>62</sup> *Mthethwa v De Bruin* NO 1998 (3) BCLR 336 (N). The judgment was delivered on 20 October 1997.

province at the time was competent to deal with an appeal or review in Zulu. The court concluded as follows:

Under these circumstances, as they obtain in this province at present, it is clearly not practicable for an accused person to demand to have the proceedings conducted in any language other than English or Afrikaans. Section 35(3)(k) does not give an accused person the right to have a trial conducted in the language of his choice. Its provisions are perfectly plain, namely, that he has the right to be tried in a language which he understands or, if that is not practicable, to have the proceedings interpreted in that language (at 338).

*S v Matomela*<sup>63</sup> was a case of automatic review, the accused having been found guilty of contravening an order for maintenance. The proceedings were recorded in isiXhosa. The reasons for the decision to use isiXhosa as language of record were requested from the presiding magistrate (Mrs Nduna) by Tshabalala J. The senior magistrate responded that there was a shortage of interpreters on that particular day and to have the matter recorded in either English or Afrikaans would have necessitated a postponement. All the parties, including the magistrate were furthermore isiXhosa speaking and the senior magistrate therefore instructed the magistrate to continue with the case in isiXhosa. The senior magistrate motivated his instructions with reference to sections 6 and 35 of the Constitution. Tshabalala J (Pickard JP concurring) found the decision to proceed in this way under the circumstances to be fair and reasonable, but nonetheless regarded this development as undesirable. The reasoning of the court in this respect shows a misunderstanding of the nature of a supreme constitution, the role of legislation in giving effect to the constitution, as well as of the centrality of multilingualism to the constitutional scheme:

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<sup>63</sup> *S v Matomela* 1998 (3) BCLR 339 (Ck).



The constitutional provisions he [the senior magistrate] has referred to above *are binding unless* there was one official language for the courts. In order to arrive at such a situation national legislation would have to be passed for that purpose. ... The Constitution as it presently stands entitles people of the same language group to conduct the whole case in their language only providing it is one of the official languages (at 341, emphasis added).

The main practical difficulty the court perceived should there be multiple languages of record, was similar to that commented on in the *Mthethwa* case, namely the problems arising on appeal or review when the language of record is not understood by the judge(s) concerned. Automatic translation of the proceedings into a language which the judges on review or appeal could understand was in the court's view inconvenient, time-consuming and carried huge cost implications. The court concluded by again expressing itself in favour of one language of record:

All official languages must enjoy parity of esteem and be treated equitably but for practical reasons and for better administration of justice one official language of record will resolve the problem. Such a language should be one which can be understood by all court officials irrespective of mother tongue (at 342).<sup>64</sup>

The issue of the interpretation of section 35(3)(k) again arose in *S v Pienaar*.<sup>65</sup> Pienaar had been charged with dealing in dagga. He first appeared in the magistrates' court on 30 August 1999 and indicated that he would not need legal representation. He later changed his mind and a legal representative (public defender) was assigned to him. The hearing was subsequently postponed a

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<sup>64</sup> Tshabalala's statement was quoted with approval in a speech by the then Minister of Justice and Constitutional Development, Penuell Maduna, at the opening of the Justice Colloquium, on 19 October 2000. In the speech, Maduna proposes a policy coming from his department of having English as the only language of record. The alternative of using all eleven official languages as languages of record is dismissed by Maduna as impractical because of its cost implications; see <http://www.info.gov.za/speeches/2000/001208345p1006.htm> (accessed 20 May 2011).

<sup>65</sup> 2000 (7) BCLR 800 (NC).

number of times. When the trial commenced on 6 December 1999 the accused pleaded not guilty and indicated that he wanted to represent himself. The reason was that the Afrikaans-speaking Pienaar had been assigned the services of a public defender who understood only English and with whom he was therefore unable to communicate. As a result the public defender was excused by the court. At the ensuing trial the accused was found guilty and sentenced. The question on review was whether the accused had a right to be represented by a legal representative with whom he could communicate (at least through an interpreter), and thus whether a fair trial had taken place. In considering this question, Buys J (Majiedt J concurring) referred with approval to a number of Canadian Supreme Court decisions about language rights, emphasising specifically the need for a broad, purposive approach in interpreting the language provisions of the constitution; the need to in this regard remedy the injustices of the past; the importance of language in relation to personal and cultural identity; and the close relation between personal freedom, human dignity and language (at 806-7). Buys J furthermore pointed to the importance of section 39, that is, the need to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom' in the interpretation of section 35 of the Constitution. The judge also pointed to the (unwritten) policy and aim of the Department of Justice of making English the only record of court proceedings. To this end it had appointed a number of presiding officers and public defenders in the province who are not able to speak Afrikaans. This happened in spite of the fact that Afrikaans is the dominant language in the province. Estimates show that Afrikaans is used in 72% of court cases in the Northern Cape, Setswana in 14,8%, isiXhosa in 8,8%, English in 1,4%, and other languages in 0,6% of cases (808). English is thus rarely used, also in the High Court in reviews and appeals (at 808). In addition, Buys J mentioned the fact that an Afrikaans-speaking audience in circuit court

proceedings eagerly attended hearings. To have these hearings take place in English (with the evidence being led translated from Afrikaans to English) would lead to alienation from the legal process (at 808). This approach would furthermore be time consuming and would involve the wastage of resources (at 809). To have oral evidence translated furthermore inevitably leads to a reduction of certain facets of what is said in the mother tongue as well as to simple inaccuracies.<sup>66</sup> Buys J held that to introduce English as the only language of record in the Northern Cape would be in conflict with section 6(1), (2), (3)(a) and (4) of the Constitution. Insofar as section 6(3)(a) is concerned such a policy would mean that the criteria of ‘usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population ... in the province concerned’ are completely ignored (at 812). It would furthermore conflict with the requirement that at least two official languages should be used (s 6(3)(a)) as well as with the requirement of parity of esteem and equitable treatment in section 6(4). The policy of the Department furthermore flies in the face of section 6(5) which requires of PanSALB to promote the use of and respect for all languages used in South Africa. In light of the above, Buys J read section 35(3)(k) as providing for a transitional approach. Where possible, the court proceedings should take place in the language understood by the accused. Whereas this may not be possible as yet (as was the case in *Mthethwa*) the intention of the Legislature in section 6 of the Constitution is that the use of Afrikaans and English as languages of record should be extended by the use of the indigenous official languages, so that ultimately all official languages spoken in a specific region enjoy equal treatment (at 812). The court held that there was a duty on the government, and more specifically in this instance on the Department of Justice, in terms of section 6 of the Constitution, to ensure that the languages which are

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<sup>66</sup> See also Steytler ‘Implementing language rights in court’ (1993) 207.

predominantly used in the Northern Cape are promoted in such manner that they eventually enjoy equal respect and are treated equitably (at 812-3). Buys J moreover noted his disagreement with the views expressed by Tshabalala J in the *Matomela* case discussed above about there being only one language of record (at 813). Buys J also viewed the appointment of judges who can speak the indigenous languages, making thereby the courts more accessible and understandable to people whose language rights were until 1994 totally denied, as in line with the letter and spirit of the Constitution (at 814). Buys J's conclusion about the matter *in casu* was that (a) the accused had a right to a fair trial; and (b) that this right included the right to be tried in Afrikaans; (c) the right to a fair trial also included the right to the assistance of a legal representative with whom he could communicate in his own language, either directly or in an exceptional case, if this is not possible, by means of a translator; and finally that (d) the magistrate had the duty to explain these rights to the accused. As this had not happened, his right to a fair trial had been violated, leading to an irregularity in the proceedings. The conviction and sentence were accordingly set aside (at 817).<sup>67</sup>

A few words should be added at this point about the decision of the Canadian Supreme Court in *R v Beaulac*,<sup>68</sup> one of the cases referred to by Buys J.<sup>69</sup> The matter concerned the trial of an accused (with French as mother tongue) on a charge of murder. At a preliminary stage the accused applied, in accordance with a provision of the Criminal Code, for his trial to take place

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<sup>67</sup> The *Pienaar* case was followed in *S v Prince* [2006] JOL 16730 (W). See also *S v Van der Merwe* [2006] JOL 16498 (T)

<sup>68</sup> [1999] 1 S.C.R. 768.

<sup>69</sup> For a discussion of this case in the SA context, see Labuschagne JMT 'Taalregte in die regsproses – *R v Beaulac*' (2000) 63 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 517.

before a judge, or a judge and a jury who could speak French or both French and English (rather than simply English). His application was however dismissed because the accused was bilingual. The proceedings were then conducted in English and the accused was convicted. An appeal to the Court of Appeal was unsuccessful. In a further appeal, the Supreme Court found in favour of the accused on the issue of language rights and held that a new trial had to take place with a judge and/or a judge and a jury who speak both English and French. Of specific importance in this decision is that a majority of seven judges of the Supreme Court (two of the nine judges thought that this was not an appropriate case to deal with the issue), resolved the issue of conflicting interpretations of language rights which had existed for a number of years in Canada. This issue is likewise of importance in the interpretation of especially section 6 of the South African Constitution. One of these approaches involved viewing the language rights in the constitution as the result of a political compromise, and therefore adopting a restrictive approach to their interpretation. In accordance with the latter approach, the function of giving effect to the language rights in the constitution and thus to ensure the ultimate equality of the official languages rested on the legislature rather than the courts. The other approach involved viewing language rights as the same as other constitutional rights, and thus to also follow a broad, purposive approach in their interpretation. In *Beaulac*, the majority, per Bastarache J, found the purposive approach the (only) correct approach to be followed in relation to language rights, and that this approach is to be followed *in all cases* involving such rights (par 25). He noted that it can be said of many rights finding their way into a Bill of Rights that they are the result of political compromise.<sup>70</sup> This should not however in any way affect the way in which they are

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<sup>70</sup> See also Green L & Reaume D 'Second-class rights? Principle and compromise in the Charter' (1990) 13 *Dalhousie LJ* 564; and more recently *Doucet-Boudreau v. Nova Scotia (Minister of Education)* [2003] 3 S.C.R. 3,

interpreted (par 24). It is clear that the court in *S v Pienaar* adopted a similar approach, which is clearly to be commended. *R v Beaulac* is however also important in another respect, which was not specifically relevant to the facts of the *Pienaar* case. In *Pienaar*, the accused could speak only Afrikaans. In the *Mthethwa* case, as we saw, the accused was bilingual. On a literal reading of s 35(3)(k), even if facilities were available to hear the case in isiZulu, it would not have been unfair to proceed in English.<sup>71</sup> As we saw, the accused in *Beaulac* was likewise bilingual. This did not however prevent the court from finding that he had a right to be tried in French. This was also not simply because of the specific constitutional and statutory provisions in question, but as a matter of principle. On the importance of language to identity (also noted by the court in *Pienaar*) as well as the relation between language rights and the right to a fair trial, Bastarache J held the following:

The language of the accused is very personal in nature; it is an important part of his or her cultural identity. The accused must therefore be afforded the right to make a choice between the two official languages based on his or her subjective ties with the language itself. The principles upon which the language right is founded, the fact that the basic right is absolute, the requirement of equality with regard to the provision of services in both official languages of Canada and the substantive nature of the right all point to the freedom of Canadians to freely assert which official language is their own language (par 34).

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2003 SCC 62 par 27; *Solski (Tutor of) v Quebec (Attorney General)* [2005] 1 S.C.R. 201, 2005 SCC 14, par 20; *DesRochers v Canada (Industry)* 2009 SCC 8, [2009] 1 S.C.R. 19 par 31.

<sup>71</sup> See in this respect *S v Mponda* 2007 (2) SACR 245 (C) where Binns-Ward AJ (Yekiso J concurring) stated the following: ‘Insofar as the judgment in *S v Pienaar* (*supra*) suggests that a person does have an absolute right to be tried in his own language, I consider, with respect, that it overstates the extent of the right in terms of s 35(3) (k) of the Constitution. Whereas the achievement of such a situation would be ideal, practicalities of the sort discussed by Yekiso J in *S v Damoyi* (*supra*) entail that a narrower meaning, in stricter accordance with the language of the provision, must apply in recognition of the practical exigencies of the administration of justice.’

In the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity. It would indeed be surprising if Parliament intended that the right of bilingual Canadians should be restricted when in fact official language minorities, who have the highest incidence of bilingualism (84 percent for francophones living outside Quebec compared to 7 percent for anglophones according to Statistics Canada 1996 Census), are the first persons that the section was designed to assist (par 45).

Language rights are not subsumed by the right to a fair trial. If the right of the accused to use his or her official language in court proceedings was limited because of language proficiency in the other official language, there would in effect be no distinct language right. ... [L]anguage rights are not meant to enforce minimum conditions under which a trial will be considered fair, or even to ensure the greatest efficiency of the defence. Language rights may no doubt enhance the quality of the legal proceedings, but their source lies elsewhere (par 47).

In light of inter alia the nature of language rights and of the right to substantive equality, the court held that the denial of the right in the present case was not simply a procedural irregularity, but a 'substantial wrong' and ordered a new trial to be held (par 54). In line with this judgment, as well as with what was said in *S v Pienaar*, the ultimate aim to strive for is a situation where the proceedings take place not only in a language which the accused understands, but in his (official) language of choice. We saw in chapter 2 that this approach is developing into an international norm.

The above issues again came to the fore in *S v Damoyi*.<sup>72</sup> This was a case of automatic review coming before the Cape High Court. In the trial proceedings, delays were caused because of the unavailability of an interpreter to translate the evidence from isiXhosa to Afrikaans or English. The magistrate was however himself isiXhosa speaking as well as the prosecutor. In order to

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<sup>72</sup> [2003] JOL 12306 (C).

ensure that the accused obtained a speedy trial, and also in light of the fact that isiXhosa is one of the official languages in terms of section 6(1) of the Constitution as well as of the Western Cape in terms of the provincial constitution, the magistrate decided that the matter would proceed in isiXhosa. The accused was subsequently convicted and sentenced. In submitting the matter to the reviewing judge, the magistrate noted as reason for the late submission, that further delays were caused in the transcription of the evidence presented in the trial. On review, Yekiso J enquired from the Department of Justice about the policy regarding the use of the official languages in court proceedings in the province. The response from the Director of Public Prosecutions was that there was no policy in this regard but that an audit of the language skills on proficiency revealed that 62 of 262 prosecutors in the province were proficient in an indigenous official language and that 3 of the 36 advocates in the office of the Director of Public Prosecutions were able to speak one or more indigenous languages. Yekiso J referred to the relevant constitutional provisions as well as decided case law and decided to follow the advice of Tshabalala J in *Matomela*:

The solution to problems such as the one raised in this matter could be the introduction of one language of record in court proceedings. I am of the opinion that the recommendation by Tshabalala J in *S v Matomela (supra)* is the route to follow, and, in my view, such a course would not only be economical but would be in the best interest [sic] of justice. After all English already is a language used in international commerce and international transactions are exclusively concluded in the English language. Although some stakeholders would take it with a pinch of salt, sanity would tip the scale in favour of English as the language of record in court proceedings, particularly in view of its predominance in international politics, commerce and industry.

This ‘solution’ takes no account of the relevant provisions of the Constitution, and the arguments invoked in favour of the suggested approach are not very convincing. It is difficult to understand how the fact that English is a language used in international commerce and international



transactions can have any relevance for the language to be used to try an accused in a magistrates' court.<sup>73</sup> The well-considered judgment of the court in *S v Pienaar*, was summarily rejected as follows:

In my view the provisions of section 6 of the Magistrates' Courts Act were superseded by the provisions of section 6 of the Constitution so that reliance on section 6 of the Magistrates' Courts Act in support of the view that the accused had a right to be tried in the Afrikaans language, in my view, is not in conformity with the provisions of section 6 of the Constitution.

Yekiso J is seemingly referring here to par 23 of the judgment of Buys J, which reads as follows:

Artikel 6(1) van die Wet op Landdroshowe 32 van 1944 bepaal:

'6. Voertaal wat by verrigtings gebruik word. – (1) Die een of die ander van die landstale kan op enige stadium van die verrigtings in 'n hof gebesig word en die getuienis word in die aldus gebesigde taal genotuleer.'

Die 'een of die ander van die landstale' waarna in hierdie artikel verwys word is Afrikaans en Engels.<sup>74</sup>

Yekiso J is no doubt correct to criticise the judgment in this respect. Buys J here seems to read section 6 of the Magistrates' Court Act as if it continues to refer to only Afrikaans and English. This appears to conflict with schedule 6, item 3(1)(f) of the 1996 Constitution.<sup>75</sup> From this it

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<sup>73</sup> See further *infra*.

<sup>74</sup> Translation: 'Section 6(1) of the Magistrates' Court Act 32 of 1944 provides the following: "6. Medium to be employed in proceedings.—(1) Either of the official languages may be used at any stage of the proceedings in any court and the evidence shall be recorded in the language so used." The reference to "[e]ither of the official languages" in this section is to Afrikaans and English.'

<sup>75</sup> Item 3(1)(f) provides that '[u]nless inconsistent with the context or clearly inappropriate, a reference in any legislation that existed when the new Constitution took effect to an official language or languages, must be

however by no means follows that the (rest of the) judgment in *Pienaar* was wrong in law. As should be clear from the above analysis, the *Pienaar* judgment does not stand or fall based on an interpretation of section 6 of the Magistrates' Court Act.

### 5.3.2 Debates on language and the courts outside the courtroom

The approach to be followed in court proceedings has thus far led to some heated discussion in academic circles, also from the side of practitioners. This is no doubt an emotional issue. Barker<sup>76</sup> comes out strongly in favour of a monolingual approach, irrespective of the language provisions of the Constitution, which he finds 'quite impractical as it would place unbearable burdens upon magistrates, judges, prosecutors and practitioners, as well as creating intolerable delays and costs we could not sustain'. For English, as 'the language of commerce and industry both in South Africa and in foreign lands' 'is reserved the destiny of becoming the unifying medium in a future United States of Southern Africa', he concludes.<sup>77</sup> The Black Lawyers' Association has similarly called for English as the only language of record to be used in court proceedings. This is, it is said, because English is understood by the majority of South Africans and is an international language.<sup>78</sup> On the other hand, Thami Ndlovu, makes a strong emotional

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construed as a reference to any of the official languages under the new Constitution'. See also Loubser 'Linguistic factors into the mix' (2003-4) 146 who, without reference to Schedule 6, expresses the view that s 6(1) of the MCA should be read in line with the constitution as referring to all the official languages (146).

<sup>76</sup> Barker H 'Language in the courts: English – the unifying medium?' (October 1998) *De Rebus* 63-65.

<sup>77</sup> See also Barker *De Rebus* November 2000 'The morass of SA multilingualism'; Barker *De Rebus* July 2002 'Black languages and the South African courts'.

<sup>78</sup> See Whittle B 'The Jury is still out on court language' (July 2003) *De Rebus* 13.

plea for the increasing use of indigenous languages in the courts.<sup>79</sup> ‘We the black lawyers’, she says, ‘must refuse to take part in the game of sending our languages to a political museum, thus reducing them to tourist ventriloquism, and take a lead in the long march of black languages’ revolution’. Matela<sup>80</sup> is likewise strongly in favour of the more frequent use of indigenous languages in the courts. He is therefore critical of the *Matomela* judgment which he reads as defeatist in that it suggests that the indigenous languages are incapable of development to the required level of legal communication. The monolingual approach proposed there, he correctly points out, can only be adopted if section 6 of the constitution is first amended. The promise of language equity made in the Constitution, he argues, should be honoured in spite of its cost implications.

John Hlope (now Judge President of the CPD) makes out a somewhat more ambivalent argument in favour of the increasing use of indigenous languages in the courts, linking such use closely to human dignity.<sup>81</sup> He is very critical of the judgment in *Mthethwa*, which according to him seeks to simply retain the status quo in relation to Afrikaans and English.<sup>82</sup> In arguing that indigenous languages should be used as languages of record, he nonetheless foresees some difficulties because of their underdeveloped nature. Hlope also expresses his agreement with sentiments expressed by Tshabalala J that there may be a need for one language of record. If court judgments are to be accessible to the rest of the world, Hlope contends, they should ultimately be

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<sup>79</sup> Ndlovu T ‘Black Languages and the South African courts’ (April 2002) *De Rebus* 20.

<sup>80</sup> Matela S ‘Language rights: a tale of three cases’ (1999) 15 *SAJHR* 386.

<sup>81</sup> Hlophe JM ‘Official languages and the courts’ (2000) 117 *SALJ* 690.

<sup>82</sup> This is no doubt somewhat unfair, as the judgment is clearly based on the circumstances as they existed at that time in the division. It does not close the door to a different practice to be followed if circumstances should change.

translated into English. He nonetheless wants to open the door somewhat to indigenous languages, by arguing that more judgments should be written in the indigenous languages, with at least High Court judgments all being translated into English. Cowling<sup>83</sup> likewise makes a somewhat ambivalent argument about the need for equality in relation to the official languages. For him multilingualism in court proceedings is an ideal to strive for. Until the required development of the indigenous languages has taken place, English should however be the default language and all records of trial proceedings should be translated into English where English was not the original language of record (at 109). Cowling's article proceeds by stating all the possible pros and cons of a monolingual and a multilingual approach. He starts by expressing the view that the current practice which is followed in the courts violates section 6(2) as well as 6(4) of the Constitution. It can moreover be said to amount to discrimination in terms of section 9(2), especially when read with section 35(3)(k) (at 93). Cowling points to a number of problems with following a multilingual approach. He notes that the record of proceedings would in each case have to be translated in accordance with the language proficiency of the judge concerned (at 97). Additional problems can arise where there is more than one accused and they speak different languages (at 98). Other problems with multilingualism which he points to are that the indigenous languages are not fully developed insofar as legal terminology is concerned. There are for example no textbooks or law journal articles in these languages on South African law; no law faculty in the country teaches law in one of the indigenous languages; law reports are not available in the indigenous languages; and as we saw above, legislation is only on a rotational basis passed in one of the indigenous languages (at 98-9). This will inevitably lead to major translation problems (at 99). According to Cowling, there are a number of benefits in making

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<sup>83</sup> Cowling 'The Tower of Babel – Language usage and the courts' (2007) 124 *SALJ* 93.

English the only language of record. English is a fully developed legal language and all legal practitioners in South Africa claim proficiency in English (at 99-100). On the downside, however, if English is the only language of record, this would have additional cost and time implications, especially insofar as cases currently heard in Afrikaans are concerned (at 95). A monolingual approach also runs counter to section 6 of the constitution (at 100), therefore his proposal as set out above. The problem with these proposals (as well as those mentioned in the first paragraph, which call for English as the only language of record) is that they simply do not take the relevant constitutional provisions seriously enough. To make of English the only language of record, even if this is for a transitional period only (as Cowling foresees) still violates the constitutional requirements in relation to language. The Constitution places a duty on the state to cater for multilingualism, also in the courtroom. To make allowance for evidence to be led in any of the 11 official languages, but to use only one of these languages as language of record, clearly does not comply with the relevant provisions of the Constitution.

The strongest arguments in the academic discussion about language rights have thus far come from Malan.<sup>84</sup> Malan points out that section 6(2) clearly places an obligation on the state in all its spheres, and thus also on the judiciary, to enhance the status of the indigenous languages.<sup>85</sup> This

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<sup>84</sup> Cowling 'The Tower of Babel' (2007) 106 accuses Malan (referring to Malan JJ 'Die gebruik van Afrikaans vir die notuleering van hofverrigtinge gemeet aan demokratiese standaarde' (2003) 28 *Tydskrif vir Regswetenskap/Journal of Juridical Science* 36) of being secretly in favour of the status quo: Malan advances 'arguments favouring a multilingual approach in order to retain the use of Afrikaans as a language of record'. Perhaps this is true, but this 'in order to' unfortunately opens the door to playing the man. Cowling could in turn be accused of (closet) linguistic imperialism and of colonial thinking in light of his argument that English should remain the dominant language until the indigenous languages are fully developed as legal languages.

<sup>85</sup> Malan 'Observations on the use of official languages for the recording of court proceedings' (2009) 146-7.

should inevitably have implications for the recording of proceedings, the delivery of judgments, as well as for legal education. Malan also points to the Certification judgment of the Constitutional Court (at 148), in support for his argument that ‘[t]he fact that eleven languages instead of the previous two enjoy official status does not and should not mean a reduction of the status of either of the previous two’. This is an interesting interpretation of the relevant parts of the judgment which read in this respect as follows:

A separate objection goes to the status of Afrikaans in the NT [the 1996 Constitution]. That objection did not allege the violation of any particular CP [Constitutional Principle]. Rather it was that NT 6 must be given content by reading it alongside IC 3(2), (5) and (9) [the 1993 Constitution], which, inter alia, require that the status of Afrikaans as an official language should not be diminished. It appears to be the contention that the status of Afrikaans is diluted under the NT, relative to the IC. But NT 6, like the rest of that document, must be tested against the CPs, and not against the IC. In any event, the NT does not reduce the status of Afrikaans relative to the IC: Afrikaans is accorded official status in terms of NT 6(1). Affording other languages the same status does not diminish that of Afrikaans.<sup>86</sup>

Malan thus argues for the increased use of the historically marginalized indigenous languages, whilst at the same time insisting that this should not mean that the status and use any of the erstwhile official languages should be arbitrarily diminished:

Official policy and practices must create conditions that facilitate and promote the maximum use of all the official languages. Policies and practices that clearly promote and facilitate the increased use of one or some official languages and intentionally or arbitrarily discourage or diminish the use of others would be blatantly offensive to the injunction that the languages must be treated with parity of esteem and equitably (at 149).

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<sup>86</sup> See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) par 212. See also chapter 3.

Malan is of the view that because of the appointment of many new judges and magistrates since 1994 who speak indigenous languages, it would make sense to extend the use of these languages as languages of record and to deliver judgment in these languages. This will especially be the case if the mother tongue of the accused in a criminal trial or of the parties in civil proceedings is the same as that of the presiding officer (at 149-50). There would thus be no need for the translation of the proceedings, which would, in the case of criminal trials, furthermore save time, in line with the right to a speedy trial (s 35(3)(d)). Using the indigenous languages as languages of record would moreover be in line with s 35(3)(k) of the Constitution, which expresses a preference for being tried in a language which one understands,<sup>87</sup> thereby also avoiding the almost inevitable chance of errors slipping in during the translation process (at 150). The argument that is often used in favour of English as the only language of record, that is, that English is an international language, is rejected by Malan.<sup>88</sup> He points out that Magistrates' Court judgments are not reported, whereas only a few judgments of the High Courts are reported. The judgments of the Constitutional Court are all reported and quite a few in the Supreme Court of Appeal. It thus makes no sense to insist on English as language of record (for purposes of an international audience) when the cases that are actually reported are a mere fraction (his estimate

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<sup>87</sup> See also Steytler *Constitutional Criminal Procedure* (1996) 362. See further Malan K 'Oor die hofnotuleringstaal in die lig van die grondwet na aanleiding van onlangse regspraak' (1998) 61 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 698 where he contends that the primary right of the accused is that the language of record should be the language he or she understands. Only by way of exception should translation services be used. This places a corresponding duty on the government. The implementation of the suggestion of Tshabalala in *Matomela* (of one language of record) would consequently amount to a violation of s 35(3)(k).

<sup>88</sup> 'Die gebruik van Afrikaans vir die notuleering van hofverrigtinge gemeet aan demokratiese standaarde' (2003) 54-5.

is less than one percent) of the judgments delivered. For comparative purposes, as he correctly points out, it is almost exclusively the judgments of the apex courts in a specific country which may be of interest to an international audience. Important judgments of the High Court in languages other than English can be (and are already at present) translated by (private) publishers (at 55).

A (majority of a) Committee of four Judges President of the High Court (Zondo, Hlope, Malherbe and Kgomo) has likewise recommended that all the indigenous languages become languages of record in court proceedings.<sup>89</sup> They nonetheless warn against the danger of balkanisation, that is, that presiding officers from a specific language group will only hear cases regarding citizens of the same language group.<sup>90</sup> The report does not regard the lack of development of indigenous languages in relation to law as a stumbling block. It is exactly their use in the court room, they contend, that will lead to their development.<sup>91</sup> Kgomo, in a minority report, however expressed himself in favour of English as the only language of record.

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<sup>89</sup> It was unfortunately, despite numerous efforts, not possible to obtain a copy of this report from the Department of Justice, or anywhere else. Reliance therefore had to be placed on secondary sources. The report is referred to by Cowling as the *Report on the Usage of Official Languages in Courts* (drafted by four Judges President of the High Court, viz Judge President of the Labour Court Judge RMM Zondo and the Judges President of the Cape (Judge JM Hlope), the Northern Cape (Judge F D Kgomo) and the Free State (Judge JP Malherbe)). The report is also referred to by Lubbe HJ 'Taalregte en die regspraak (2008) 36 *Stellenbosch Papers in Linguistics PLUS* 67.

<sup>90</sup> Cowling 'The Tower of Babel' (2007) 98.

<sup>91</sup> Lubbe 'Taalregte en die regspraak' (2008) 80.



## **6 Conclusion**

In this chapter, the application of the constitutional language requirements in relation to the legislature, the executive and the judiciary were discussed. In the discussion of the legislature, it was contended that section 6 of the Constitution, read in a broad and purposive manner in light of the principles of proportionality, substantive equality and of legal certainty, principles derived from the rule of law, which is in turn a founding value of the South African Constitution, require that legislation must be enacted in all eleven official languages. 14 years after the enactment of the 1996 Constitution, only two languages, English and an alternative official language, are still used for the enactment of legislation. It was argued that it would suffice if, at least initially, and for reasons of practicality, legislation is translated only after it has been passed by parliament. All the official versions of the Act may furthermore be consulted for interpretive purposes. Insofar as parliamentary debates are concerned, it was contended that members of parliament should at any time be allowed to use any of the 11 official languages. Translation services must be available at all times into all the official languages. For reasons of practicality, notice periods may have to be imposed in the case of committee meetings. Similar arguments as in the paragraph above apply to the provincial legislatures and municipal councils. Once a language has been designated as official in the province or municipality concerned, legislation should be enacted in this language and it should be possible to use this language in legislative debates as well as in committee meetings. Translation services should be available as a matter of course. It is therefore not advisable to designate a multiplicity of languages as official languages if there is no intention to meet with the obligations that go along with such designation. Where multiple languages are used within a province or municipality, it is advisable to rather draw a distinction between 'official' and 'administrative' (or 'other provincial or local') languages, as has been

done in the case of Mangaung. Where there are financial or resource difficulties in immediately giving effect to a language policy that recognises more than one official language, provision can furthermore be made for implementation in phases. In respect of the executive/administrative arm of government it is required in line with the three principles referred to above that general acts which create rights or obligations to individuals should be published in all 11 official languages on the national level. The same approach needs to be followed on provincial and local level in respect of the designated official languages. More leeway exists insofar as other acts and documentation are concerned. The intended audience of the specific communication should in principle determine the language to be used. Insofar as detail is concerned, the draft Free State Language policy was pointed to as a commendable example.

In respect of the judiciary, we saw in this chapter that there has already been some movement towards multilingualism in the courtroom, particularly insofar as the language of record is concerned.<sup>92</sup> At the same time, a number of role players support the use of only one language of record. It was argued in this chapter that the latter approach would be in clear conflict with section 6 of the Constitution. The Constitution, interpreted in a broad and purposive manner, and with reference to the principles of proportionality and substantive equality, can be said to require

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<sup>92</sup> See also Pan South African Language Board (PanSALB), support initiative to use indigenous languages in court 4 March 2009, available at <http://www.info.gov.za/speeches/2009/09030509451004.htm>. According to the press release, the Zwelitsha Magistrate's Court in Eastern Cape started hearing all its cases in Xhosa in March 2009, in terms of a project of the Department of Justice. The Law Society, in a recent press statement, likewise supported the extension of the use of indigenous languages, apparently as languages of court record; see 'LSSA recommends greater use of all official languages in the legal environment' *De Rebus* 2010 November at 16: 'The Department of Justice and Constitutional Development must use all official languages in the courts, as far as is practically possible.'

the use of all the official languages as languages of record. There can be little doubt that the move towards the abolition of Afrikaans as language of record is due to its stigma as language of the oppressor.<sup>93</sup> It is however, as is well-known, not only (white) Afrikaners who have Afrikaans as mother tongue.<sup>94</sup> In light of what has been said in earlier chapters, there can furthermore be no doubt that the battle by Afrikaans speakers for the recognition of the status of ‘their’ language (and for the other official languages) is fully in line with international developments as well as with the provisions of the South African Constitution. As pointed out in the *Pienaar* and *Beaulac* judgments, language is closely tied to human dignity, a founding value of the South African Constitution (s 1). To have one’s mother tongue translated because it is not worthy of being used as language of record in court proceedings (as has been the experience of many South Africans for many years) undoubtedly violates such dignity.<sup>95</sup> Translation, which is almost inevitably imperfect, furthermore often leads to the denial of a fair trial.<sup>96</sup>

But does the Constitution not simply provide for a right to be tried in a language which one ‘understands’? The rules of statutory interpretation traditionally provide that a more specific provision (here, section 35(3)(k)) takes precedence over a general provision with which it appears to be in conflict (here, section 6).<sup>97</sup> This rule was implicitly relied on by the court in *Mthethwa*. It should be clear from the discussion thus far that this rule of interpretation cannot

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<sup>93</sup> See chapter 3.

<sup>94</sup> Census 2001 indicates that 253 282 members of the black population indicated Afrikaans as their first home language, 3 173 972 of the coloured population, and 19 266 of the Indian/Asian population (in addition to the 2 536 906 members of the white population).

<sup>95</sup> To have only one language of record for reasons of ‘practicability’ would have the same consequence.

<sup>96</sup> See e.g. the study by Steytler ‘Implementing language rights in court’ (1993) 211.

<sup>97</sup> See De Ville *Constitutional and Statutory Interpretation* (2000) 80.

hold sway in the interpretation of the Constitution. Section 35(3)(k) in other words does not exhaust the rights which an accused has in terms of the Constitution. Section 35(3)(k) provides for the right to a fair trial, and in this respect requires that, as a rule, the language should be the language which the accused understands, even if he or she is not fluent in that language. Section 6 however requires more. It goes beyond merely the right to a fair trial. It places a duty on all three branches of the state to ultimately provide for legal proceedings to take place in the chosen official language of an accused.<sup>98</sup> It is indeed the case that international law instruments generally do not provide that an accused, particularly where he or she is the member of a minority linguistic group, has the right to be tried in his or her language of choice.<sup>99</sup> As indicated in chapter 2, however, the right to be tried in regional/minority languages is starting to develop into an international norm.<sup>100</sup> There will no doubt be exceptions, such as where the different accused in a trial have more than one mother tongue, and insofar as it may not be possible to cater for all official languages in this way within all provinces.<sup>101</sup>

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<sup>98</sup> It can of course be envisaged that accused may, because of the choice of a specific legal representative, prefer for the matter to take place in a language which he or she does not understand well.

<sup>99</sup> Steytler *Constitutional Criminal Procedure* (1996) 360, Cassim F 'The right to address the court in the language of one's choice' (2003) 44 *Codicillus* 28-9.

<sup>100</sup> See further Henrard K 'Language and the administration of justice: The international framework' (2000) 7 *International Journal on Minority and Group Rights* 82-92. See also the Canadian Official Languages Act which provides the following in s 15(1): 'Every federal court has, in any proceedings before it, the duty to ensure that any person giving evidence before it may be heard in the official language of his choice, and that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language.'

<sup>101</sup> Those languages which are predominantly spoken within a specific division should in other words be recognised as languages of court; see also Cote D *The Right to Language Use in South African Criminal Courts* (LLM thesis,

Insofar as civil proceedings are concerned, the most urgent step that needs to be taken is the abolition of the rule that provides for a party in a civil case to incur costs in the event of the need to translate evidence presented from one of the other official languages into Afrikaans or English. This practice is no doubt discriminatory to speakers of indigenous languages who would need translation facilities in the courts.<sup>102</sup> All official languages should be treated equally in this respect. Here too, proceedings should take place in indigenous languages, at least in those instances where all parties agree to this.<sup>103</sup> Where different languages are at stake, the JP report has a commendable proposal. It proposes in this regard that the party who institutes the proceedings can choose the language of record and that translation facilities should be provided by the state where they are required.<sup>104</sup> Cowling's proposal that in regard to argument on the merits in appeal courts any language may be used and that translation is to be provided at state expense also sounds viable.<sup>105</sup>

The argument about increasing costs in having matters heard on appeal or review if the court record is an indigenous language is not convincing. Because of the current make-up of the High Courts, there should be no need for translation up to this level.<sup>106</sup> It is only once a matter goes to

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University of Cape Town, 2005) available at

[http://lawspace.law.uct.ac.za/dspace/bitstream/2165/244/1/CoteD\\_2005.pdf](http://lawspace.law.uct.ac.za/dspace/bitstream/2165/244/1/CoteD_2005.pdf) (accessed 20 May 2011) 53.

<sup>102</sup> Cowling 'The Tower of Babel (2007) 101.

<sup>103</sup> Cowling 'The Tower of Babel (2007) 102.

<sup>104</sup> Cowling 'The Tower of Babel (2007) 102-3.

<sup>105</sup> This approach, as he points out, is already followed in the Constitutional Court; see Rules of the Constitutional Court, Rule 13.

<sup>106</sup> The Canadian example is again worthy of following here: section 16 of the Official Languages Act provides in this respect: '(1) Every federal court, other than the Supreme Court of Canada, has the duty to ensure that (a) if

the Supreme Court of Appeal or the Constitutional Court that translation may become a necessity in order to ensure that a quorum of judges can decide a case and be able to access the documentation.<sup>107</sup> This will clearly not lead to an increase in costs, but much more likely make translation necessary in fewer instances. The fact that legal terminology may not as yet exist in the indigenous languages is furthermore not a reason for not using these languages as languages of record. It is absolutely essential, in light of the requirements of section 6 of the Constitution, that the indigenous languages be developed in this way both for purposes of being used as languages of record and to enable accurate translation from one language to another.<sup>108</sup>

In appointing judges, magistrates, prosecutors and legal aid attorneys, attention should moreover be given to their ability to speak the dominant languages in the province to which they are

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English is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand English without the assistance of an interpreter; (b) if French is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand French without the assistance of an interpreter; and (c) if both English and French are the languages chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand both languages without the assistance of an interpreter.’

<sup>107</sup> In the case of specialized appeal courts such as the Labour Appeal Court and the Competition Appeal Court, this may also be necessary.

<sup>108</sup> The fact that legal terminology does not exist in these languages has no doubt frequently led to injustices in the past and continues to do so; see e.g. Steytler ‘Implementing language rights in court’ (1993) 205. Even if only one language should become the language of record (in violation of the Constitution, as contended here) such terminological development would still be required for purposes of effective translation.

appointed.<sup>109</sup> Language competence should similarly be taken account of in the assignment of cases to judges, prosecutors, etc so that a situation such as the one with which this thesis starts, does not occur again.<sup>110</sup> To prevent balkanisation in the long run, it is essential that legal practitioners should have a working knowledge of at least three official languages. The learning of indigenous languages should be addressed on school level and should continue at higher education level. The dominant languages within a province should in other words form part of the law curriculum at universities.

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<sup>109</sup> See also Cote *The Right to Language Use in South African Criminal Courts* (2005) 53; Lubbe 'Taalregte en die regspraak' (2008) 83; and Malan 'Die gebruik van Afrikaans vir die notuleering van hofverrigtinge gemeet aan demokratiese standaarde' (2003) 51-2.

<sup>110</sup> See also Malan 'Die gebruik van Afrikaans vir die notulering van hofverrigtinge gemeet aan demokratiese standaarde' (2003) 51.

## Chapter 5

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### The Constitution, language and education

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#### 1 Introduction

The right to education is entrenched in various international instruments such as the Universal Declaration of Human Rights (art 26), the International Covenant on Economic, Social and Cultural Rights (art 13), and the Convention on the Rights of the Child (art 28). It is furthermore considered to be an indispensable means of realizing other human rights. In the discussion of international norms in relation to minority languages in chapter 2, we saw that the education system is of central importance in the protection of these languages. In the European Charter for Regional or Minority Languages, for example, states parties undertake -

to promote, by appropriate measures, mutual understanding between all the linguistic groups of the country and in particular the inclusion of respect, understanding and tolerance in relation to regional or minority languages among the objectives of education and training provided within their countries and encouragement of the mass media to pursue the same objective.<sup>1</sup>

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<sup>1</sup> See likewise the Framework Convention for the Protection of National Minorities art 6.



In different countries, the relation between the recognition of official languages and education will necessarily give rise to different legal issues. The issues likely to arise will also depend on the specific provisions of the relevant constitution in relation to education, which will in turn be determined by the peculiar history of the country concerned. Comparison is therefore not always possible or useful in this context.<sup>2</sup> In South Africa the main constitutional issue thus far has been the question of single-medium educational institutions. The relevant constitutional provisions, case law and academic commentary in this respect will be analysed in section 3 below. Another question of importance, but which has not yet become a constitutional issue, is that of mother-tongue instruction. As we saw in chapter 1, what often happens in former colonies is that the colonial language becomes the official language and that this language also becomes the medium of instruction in schools and at university. In South Africa, with its 11 official languages, the danger is likewise that the dominant colonial language (English) will become the only language of instruction.<sup>3</sup> The importance of learning English in the current age of globalisation cannot be overestimated.<sup>4</sup> This must nevertheless take place in a manner which is educationally sound. The argument

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<sup>2</sup> See also the judgments of Mahomed DP and Sachs J in *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) par 15, 86; Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Religious Minorities* (1979) 101.

<sup>3</sup> See De Varenness 'Language rights in South Africa' (2010) 15: 'There is no doubt in my opinion that there is a move towards English as not only the main official language of education and government in South Africa, but also the exclusive one, contrary to the obligations of the Government of South Africa under Sections 6 and 29 of the Constitution.'

<sup>4</sup> See in general Watson K 'Language, education and ethnicity: Whose rights will prevail in an age of globalization?' (2007) 27 *International Journal of Educational Development* 252.

to be presented here, in line with what was said in chapter 2, is that international norms require of states to provide instruction in the mother tongue in as far as is practically possible. These international norms do not only require this form of instruction for purposes of the protection of minority languages, but also because it is generally recognised as sound educational practice. In section 2 of this chapter, a brief analysis will be undertaken of the academic debate surrounding the latter issue. Although this debate goes somewhat beyond strictly legal questions, it cannot be ignored in considering the issue of mother-tongue instruction as a constitutional issue. The section also engages in some comparative analysis, with lessons from India and the United States, which are of value in understanding section 29(2) of the South African Constitution. The issue of independent educational institutions, although no doubt an important one in relation to language rights, has not thus far been extremely controversial in South Africa. It will therefore only be referred to in passing in the discussion that follows.

## **2 Mother-tongue education**

The education policy under apartheid not only sought to distinguish between races, but also between linguistic groups. In the latter respect, mother-tongue education in single-medium institutions was the preferred policy.<sup>5</sup> In 1949 a

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<sup>5</sup> Orman J *Language Policy and Nation-Building in Post-Apartheid South Africa* (2008) Dordrecht: Springer 86; Reagan T 'The politics of linguistic apartheid: language policies in black education in South Africa' (1987) 56 *Journal of Negro Education* 300. The policy, with the overriding concern being the survival of the Afrikaner (Orman 86), did much to promote English as the tool of political resistance (Orman 86, 89). See Woolman S & Fleisch B *The Constitution*

number of missionary schools which provided English language education to black children were forced to close down by virtue of the policy of mother-tongue education. Separate schools were subsequently created for white English and Afrikaans-speaking children, as well as for Indian, Coloured and Black children, the latter being further divided based on their mother tongue. In terms of the Bantu Education Act of 1953, from 1953 until 1976, Black children in general received mother-tongue education until about the 8<sup>th</sup> year at school, with English and Afrikaans being taught as second languages.<sup>6</sup> Thereafter, instruction took place mostly in English.<sup>7</sup> In 1976 this however changed, with English becoming the medium of instruction after only four years of mother tongue education.<sup>8</sup> Educational funding was unequal, with black children being the worst off. Apart from overcrowding caused by the high teacher-learner ratio in black schools, teachers were generally poorly trained, there was a lack of textbooks, and school buildings and facilities were of an inferior nature. Separate higher education facilities were likewise provided for different racial and ethnic/linguistic groups, with Afrikaans and English being the media of instruction. 17 years after apartheid was officially abolished, much of its effects unfortunately still remain.

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*in the Classroom: Law and Education in South Africa 1994-2008* (2009) Pretoria: Pretoria University Law Press 46-49 for a more detailed historical account of this policy.

<sup>6</sup> Heugh K 'The Case against bilingual and multilingual education in South Africa: Laying bare the myths' (2002) 20 *Perspectives in Education* 186.

<sup>7</sup> Orman *Language Policy and Nation-Building in Post-Apartheid South Africa* (2008) 86. The attempt to introduce Afrikaans as medium of instruction in 1976 for half of all subjects taught in black schools (in addition to English), led to the Soweto uprising.

<sup>8</sup> Heugh 'The Case against bilingual and multilingual education in South Africa' (2002) 186.

The principle of mother-tongue education,<sup>9</sup> promoted under apartheid for racist purposes, is nonetheless educationally sound.<sup>10</sup> Both international and domestic experience has shown that mother-tongue instruction provides the best basis for later transition to other languages.<sup>11</sup> Heugh persuasively refutes the argument in favour of English-medium instruction for non-mother-tongue speakers as follows:

In other words, the common sense notion that the earlier and greater the exposure to English coupled with a proportional decrease in the use of the mother tongue will result in better proficiency in English does not hold up to scientific scrutiny. Rather, the less use made of the mother tongue in education, the less likely the student is to perform well across the curriculum and in English. In a multilingual society where a language such as English is highly prized, there is only one viable option and this is bilingual education where adequate linguistic development is foregrounded in the mother tongue whilst the second language is systematically added. If the mother tongue is replaced, the second language will not, in most cases, be adequately learnt and linguistic proficiency in both languages will be compromised.<sup>12</sup>

According to Heugh, most children need between six to eight years before they can successfully start using a second language as medium of instruction.<sup>13</sup> The fact that ‘especially in the early years of formal teaching, mother tongue instruction is the foremost and the most effective medium of imparting

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<sup>9</sup> The ‘mother tongue’ can of course be understood in different ways, e.g. based on origin, competence and identification which can be internal (in terms of which a person defines herself) or external (in terms of which others define one); see also chapter 3. Here it refers to any language in which a learner is competent.

<sup>10</sup> De Varennes *Language, Minorities and Human Rights* (1996) 193-8.

<sup>11</sup> Heugh ‘The Case against bilingual and multilingual education in South Africa’ (2002) 174.

<sup>12</sup> Heugh ‘The Case against bilingual and multilingual education in South Africa’ (2002) 174.

<sup>13</sup> Heugh ‘The Case against bilingual and multilingual education in South Africa’ (2002) 186.

education' has also recently been accepted by the Constitutional Court.<sup>14</sup> De Varenness likewise argues strongly in favour of mother-tongue instruction, in line with what has been said above, and also points out that those who study in their mother tongue 'will stay in school longer, and will have a better chance of acquiring a higher degree of fluency in the official or majority language, especially after at least 8 years of education in their language'.<sup>15</sup> He produces the following graph which shows that the difference in success rate of learners who have their mother tongue as medium of instruction is almost twice as high as those who do not:<sup>16</sup>

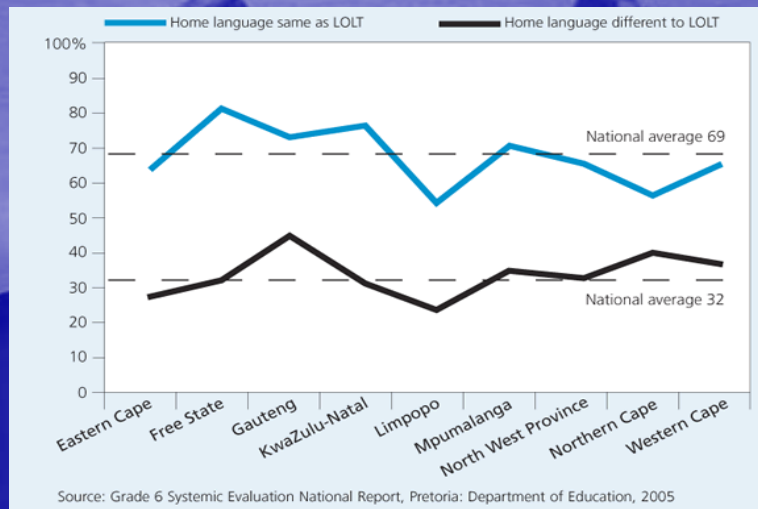
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<sup>14</sup> *Head of Department: Mpumalanga Department of Education, and Others and Hoërskool Ermelo* 2010 (2) SA 415 (CC) par 50.

<sup>15</sup> De Varenness 'Language rights in South Africa' (2010) 16. See also Alexander N 'Language, class and power in post-apartheid South Africa' (2005) available at [http://www.yale.edu/macmillan/apartheid/apartheid\\_part1/alexander.pdf](http://www.yale.edu/macmillan/apartheid/apartheid_part1/alexander.pdf) (accessed on 8 February 2011) 10-11.

<sup>16</sup> The original source could unfortunately not be traced.

South Africa – Grade 6 Language achievement by province: where the home language is the same as the language of learning and teaching (LOLT); and where the home language is different from the LOLT



Source: Grade 6 Systemic Evaluation National Report, Pretoria: Department of Education, 2005  
 • Source: ID21 Insights, Institute of Development Studies, University of Sussex, <http://www.id21.org/insights/insight7-ed05/z-art07fig01.html>

The 2006 UNESCO Education for All Global Monitoring Report likewise accepts that mother-tongue education for the first few years of school has cognitive, psychological and pedagogical advantages.<sup>17</sup> Finally, education in the mother-tongue is undoubtedly the best way to protect and maintain minority languages since this ensures that the minority language is preserved in terms of the Graded Intergenerational Disruption Scale,<sup>18</sup> or as De Varennes puts it, ‘you

<sup>17</sup> EFA Global Monitoring Report 2006, available at <http://unesdoc.unesco.org/images/0014/001416/141639e.pdf> (accessed on 31 July 2011) 203; Heugh K ‘Mother-tongue education is best’ (2005) 3 *HSRC Review* 6.

<sup>18</sup> Strategies to counter language shift are based on the intergenerational disruption scale. The scale consists of various levels: the lower the level the weaker the chances of overturning language shift. The two levels at the extreme ends of the scale are level 1 where the language is used by the state and by the professions and in the media and level 8 where there are a few elderly people speaking the language; see Fishman JA *Reversing Language Shift* (1991) Clevedon: Multilingual Matters.

kill a language if you do not teach it. Education of, but especially in a language, is one important step in trying to prevent this tragedy'.<sup>19</sup>

Educational practice has furthermore demonstrated that where the mother-tongue is established and valued, bilingual education can lead to positive cognitive consequences or 'additive bilingualism'. Additive bilingualism means that the learning of the second language has no adverse effect on the maintenance of the mother tongue. The opposite effect is known as subtractive bilingualism where the acquisition of a second language leads to less efficient mother-tongue acquisition or retention.<sup>20</sup> One of the crucial factors in determining whether additive or subtractive bilingualism will be the result in a multilingual society is whether the children under consideration are from majority or minority language groups. In majority groups, most forms of bilingualism lead to additive bilingualism. Conversely, most forms of bilingualism for minority children result in subtractive bilingualism. The crucial requirement for the prevention of this result is that the learning of the second language must be complementary to the mother-tongue in order to result in additive bilingualism; this requires that the child must have reached a critical 'threshold of proficiency' in the first language before attempting to become bilingual. These studies also show that children benefit more from bilingual than from unilingual study, but that switching from

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<sup>19</sup> De Varennes 'Language rights in South Africa' (2010) 17.

<sup>20</sup> See Snayers JH & Du Plessis LT 'Moedertaalonderrig en tweetalige onderwys – perspektiewe op die voertaalvraagstuk in Suid-Afrikaanse skole' (2006) 46 *Tydskrif vir Geesteswetenskappe* 52-3.

the mother-tongue to the language of choice at too early a stage does not benefit learners.<sup>21</sup>

The South African national language policy is based on additive bilingualism. Paragraph 5 of the Preamble of the Language in Education Policy of 14 July 1997 reads as follows in this regard:

[T]he underlying principle is to maintain home language(s) while providing access to and the effective acquisition of additional language(s). Hence, the Department's position that an additive approach to bilingualism is to be seen as the normal orientation of our language-in-education policy.

The second of the main aims of the Language in Education Policy is furthermore stated to be the pursuit of the 'language policy most supportive of general conceptual growth amongst learners, and hence to establish additive multilingualism as an approach to language in education'.<sup>22</sup> No specific provision is however made for mother-tongue instruction, and the grades in which mother-tongue instruction should be used are not specified. The policy is poorly drafted in this respect:

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<sup>21</sup> Cummins J 'The Cross-Lingual Dimensions of Language Proficiency: Implications for Bilingual Education and the Optimal Age Issue' (1980) 14 (2) *TESOL Quarterly* 175; Heugh K 'Mother-tongue education is best' (2005) 3 *HSRC Review* 6.

<sup>22</sup> See further Smit MH 'Language rights and the best interests of the child' (2008) 71 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 40-1.



All learners shall offer at least one approved language as a subject in Grade 1 and Grade 2. From Grade 3 (Std 1) onwards, all learners shall offer their language of learning and teaching and at least one additional approved language as subjects.<sup>23</sup>

The Language in Education Policy should be read with the 2002 Department of Education Revised national curriculum statement (Schools).<sup>24</sup> In this Statement somewhat more clarity is to be found on the approach to language teaching in schools. It recognises the importance of learners attaining high levels of proficiency in at least two languages as well as the ability to communicate in other languages. It again endorses the additive (or incremental) approach to multilingualism. It notes specifically in this respect that -

[L]earners' home languages should be used for learning and teaching whenever possible. This is particularly important in the Foundation Phase where children learn to read and write. When learners have to make a transition from their home language to an additional language for learning and teaching, careful planning is necessary.

The Revised national curriculum statement in addition provides that learners should learn an African language for at least three years before the end of grade 9. Regarding learning a first additional language (usually English) the statement admirably provides that –

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<sup>23</sup> Smit 'Language rights and the best interest of the child' (2008) 40 reads the policy in this respect generously as saying that in grades one to two the mother tongue of learners will be the medium of instruction and thereafter 'one additional language as a subject shall be offered'. This is a possible construction, although the policy explicitly speaks of 'subjects' (to be) offered rather than media of instruction.

<sup>24</sup> See Gauteng Province 'Department of Education' available at <http://www.education.gpg.gov.za/Curriculum/IntermediatePhase.htm> (accessed 2 June 2011).

The first additional language assumes that learners do not necessarily have any knowledge of the language when they arrive at school. The curriculum starts by developing learners' ability to understand and speak the language. On this foundation, it builds literacy. Learners are able to transfer the literacies they have acquired in their home language to their first additional language. The curriculum provides strong support for those learners who will use their first additional language as a language of learning and teaching. By the end of grade 9, these learners should be able to use their home language and first additional language effectively and with confidence for a variety of purposes including learning (at 17-18).

The statement thus provides that teaching in the home language should continue until at least grade 9.<sup>25</sup> Only in grade 9 will skills in the additional language be developed sufficiently to be used as sole medium of instruction.<sup>26</sup> A second additional language can also be learnt, whether an official language or a foreign language. This is for learners who wish to learn three languages. The policy also seeks to cater for learners who enter a school where the language of instruction is, for them, an additional language (e.g. English):

When learners enter a school where the language of learning and teaching is an additional language for the learner, teachers and other educators should make provision for special assistance and supplementary learning of the additional language, until such time as the learner is able to learn effectively in the language of learning and teaching.

According to Heugh there are however few indications that these policies are being implemented.<sup>27</sup> What appears to happen is that English is becoming more and more important as language of instruction, and that learners with one of the

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<sup>25</sup> Heugh K 'Die prisma vertroebel: taalonderrigbeleid geïnterpreteer in terme van kurrikulumverandering' (2006) 46 *Tydskrif vir Geesteswetenskappe* 66.

<sup>26</sup> Heugh 'Die prisma vertroebel (2006) 66.

<sup>27</sup> Heugh 'Die prisma vertroebel (2006) 67-8.

indigenous languages as mother tongue are assumed to be in the position to cope with English as medium of instruction.

As noted in the introduction to this chapter, the debate in legal circles since 1994 has not been about the constitutionality of the policy of mother-tongue education, but about its twin brother under apartheid: single-medium education.<sup>28</sup> This does not mean that mother-tongue education cannot become a constitutional issue.<sup>29</sup> In chapter 2 it was shown that there is a growing international consensus that states have a duty to provide instruction in the mother tongue where this is demanded by parents.<sup>30</sup> Some of the relevant international instruments in this respect are article 27 of the International Covenant on Civil and Political Rights, the European Charter for Regional or Minority Languages, the Framework Convention for the Protection of National Minorities, and the Hague Recommendations on the Educational Rights of National Minorities. The European Charter, as noted, provides for a range of options which states parties can choose from in relation to the use of minority languages as media of instruction and/or for their study in school, as well as at Universities, for technical and vocational training, as well as for adult and further

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<sup>28</sup> See *infra*.

<sup>29</sup> That it can become such an issue has been acknowledged by the Constitutional Court; see *Ermelo* case par 50.

<sup>30</sup> See also *Cyprus v Turkey*, Application no. 25781/94 European Court of Human Rights, 10 May 2001 where the court held that the Turkish-Cypriot authorities had violated the right to education protected in art 2 of Protocol no 1 under the European Convention. This was because no provision had been made for secondary school facilities using the Greek language as medium of instruction despite the wishes of Greek Cypriot parents living in Northern Cyprus to have their children educated through this medium.

education (art 8). Article 14 of the Framework convention sets out the same rights more briefly as follows:

1. The Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language.
2. In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.
3. Paragraph 2 of this article shall be implemented without prejudice to the learning of the official language or the teaching in this language.

In addition, reference should be made to article 4(3) of the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,<sup>31</sup> as well as the Recommendations of the Human Rights Council in relation to education.<sup>32</sup> Insofar as the state does not provide quality education in the mother tongue and/or fails to implement its own educational policies which provide for mother tongue instruction, these can clearly be

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<sup>31</sup> The article provides as follows: ‘States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.’

<sup>32</sup> Human Rights Council, Tenth Session, 5 March 2009, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.11.Add.1.pdf> (accessed on 1 July 2011): ‘States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue. These measures are most critical in preschool and primary schools, but may extend to subsequent stages of education’ (par 16).

challenged as a violation of section 29(2). Such failure by the state effectively deprives parents of their right of choice in respect of the medium of instruction.

The imposition of mother-tongue instruction can of course also go too far. The Indian experience shows that the excessively eager recognition of the importance of mother-tongue education by the state can potentially come into conflict with the right not to be discriminated against on the basis of language.<sup>33</sup> In the *State of Bombay* decision,<sup>34</sup> section 29(2) of the Indian Constitution was at stake providing the following:

No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

The facts were that a society representing the Anglo-Indian community managed a number of schools in which English was used as medium of instruction. The controversy arose when the state government of Bombay, in an effort to promote mother-tongue education, issued an order prohibiting any child other than from the Anglo-Indian community and those of European descent from being admitted to primary and secondary schools where the medium of instruction was English. The parents of learners who had been refused admission in terms of the order impugned its validity. The Indian Supreme Court found that the order violated section 29(2). The importance of the decision lies in the fact that it recognises

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<sup>33</sup> See s 9(3) SA Constitution. Of further relevance in such a hypothetical case would be s 29(2) which expressly provides for education in the language of choice insofar as public educational institutions are concerned.

<sup>34</sup> *State of Bombay v Bombay Education Society* AIR 1954 SC 561.

that autonomy, specifically the choice of parents relating to the medium of instruction remains important, as also confirmed by section 29(2) of the South African Constitution. The court expressed itself as follows in this respect, quoting from an earlier judgment (at 581):

It will be noticed that while clause (1) protects the language, script or culture of a section of the citizens,<sup>35</sup> clause (2) guarantees the fundamental right of an individual citizen. The right to get admission into any educational institution of the kind mentioned in clause (2) is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens.

Regarding the policy of promoting mother-tongue education underlying the order, the court pointed out that this was no doubt a laudable policy, yet 'its validity has to be judged by the method of its operation and its effect on the fundamental right guaranteed by article 29(2)' (at 583). '[T]he effect of the order' the court held, 'involves an infringement of this fundamental right, and that effect is brought about by denying admission only on the ground of language' (at 584).

The dominance of English in South Africa, as we saw above, has led to many parents choosing to have their children educated through English as medium of instruction rather than the child's mother tongue. English has become the unifying language for the elite, and the promotion of the indigenous languages is

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<sup>35</sup> Section 29(1) provides as follows: '(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.'

often associated with racial ghettoisation.<sup>36</sup> PanSALB research nonetheless shows that only 12% of the public support English as the exclusive medium of education.<sup>37</sup> More than one-third of the public furthermore support exclusive mother tongue instruction.<sup>38</sup> The most popular option, the report concludes ‘is either dual media of instruction (English and mother tongue) or approaches that would ensure that the mother tongue and English are learned equally well’.<sup>39</sup> The reason why children are moved from township schools to model-C schools is thus not because of the medium of instruction, but because of the better quality of teaching in these schools and because of better resources at these schools.<sup>40</sup>

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<sup>36</sup> Alexander N ‘English Unassailable but Unattainable: The Dilemma of Language policy in South African education’ (1999) available at <http://www.eric.ed.gov/PDFS/ED444151.pdf> (accessed 28 July 2011) 17.

<sup>37</sup> PanSALB *Language Use and Language Interaction in South Africa: A National Sociolinguistic Survey* (2000) Pretoria: PanSALB 121.

<sup>38</sup> PanSALB *Language Use and Language Interaction in South Africa* (2000) 121.

<sup>39</sup> PanSALB *Language Use and Language Interaction in South Africa* (2000) 121.

<sup>40</sup> Heugh ‘The case against bilingual and multilingual education in South Africa’ (2002) 184. Heugh also points to the falsity of the belief that the majority of black parents opt for their children to be educated only or mainly in English: in reality the majority of black parents choose the home language as language of instruction at primary school (at 180-2). One should therefore be careful not to equate the wishes of a minority (elite) with that of the majority (at 184). Another false belief is that the medium of instruction in rural and township primary schools is English. According to Heugh, the medium of instruction is usually an indigenous language (at 183).

Both the 1993 and the 1996 Constitutions, however, entrench not the right to mother-tongue education, but to education in the language of choice.<sup>41</sup> This is to be understood within the context of the educational history of South Africa.<sup>42</sup> Section 29(2) of the 1996 Constitution should not be read in isolation, but with reference to the principles of proportionality and substantive equality as set out in chapter 3 as well as the social context, that is, the dominance of English on many levels in South Africa as well as the reality of the poor state of Black schools. Read as such, section 29(2) may be said to bring with it added duties on the part of the government, as the experience in the United States shows. The flow to the US of immigrants before World War II was mostly from Europe, some of whom spoke English and with others speaking other European languages.<sup>43</sup> Thereafter changes to the Immigration Act of 1965 drastically changed the patterns of immigration: whereas previously immigration had rested on the notion of ‘national origins’ (in other words potential immigrants had to be of the same origins as immigrants in the past) America was now open to all who wanted to enter. In particular, legal and illegal immigration from Asia had increased dramatically.<sup>44</sup> In *Lau v Nichols*<sup>45</sup> the consequences of the new immigration policies for education arose for decision. In the San Francisco area

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<sup>41</sup> The relevant part of section 29(2) of the Constitution provides as follows: ‘Everyone has the right to receive education in the official language or languages of their choice in public educational institution where that education is reasonable practicable.’

<sup>42</sup> See *supra*.

<sup>43</sup> White TH *America in Search of Itself: The making of the President 1956-1980* (1982) 429.

<sup>44</sup> In 1830 the Census recorded three Chinese living in the US; in 1970 the Chinese American population was 237 292 out of a total US population of 179.3 million.

<sup>45</sup> 414 U.S. 563, 39 L.Ed. 2d.1 (1974).



there were 2 856 students of Chinese descent who did not speak English, the language of instruction in schools. Some of them (about 1000) received supplemental courses in English, but the majority did not. The claim was that of unequal educational opportunities (compared to the English-speaking majority) and the seeking of an order for this to be remedied in an appropriate way. The matter was brought to court on the basis of the 14<sup>th</sup> Amendment as well as the Civil Rights Act.<sup>46</sup> The Act, in section 610, prohibited discrimination on the ground of ‘race, color or national origin’ in ‘any program or activity receiving Federal financial assistance’. The Court of Appeals had rejected the claim on *laissez faire* grounds: ‘Every student’, it reasoned, ‘brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system’. The Supreme Court restricted itself to the Civil Rights Act and held that a violation of section 601 had taken place. It rejected the reasoning of the Court of Appeals and held that ‘there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education’. The court then held that the matter should be remanded for determination of the appropriate educational relief. The case shows that affirmative measures may be required also in the South African situation where learners opt, for reasons of perceived economic necessity, for instruction in a language other than their mother tongue. Tying in with the above, Heugh notes that -

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<sup>46</sup> Civil Rights Act of 1964, 42 U.S.C.

[t]he false dichotomy of a choice between either English or mother tongue/African languages needs to be set aside once and for all. Bilingual education for each child within a multilingual education policy does not mean a choice between either English or an African language (including Afrikaans). It means both. It means developing the first language and adding a second language in the best possible manner to ensure the successful learning of the second language. Jettisoning the one for the other spells individual and societal disaster for the country. The country's political, economic and social future depends upon the successful education of its youth. If the majority of the youth continue to be failed, the socio-economic differences which existed during apartheid will not change very much. The youth have been promised change and opportunities denied their parents. Their disappointment will inevitably turn to disaffection.<sup>47</sup>

### **3 Single-medium schools**

As noted in the introduction, it is especially the question of single-medium public schools (so-called 'model-C schools') that has thus far been the subject of dispute in South Africa after 1994. As also noted earlier, the existence of these schools is largely a legacy of the policy of apartheid. Section 32 of the 1993 Constitution did not specifically mention single-medium (public) educational institutions.<sup>48</sup> For ease of reference, section 32 is quoted here in full:

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<sup>47</sup> Heugh 'The case against bilingual and multilingual education in South Africa' (2002) 193.

<sup>48</sup> See however s 247(1) of the 1993 Constitution which provides for agreement to be reached between national and provincial governments on the one hand and school governing bodies on the other regarding changes in their rights, powers and functions. Where this proved impossible, section 247(3) provided that these rights, powers and duties could be changed by the government, subject to the provisions of the Constitution. For commentary, see Malherbe EFJ 'Die onderwysbepalings van die 1993 Grondwet' 1995 *TSAR//Journal of South African Law* 11-13; and the *Gauteng Legislature* case par 22-34.

Every person shall have the right-

- (a) to basic education and to equal access to educational institutions;
- (b) to instruction in the language of his or her choice where this is reasonably practicable;  
and
- (c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.

Some commentators read section 32(c) as not related to the setting up of private schools with a common culture, language or religion, but to public schools based on such commonalities.<sup>49</sup> A similar interpretation of section 32 was argued for in the case of *In re: Dispute concerning the constitutionality of certain provisions of the School Education Bill of 1995*.<sup>50</sup> The section was in other words said to mean that ‘every person can demand from the State the right to have established schools based on a common culture, language or religion’ (par 7). In this matter, members of the provincial legislature challenged the constitutionality of the provincial School Education Bill which provided that schools could not use language competence in the admission of students and also provided for limitations on the religious policies of schools. The argument presented was that

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<sup>49</sup> See Malherbe EFJ ‘The language provisions of the 1993 Constitution as applied in Gauteng’ (1995) *TSAR/Journal of South African Law* 354; also Malherbe ‘Die onderwysbepalings van die 1993 Grondwet’ (1995) 4. Contra Basson DA *South Africa’s Interim Constitution: Text and Notes* (1995) Kenwyn: Juta 48; Cachalia A *et al Fundamental rights in the New Constitution: An Overview of the New Constitution and a Commentary of Chapter 3 on Fundamental Rights* (1994) Cape Town: Juta 105; and Du Plessis LM & Corder H *Understanding South Africa’s Transitional Bill of Rights* (1994) Cape Town: Juta 188-9.

<sup>50</sup> 1996 (3) SA 165 (CC).

section 32(c) of the 1993 Constitution had guaranteed the right to establish separate schools dedicated to a particular language (and religion) and that this right had been violated by the provisions of the School Education Bill. The Constitutional Court, per Mahomed DP, however rejected this interpretation of section 32(c) in holding that the subsection only relates to private educational institutions (par 7). Insofar as the Bill did affect the language and religious policies at schools, this was done only in relation to public schools and private schools receiving a state subsidy. The subsection was consequently read by the court as not imposing any obligation on the state to establish or maintain such institutions as mentioned in the section, but as only allowing private individuals to establish such institutions. Sachs J who delivered a separate concurring judgment held that the right to education had to be balanced with the other rights in the Constitution, specifically the right to equality:

The Constitution should be seen as providing a bridge to accomplish in a principled yet emphatic manner the difficult passage from State protection of minority privileges, to State acknowledgement and support of minority rights. The objective should not be to set the principle of equality against that of cultural diversity, but rather to harmonise the two in the interests of both. Democracy in a pluralist society should accordingly not mean the end of cultural diversity, but rather its guarantee, accomplished on the secure bases of justice and equity (par 52).<sup>51</sup>

It is furthermore clear from all the judicial pronouncements in this case that the only relevant provision in relation to the continuing existence of single-medium public schools was section 32(b). Sachs J, whose judgment arguably went

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<sup>51</sup> Sachs J's view of multiculturalism as non-foundational, in comparison with the notion of equality (also in par 52) is however problematic; see Du Plessis & Pretorius 'The structure of the official language clause' (2000) 515.

somewhat broader than was necessary to decide the case, held in this regard that the section did not entrench single-medium schools. It instead opened the door to their abolition:

[T]here is nothing in these principles [i.e. of language equality and of non-diminution] to guarantee the exclusivity of Afrikaans in any school. On the contrary, the promotion of multilingualism, even leaving out the factor of equal access to schools, would encourage the establishment of dual- or multiple-medium schools. Whether or not the Afrikaans language would survive better in isolation rather than, as it were, rubbing shoulders with other languages, would not be a matter of constitutionality but one of policy, on which this Court would not wish to pronounce. Similarly, it would not be for us to say whether denying Afrikaans-speaking children the right to study and play with children of other backgrounds would or would not be to their mutual educational and social detriment or advantage (par 74).<sup>52</sup>

It is clear that the *Gauteng Legislature* case had an important impact on the formulation of section 29 of the 1996 Constitution, specifically insofar as subsections (2) and (3) now clearly deal with respectively public and private

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<sup>52</sup> See also par 83 where Sachs J, with reference to the Convention on the Elimination of all Forms of Racial Discrimination of 1965 expresses the view that the principles contained in this Convention ‘would favour those groups seeking admission to Afrikaans medium schools, rather than the present incumbents in their defensive postures. Any claim of Afrikaans community groups to have the State subsidize what, objectively speaking, are privileges in terms of exclusive access to affluent schools, would therefore be weak. Their argument that the State should anticipate and obviate possible future disadvantage may well be somewhat stronger, but I do not see how the threat of loss of dominance could legally *per se* be regarded as threatened disadvantage’ (par 83, footnote omitted).

educational institutions.<sup>53</sup> This did not however mean the end of controversy about single-medium schools. Section 29(2) provides as follows:

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

- (a) equity;
- (b) practicability; and
- (c) the need to redress the results of past racially discriminatory laws and practices.<sup>54</sup>

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<sup>53</sup> A challenge to s 32 in the *Certification* judgment was unsuccessful (par 79-81). The challengers did not point to any constitutional principle which had been breached. The court nonetheless pointed out that s 29(b) went further than s 32(b) insofar as ‘the various factors set out in NT 29(2)(a)-(c) are the basis on which the State is directed to take positive action to implement the right to receive education in the official language or languages of choice; they impose a positive duty on the State which does not exist under the IC.’

<sup>54</sup> It should be clear that this subsection also applies to tertiary level educational institutions; see in this regard the Language Policy for Higher Education, November 2002 available at <http://www.info.gov.za/otherdocs/2002/langpolicy.pdf> (accessed on 2 August 2011); and Department of Education ‘Development of Indigenous Languages as Mediums of Instruction in Higher Education’ Report compiled by the Ministerial Committee appointed by the Ministry of Education in September 2003, available at <http://www.education.gov.za/LinkClick.aspx?fileticket=VVy05Mi9bJY%3D&tabid=452&mid=1036> (accessed on 1 June 2011). Although clearly important, and controversial (see e.g. Malherbe R ‘n Universiteit se taalbeleid as ’n uitdrukking van grondwetlik-beskermede diversiteit’ 2005 *TSAR/ Journal of South African Law* 708), the discussion in this chapter will not engage with tertiary educational institutions, but will be restricted to educational institutions on the primary and secondary levels.

Before the matter was ‘resolved’ by the Constitutional Court in the *Ermelo* case, commentators expressed different views on the interpretation of section 29(2). It is important to understand the context of this dispute: Because of apartheid there is still a great disparity in resources between schools in the black townships and the former white areas. This has led to an increasing demand for the opening of formerly white schools, both Afrikaans and English, to black students. Especially in Afrikaans schools, this has led to controversy, as the preferred language of instruction of Black students who seek admission to these schools is mostly English, therefore raising the question of the interpretation of section 29(2). Malherbe<sup>55</sup> sees a close link between the first and second parts of section 29:

The fact that subsection 29(2) expressly refers to single-medium institutions means that within a range of possibilities that may also include dual and parallel medium instruction, at least this alternative must always be considered. Whenever they are found to provide the most effective way to fulfil the right to education in one’s preferred language, single-medium institutions should be the first option.

Malherbe, on one reading,<sup>56</sup> appears to privilege single-medium institutions, because of the specific mention thereof in the subsection.<sup>57</sup> Woolman on the

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<sup>55</sup> Malherbe Perspectives in Education at 22; see also Malherbe Rassie ‘A fresh start 1: Education rights in South Africa’ *European Journal for Education Law and Policy* 4 (49-55) 2000; and Malherbe R ‘Education Rights’ in Boezaart T (ed) *Child Law in South Africa* (2009) Cape Town: Juta 410-5.

<sup>56</sup> The reading is that of Woolman S ‘Community rights: Language, culture and religion’ in Woolman, S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2002) Cape Town: Juta 58-58 to 58-59. It could of course be said that Malherbe chooses neither for single-medium instruction here, nor for its alternative.

other hand insists that a strict distinction should be maintained between the right to education in the language of choice on the one hand and the decision as to whether schools should be single-medium. Malherbe is accused of ‘collapsing’ the distinction between the two parts of the subsection and to place insufficient emphasis on the three criteria mention in (a) to (c).<sup>58</sup> According to Woolman, single-medium educational institutions can only be the ‘first option’ if it complies with these three criteria. Woolman’s reading ties in more closely with that of Sachs J in *Ex Parte Gauteng Legislature* and as we will see in more detail below, the Constitutional Court in the *Ermelo* case, although it saw a close link between the two subsections, did not view the second part of the subsection as according any priority to single-medium schools.

Before the Constitutional Court in *Ermelo* decided on the issue of single-medium schools, a number of courts dealt with the issue. To fully understand the issues and the controversy, it is necessary to briefly look at these cases. In the *Middelburg* case,<sup>59</sup> the MEC for Education in the Province had instructed the school concerned, whose language of instruction was Afrikaans, to admit 20 learners, to be instructed in English. The school refused based on its language policy, after which the Department withdrew the powers of admission of the

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<sup>57</sup> See also Visser PJ ‘Education law – Language policy at single-medium schools – Section 29(2) of the Constitution – Irregular interference by provincial education department - *Western Cape Minister of Education v Governing Body of Mikro Primary School*’ (2006) 69 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 334, 340, but see at 341; and see Smit ‘Language rights and the best interests of the child’ (2008) 50.

<sup>58</sup> Woolman ‘Community rights’ (2002) 58-58 to 58-59; see also Woolman S & Bishop M ‘Education’ (2002) 57-57 to 57-58.

<sup>59</sup> *Laerskool Middelburg v Departementshoof, Mpumalanga* 2003 (4) SA 180 (T)



school governing body, and proceeded to register 24 learners at the school, to be taught in English. The school was thus effectively turned into a dual-medium school. These actions of the Department were challenged by the school on review in the High Court. The court, per Bertelsmann J, found the actions of the Department to be in conflict with the regulations issued in terms of the Schools Act 84 of 1996. Space was still available in English and dual medium schools in the area, and according to the regulations (which according to Bertelsmann J provided for the only way in which the language policy of a school could be changed), a change in the status of a school to dual medium, could only take place if there was no space left in schools with the desired medium of instruction (at 169-70). Because of the delay in lodging the application, however, the court decided that it was in the best interests of the children involved that they remain at the school despite the invalidity of the administrative action in question.<sup>60</sup> In the course of his judgment, Bertelsmann J moreover echoed the sentiments expressed by Sachs J in the *Gauteng Legislature* case:

As long as a dual-medium school is properly managed, it can hardly be argued that the conversion of a single-medium public institution to a dual-medium school *per se* detracts from the claim of every cultural group to education in its own official language or its language of choice. The right to a single-medium public educational institution is clearly subordinate to the right which every South African has to education in such an institution and has to give way where there is a clearly proven need to share education facilities with other cultural groups (at 173D-F).<sup>61</sup>

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<sup>60</sup> Section 28(2) of the Constitution provides: 'A child's best interests are of paramount importance in every matter concerning the child.'

<sup>61</sup> Woolman 'Community rights' (2002) 58-64 fn 1 (last par) is incorrect in his critique of the judgment; it does not make the claims which he (Woolman) asserts are made.

This 'sharing' however had to be implemented in accordance with the law (at 173F-175B).

In the case of *Mikro*,<sup>62</sup> after several requests to admit grade one learners to Mikro Primary School had been rebuffed, the Head of the Department of Education in the Western Cape issued a directive to admit 40 learners to the school from January 2005 and to provide them with tuition in English. The instruction was rejected by the school on the ground that Mikro was an Afrikaans single medium school. An appeal by the school to the MEC for Education against the directive was unsuccessful. On the first day that the schools opened in 2005, officials of the department came to the school and registered 21 of the 40 learners. The school then brought an application for the review and setting aside of the relevant actions taken as well as for ancillary relief. The court, per Thring J, pointed out that in terms of section 6(2) of the Schools Act, the school board was entitled to decide on the school's language policy and that the school in this case had taken all the required steps to adopt such a policy. Although the court was non-committal as to the desirability of changing the language policy of single-medium schools, it pointed out that such a change would have a profound effect on the way in which the school operated (at 516). The department, the court held, did not have the authority to simply override the language policy by instructing the school to accept learners who had to be taught in English. The court noted (in line with submissions from the advocate representing the school) that where the department seeks to change a school's policy, it would have to first withdraw the powers of the school's governing body to determine such

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<sup>62</sup> *The Governing Body of Mikro Primary School v The Western Cape Minister of Education* 2005 (3) SA 504 (C).

policy (at 519-520). Section 22 of the Schools Act provides in this respect that the Head of Department may, on reasonable grounds, withdraw a function of a governing body after following certain procedures. The Department had not sought to do this. The precondition for such action was furthermore, as held in the *Middelburg* case, that there should not be other schools in the area where it is possible to accommodate learners and which use the desired medium of instruction. *In casu* there were in fact other schools in the area with English as medium of instruction (at 520-521). The court thus found that the actions of the department were unlawful and ordered inter alia that the children be moved to another school as soon as was reasonably possible.<sup>63</sup> The court placed great emphasis on the need for the educational authorities to comply with the requirements of legality (at 525).

The Supreme Court of Appeal agreed in almost all respects with the judgment of Thring J, when the matter went on appeal.<sup>64</sup> Section 29(2) of the Constitution however took on greater importance in the Supreme Court of Appeal. Streicher JA, for a unanimous court,<sup>65</sup> pointed out that the argument from the Department about the admission of learners to schools and its interpretation of section 29(2) boiled down to the following:

In effect, the first and second appellants contended that s 29(2) of the Constitution should be interpreted to mean that everyone had the right to receive education in the official language of

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<sup>63</sup> The dismissal of the appeal by the MEC was held to be based on an error of law as well as procedurally unfair (at 521-2).

<sup>64</sup> *The Western Cape Minister of Education v The Governing Body of Mikro Primary School* 2006 (1) SA 1 (SCA).

<sup>65</sup> The other judges of appeal were Cameron JA, Brand JA, Lewis JA and Mlamo JA.

his or her choice at each and every public educational institution where this was reasonably practicable. If this were the correct interpretation of s 29(2), it would mean that a group of Afrikaans learners would be entitled to claim to be taught in Afrikaans at an English-medium school immediately adjacent to an Afrikaans-medium school which has vacant capacity, provided they can prove that it would be reasonably practicable to provide education in Afrikaans at that school. So interpreted, since the right in question extends to 'everyone', this would entail that boys have a constitutional right to be educated at a school for girls if reasonably practicable (par 30).

The court rejected this interpretation of section 29(2). The right to receive education in the language of choice where practicable, Streicher JA held, was a right against the state. The Constitution left it to the state to decide which of a variety of options to choose from in giving effect to this right. One of the options open to it was single-medium educational institutions. This in itself indicated that the section did not grant the right to be instructed in the language of one's choice 'at each and every public educational institution subject only to it being reasonably practicable to do so' (par 31). The learners thus had no constitutional right to receive education in English at the Mikro school specifically. Furthermore, in terms of the Schools Act, only the governing body of the school had the power to decide on its language policy. The MEC of a province and the Head of the Department of Education in the province, did not have any powers to do so, save in the case of the establishment of a new school where the HOD would temporarily exercise such powers until a school governing body has been appointed. Streicher JA furthermore disagreed with the judgment of Bertelsmann J in the *Middelburg* case, insofar as he held there that the regulations (Norms and

Standards)<sup>66</sup> provides for a way in which the language policy of a school could be changed. Streicher JA held that the National Minister of Education, although he or she could lay down norms and guidelines, did not have the power to change the policy him or herself, and did not have the power to grant to anyone else the power to do so (par 33). The Norms and Standards furthermore did not purport to give such power to anyone; it simply laid down certain guidelines to be used in determining whether instruction should be provided in a particular language. However, Streicher JA pointed out,

[n]either the Act nor the Norms and Standards purports to provide that, in the event of it being practicable to provide education in a particular language at a particular school, children who wish to be educated in that language are automatically eligible for admission to that school for instruction in that language (par 34).

According to the court, this does not however mean that the Department has no remedy in the event that a governing body unreasonably decides not to change its language policy, for example when there is no other school at which learners can be accommodated. Such a decision of a governing body constitutes administrative action and is therefore subject to judicial review (par 36). Secondly, and here the court agreed with the obiter remarks of Thring J in the court a quo, the functions of the governing body of a school could be withdrawn by the Head of Department in terms of section 22 of the Schools Act.<sup>67</sup> The

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<sup>66</sup> See in this regard the Language in Education Policy of 14 July 1997, available at <http://www.education.gov.za/LinkClick.aspx?fileticket=XpJ7gz4rPT0%3D&tabid=390&mid=1125> (accessed 31 May 2011).

<sup>67</sup> Section 22 reads as follows: ‘Withdrawal of functions from governing bodies  
(1) The Head of Department may, on reasonable grounds, withdraw a function of a governing

HOD can then appoint persons to perform the withdrawn functions in terms of section 25, including the determination of a language policy (par 40).<sup>68</sup> The Department in this case had, as we saw earlier, not made use of any of these provisions and the powers conferred thereby, but attempted to change the language policy by unlawful means (par 43). In regard to the order of the court a quo, the Supreme Court of Appeal simply added that '[t]he placement of the children at another suitable school is to be done taking into account the best interests of the children' (par 59).<sup>69</sup>

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body. (2) The Head of Department may not take action under ss (1) unless he or she has – (a) informed the governing body of his or her intention so to act and the reasons therefor; (b) granted the governing body a reasonable opportunity to make representations to him or her relating to such intention; and (c) given due consideration to any such representations received. (3) In cases of urgency, the Head of Department may act in terms of ss (1) without prior communication to such governing body, if the Head of Department thereafter – (a) furnishes the governing body with reasons for his or her actions; (b) gives the governing body a reasonable opportunity to make representations relating to such actions; and (c) duly considers any such representations received. (4) The Head of Department may for sufficient reasons reverse or suspend his or her action in terms of ss (3). (5) Any person aggrieved by a decision of the Head of Department in terms of this section may appeal against the decision to the Member of the Executive Council.'

<sup>68</sup> Section 25 of the Schools Act provides as follows: '(1) If a governing body has ceased to perform its functions, the Head of Department must appoint sufficient persons to perform those functions for a period not exceeding three months. (2) The Head of Department may extend the period referred to in sub section (1), by further periods not exceeding three months each, but the total period may not exceed one year.'

<sup>69</sup> The education authorities had greater success in the subsequent decision of *Seodin Primary School and Others v MEC of Education, Northern Cape and Others* 2006 (4) BCLR 542 (NC). In this case the MEC had decided to change the language policy of a number of schools from

The interpretation and role of section 22 of the Schools Act in changing single-medium schools to dual medium again came to the fore in the *Ermelo* case.<sup>70</sup> The Head of the Department of Education (HOD) in Mpumalanga had implemented sections 22 and 25 of the Schools Act as proposed by Streicher JA in *Mikro*, when the principal of the school refused to register a group of learners who were to be taught in English, as other schools in the area were full. The HOD thus withdrew the function of the school governing body to determine the school's language policy in terms of section 22 and appointed an interim committee in terms of section 25, which proceeded to change the language policy of the school from Afrikaans to dual medium: English and Afrikaans. The court (consisting of Ngoepe JP, Seriti J and Ranchod AJ) in this case followed the decision of the Supreme Court of Appeal in *Mikro* and held that the decisions in question complied with the requirements of the Schools Act.

On appeal to the Supreme Court of Appeal, a unanimous court (per Snyders JA) reminded the department of what was decided in the *Mikro* case, that is, that the right to education in the language of choice is 'a right against the State and not a

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(Afrikaans) single medium to dual medium, and then proceeded to register learners at these schools, to be taught in English. It appeared that the language policies of the relevant schools had not been approved of by the MEC as was stipulated in the Northern Cape School Education Act (par 28 to 29). The court, despite referring to the *Mikro* case, made no finding as to the illegality of the steps taken by the MEC (in light of the *Mikro* decision), simply holding that the learners would be prejudiced should they be removed from the schools in question.

<sup>70</sup> *High School Ermelo and Another v Head of Department Mpumalanga Department of Education and Others* (3062/2007) [2007] ZAGPHC 232 (17 October 2007).

right against each and every public school'.<sup>71</sup> It furthermore emphasised the need for the department to comply with the principle of legality. In her interpretation of the Schools Act, *Snyders JA* distinguished between the core functions of a governing body (section 20) and further 'non-essential' functions to be allocated to it by the head of the department of education in the province (section 21). Section 22, which provide for the withdrawal of functions, the court now held (thereby reversing the obiter view expressed in *Mikro*) related only to the non-essential functions of the governing body of a school, and not to its core functions. The HOD consequently had no power to suspend the functions of the school governing body to determine the language policy of the school, which was one of the governing body's core functions in terms of section 20. The court justified its decision in this respect as follows:

Language is a sensitive issue. Great care is taken in the Act to establish a governing body that is representative of the community served by a school and to allocate to it the function of determining the language policy. The Act authorises only the governing body to determine the language policy of an existing school, and nobody else. As nobody else is empowered to exercise that function, it is inconceivable that s 22 was intended to give the head of department the power to withdraw that function, albeit on reasonable grounds, and appoint somebody else to perform it, without saying so explicitly (par 21).

Also relevant was the fact that section 22 with its power of withdrawal, followed immediately after section 21 (par 22). The functions withdrawn in terms of section 22 revert to the department and this explains why there is no provision for a replacement committee in section 22 (par 22). Section 25 furthermore only

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<sup>71</sup> *Hoërskool Ermelo & Others v Head, Department of Education, Mpumalanga and Others* 2009 (3) SA 422 (SCA).



found application where a governing body had ceased to perform the functions allocated to it in terms of the Act. The section could thus have no relevance for a matter such as the one before the court where a function had in fact been performed, but the HOD was unhappy with its outcome. The interpretation in *Mikro* effectively enabled an abuse of powers, the court held (par 27). It furthermore made no sense, Snyders JA held, to appoint an interim committee in terms of section 25, when its only task is effectively to change the language policy of the school. The concern by the department that if this interpretation of the Schools Act is adopted it has no remedy at its disposal in the event that a governing body refuses on reasonable grounds to change its language policy, was rejected by Snyders JA, pointing out that the Department can seek the judicial review of such a decision (par 32). The eight learners who had been registered at the school were nonetheless allowed to remain at the school until they had completed their grade 12 studies.

In the Supreme Court of Appeal judgment the focus was almost exclusively on the question of legality,<sup>72</sup> thereby making the constitutional issue of language policy an issue of secondary importance. The Constitutional Court took a different view of the matter, emphasising the need to understand the requirements of the legislation in question and the applicable rules of administrative law, within the broader context of the Constitution. For Moseneke DCJ, speaking for a unanimous court, the issue was not firstly about legality, but about ‘the right to receive education in the official language of one’s choice in a

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<sup>72</sup> Snyders JA started her judgment by noting that ‘[t]his case is not, as at first blush appears, about language policy at schools, a highly emotive issue in the South African context, but rather about the principle of legality and the proper exercise of administrative power.’

public educational institution’ (par 1). For the court it was also important to look at the broader context of the case, which it spelt out in par 2:

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. It is trite that education is the engine of any society. And therefore, an unequal access to education entrenches historical inequity since it perpetuates socio-economic disadvantage.<sup>73</sup>

The Constitution, the court also pointed out, called for the eradication of this inequality through the radical transformation of society, including the education sector. This should also have an effect on the indigenous languages, which, he noted, have faced neglect and have not come to their right at high school level (par 49).

In relation to the interpretation of section 29, the court adopted a contextual approach, pointing to the close link between the first and second parts of the subsection. Regarding the qualification of ‘reasonable practicality’ built into the right to receive education in the official language of one’s choice, the court held that this would depend on the circumstances of each case, taking account of a range of factors such as -

- the availability and accessibility of public schools;
- the enrolment levels at public schools;
- the medium of instruction that the governing body of a school has adopted;

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<sup>73</sup> See also par 45-6.

- the language choices of learners and their parents; and
- the curriculum options that are offered (par 52).<sup>74</sup>

From one perspective, compliance with the requirement laid down in the first part of the subsection would depend upon whether it can be said that ‘the State has taken reasonable and positive measures to make the right to basic education increasingly available and accessible to everyone in a language of choice’ (par 52). From another perspective, should a learner already enjoy the benefit of being taught in his or her language of choice, the learner may not be deprived of this and the right may not be diminished without justification (par 52). The manner in which this right should be given effect to, the court pointed out, is regulated in the second part of the subsection, with single-medium instruction being one of the options. Fairness, feasibility, and the duty to rectify past discrimination, he pointed out, were some of the considerations to be taken account of here (par 53).

A similar kind of contextual approach was adopted in interpreting the Schools Act, taking account of its broader aims as well as the coordination of the different functions to be exercised in terms of the Act. The school-governing body, the court pointed out, has an important role within the broader scope of the Act. It is important to note that it is democratically elected, and that its main function is to look after the interests of the school and its learners. Insofar as the determination of a language policy is concerned, the court noted that -

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<sup>74</sup> The approach adopted by the court to the interpretation of s 29 appears to correspond fully with the principles of proportionality and substantive equality as identified in chapter 2 of this thesis.

[o]rdinarily, the representatives of parents of learners and of the local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that comes with it.

This does not, however, mean that the function to decide on a medium of instruction of a public school is absolute or is the exclusive preserve of the governing body. Nor does it mean that the only relevant consideration in setting a medium of tuition is the exclusive needs or interests of the school and its current learners or their parents (par 57-8).

The importance of the latter paragraph of the judgment needs to be emphasised. The court motivated the need for taking a broader view of the function of determining a language policy with reference to the requirement in the Schools Act that this function is to be exercised ‘subject to the Constitution, [the Schools] Act and any applicable provincial law’. The seemingly superfluous reference to the Constitution, the court held, should be understood as emphasising that ‘the power to fashion a policy on the medium of instruction must be accorded contours that fit into the broader ethos of the Constitution and cognate legislation’ (par 59). This means, the court noted, that the function of determining a language policy, a function which ‘in the first instance’, belongs to a governing body ‘must be understood within the context of the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress’ (par 61). As the phrase ‘in the first instance’ already indicates, the court disagreed with the Supreme Court of Appeal that the determination of a language policy is exclusively the function of a school governing body and that the Head of the Department of Education in a province has no role to play in this

regard.<sup>75</sup> The court more particularly disagreed with the Supreme Court of Appeal's restrictive reading of section 22 of the Schools Act, effectively preferring the SCA's earlier reading in *Mikro* to the effect that the withdrawal power of section 22 related to all the functions exercised by a governing body. There was no indication to be found in the section itself or in the purpose or broader scheme of the Act that section 22 should be read in this restrictive fashion, the Constitutional Court held. The HOD therefore had the power to withdraw the function of determining the language policy of a school, provided that it had to be done on reasonable grounds, in pursuit of a legitimate purpose (par 68) and in a procedurally fair manner (par 73). The reasonableness of such a withdrawal, the court held, would again entail a contextual enquiry, taking account of all the circumstances which motivated the HOD to withdraw the powers:

In this regard, a reviewing court will have to consider carefully the nature of the function, the purpose for which it is revoked in the light of the best interests of actual and potential learners, the views of the governing body and the nature of the power sought to be withdrawn, as well as the likely impact of the withdrawal on the wellbeing of the school, its learners, parents and educators. And all these factors would have to be weighed within the broad contextual framework of the Constitution (par 74).

Returning to the functions of a school governing body and specifically the fiduciary duty it has towards a school, the court pointed out that a school should not be seen as static and insular, but as a dynamic part of an evolving society. A

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<sup>75</sup> For criticism of this reading by the court, see Malherbe R 'Taal in skole veroorsaak nog 'n slag hoofbrekens *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 3 BCLR (KH)' (2010) *TSAR/ Journal of South African Law* 614-7.

school, as a public resource, is consequently to be managed not only in the interests of the current learners and their parents, but in the interests of the broader community within which it is located and in light of the values of the Constitution (par 80). The court nonetheless agreed with the Supreme Court of Appeal in *Ermelo* that section 25 had no application *in casu*. The section clearly applied only in instances where a governing body had become dysfunctional, and was aimed at ensuring that a school could continue to function until a new governing body had been appointed. Where a specific function was withdrawn from a school governing body, this function had to be exercised by the Head of Department for a limited period and with a specific aim in mind. *In casu* the HOD had incorrectly, under the influence of the *Mikro* decision, conflated his powers in terms of sections 22 and 25. His withdrawal of the powers of the school governing body and his appointment of an interim committee were therefore invalid (par 89). The determination of a new language policy by the interim committee was as a result also of no force or effect. The court agreed with the order of the SCA that the learners who had already been registered should be allowed to finish their grade 12 studies at the school. The court was however of the view that the matter called for an exercise of its broader remedial powers in terms of section 172 of the Constitution. The court held that it was indeed necessary for the governing body of the Ermelo High School to reconsider its language policy in light of the considerations pointed to in the court's judgment. More specifically, it had to take account of the interests of the broader community it was located in, as well as of section 6(2) of the Schools Act, section 29(2) of the Constitution and the norms and standards published by the Minister of Education. The governing body had to report back to the court

within a month as to the steps it had taken in reviewing its language policy as well as a copy of the language policy decided on. The Department of Education in the province likewise had to report to the court within a month, setting out the likely number of grade eight learners for the following years as well as the steps it had taken in securing sufficient space for learners to be educated.

The judgment of the Constitutional Court has not been met with universal acclaim. Malherbe<sup>76</sup> and Malan,<sup>77</sup> apart from levelling criticism at the court's interpretation of the relevant constitutional and statutory provisions, in effect also criticise the court (and the educational authorities) of aiming at the eradication of diversity. The latter is a debatable claim. The exposition in chapters 1-4 of this thesis has indeed shown the importance of language diversity, which the Constitution also endorses. This diversity cannot however be achieved when different cultures exist in isolation from each other, as acutely observed by Sachs J in *Gauteng Legislature* (par 74) and Bertelsmann J in *Middelburg*.<sup>78</sup> In chapter 2 it was likewise pointed out that the international recognition of (minority) language rights aims at protecting the identity of minority (language) groups without this leading to their isolation from broader

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<sup>76</sup> Malherbe 'Taal in skole veroorsaak nog 'n slag hoofbrekens (2010) 609.

<sup>77</sup> Malan K 'The Constitution, education authorities and the road ahead for single medium Afrikaans schools' (2010) 50:2 *Tydskrif vir Geesteswetenskappe* 261.

<sup>78</sup> See also Jansen JD 'The ties that bind: Race and restitution in education law and policy in South Africa and the United States of America' (2006) 105 *Yearbook of the National Society for the Study of Education* 222.

society, that is, ‘integration without forced assimilation’.<sup>79</sup> In setting out certain core principles in relation to minority issues in education, the Human Rights Council has for example noted the following:

School policies or practices that, de jure or de facto, segregate students into different groups based on minority status violate the rights of minorities and also rob the entire society of its best opportunity to foster social cohesion and respect for a diversity of views and experiences. Students and societies gain the greatest educational advantage when classrooms have a diversity of students, ethnically, culturally and economically (par 10).<sup>80</sup>

Dual medium and multi-medium schools are perhaps a better way of ensuring that learners are prepared for the demands of a multicultural society. Moreover, the approach favoured by the Constitutional Court is undoubtedly the best way in which to ensure a harmonisation of the constitutional demands of equality and diversity.

It thus appears that, with perhaps a few exceptions in the metropolises, the only option open for those language communities who desire single-medium Afrikaans education for their children, is to set up independent schools as provided for in section 29(3) of the Constitution. Within these institutions it would be possible to retain a degree of autonomy from state regulation, and also to require of learners attending these schools to adhere to the school’s curriculum

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<sup>79</sup> Henrard K The Interrelationship between Individual Human Rights, Minority Rights and the Right to Self-Determination and Its Importance for the Adequate Protection of Linguistic Minorities (September 2001) 1 *The Global Review of Ethnopolitics* 43.

<sup>80</sup> Human Rights Council Tenth Session 5 March 2009 available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.11.Add.1.pdf>.



and policies in relation to, for example, the languages to be used at the school.<sup>81</sup>

Even then, as the Human Rights Council has recently pointed out (2009):

In cases where members of minorities establish their own educational institutions, their right to do so should not be exercised in a manner that prevents them from understanding the culture and language of the national community as a whole and from participating in its activities (par 57).

#### **4 Conclusion**

The debate in relation to one of the matters discussed in this chapter – single-medium educational institutions, has now in a sense been concluded with the decision of the Constitutional Court in *Ermelo*.<sup>82</sup> The contextual approach adopted in this case by the Court bodes well for future cases about language rights. It ties in very closely with the broad, purposive approach in relation to language rights followed by the Canadian Supreme Court. Worthy of note is the requirement laid down in the *Ermelo* case that the consideration of a school's language policy is a matter requiring continual consideration, for purposes of redress, as well as to ensure that the policy complies with the constitutional demands laid down in section 6. Moreover, the court, in line with developments in international law, rejects the view that single medium schools, particularly Afrikaans single-medium schools, are the ideal manner in which to ensure that the Afrikaans language retains its status as one of the official languages. Whilst

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<sup>81</sup> *Wittmann v Deutsche Schulverein*, Pretoria 1998 (4) SA 423 (T); *Gauteng Provincial Legislature* case; Woolman 'Community rights' (2002) 58-54; Woolman & Fleisch *The Constitution in the Classroom* ch 4.

<sup>82</sup> This of course does not mean that all interpretive issues in relation to s 29 have now been resolved.

the maintenance of a collective identity is protected by the constitution, this should not stand in the way of broader societal integration. To fully implement section 6 of the Constitution, it is furthermore required to in some ways go beyond the language in education policy. The latter policy does aim at making multilingualism a defining feature of South African identity, and the curriculum statement, as we saw, suggests that an indigenous language has to be learnt for three years. As Heugh however points out, this is a negligible attempt at achieving multilingualism and does not come close to complying with the requirements of the Constitution.<sup>83</sup>

This brings us back to the first, closely related issue, that of mother-tongue education. The language policy adopted by the education department in promoting multilingualism through mother tongue education, in accordance with the principle of additive bilingualism, is no doubt commendable.<sup>84</sup> This policy, as Alexander points out, especially if one is to implement it at all three levels of education, nevertheless faces serious implementation difficulties, partly because of the legacy of apartheid.<sup>85</sup> As we saw, apartheid led to the closure in the late 1940s of private schools which provided black children with quality education in

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<sup>83</sup> Heugh 'Die prisma vertoebel' (2006) 75 fn 11.

<sup>84</sup> Alexander 'English Unassailable but Unattainable' (1999) 17; Heugh 'The case against bilingual and multilingual education in South Africa' (2002) 173-4.

<sup>85</sup> See in this regard also Parliamentary Monitoring Group 'Language medium in schools: PanSALB recommendations at the Education Portfolio Committee on 20 February 2001', regarding the failure to implement the language in education policy; available at <http://www.pmg.org.za/minutes/20010219-language-medium-schools-pansalb-recommendations> (accessed on 1 June 2011). See also Beukes 'Language policy implementation in South Africa' (2008) 1.

English. Mother tongue education was furthermore used to provide an inferior education to black children. There could hardly be a return to enforced mother-tongue instruction. This does not mean that there is no duty on the government to progressively provide quality education in the mother tongue so as to provide an actual choice to parents as to the language of instruction, which many do not have at present.<sup>86</sup> There are furthermore indications of an unwillingness and/or inability on the side of government to implement its own policies.<sup>87</sup> Various commentators have in this regard with good reason complained about the lack of implementation of the language in education policy.<sup>88</sup> Pressure should be exerted on the government to urgently implement its own policies, through a constitutional challenge, if necessary.<sup>89</sup> Such a challenge could be based on a combination of constitutional provisions, such as section 6(2) of the Constitution, which as we saw places a duty on the state to ‘take practical and positive measures to elevate the status and advance the use of these [the indigenous] languages’; section 9(3) which prohibits discrimination based on

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<sup>86</sup> See also De Varennes ‘Language rights in South Africa’ (2010) 15. It is furthermore especially in the educational field that the non-official languages, specifically the Khoi, Nama and San languages can and should be accommodated.

<sup>87</sup> According to Heugh ‘Die prisma vertoebel’ (2006) 67, the policies are not being implemented and the default position in relation to mother tongue teaching in the indigenous languages is presently only three years.

<sup>88</sup> Alexander ‘Language, class and power in post-apartheid South Africa’ (2005); Heugh ‘The case against bilingual and multilingual education in South Africa’ (2002) 171.

<sup>89</sup> PanSALB likewise has an important role to play in this regard. According to PanSALB’s website (under Services) one of its key objectives is to assist in the implementation of the Language in Education Policy; see <http://www.pansalb.org.za/services.html> (accessed on 1 July 2011).

inter alia language, read with section 9(2), the affirmative action clause; section 10, the right to human dignity (see chapters 1 and 4); section 28(2) which provides for a child's best interests to always be of paramount importance in matters concerning that child; and section 29(2) which provides for education in the language of choice, a choice which has to be a 'real' one.

## **Chapter 6**

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### **Conclusion**

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#### **1 Introduction**

The 1996 Constitution contains a number of provisions that deal specifically with language and rights relating to language. The most important of these is section 6 which recognises 11 languages as official languages. Section 6 also provides for the manner in which it has to be given effect to by the government on all three levels, that is, the national, provincial and local levels. In addition, a number of other provisions of the Constitution relate to language, such as section 9(3) (prohibition against discrimination on the basis of language), section 29 (language in education), section 30 (the right to use the language of choice), section 31 (the right of persons belong to a linguistic community to use their language together with other members of that community), and section 35 (rights of arrested, detained and accused persons). In choosing to recognise 11 official languages in the Constitution, a deliberate preference is expressed in favour of

language diversity and against the 19<sup>th</sup> century ideal of the nation state. Such recognition furthermore carries with it important obligations, also of a financial nature. International law shows that persons belonging to linguistic minorities are entitled not only to protection against discrimination based on the language they speak, that is, formal equality, but also to positive state action in order to ensure their substantive equality in comparison with the majority language, or, in the case of South Africa, of the dominant language(s). This is acknowledged in the Constitution by providing for steps to be taken to enhance the status of specifically the historically marginalised indigenous languages (section 6(2)) as well as for substantive equality (section 9). The choice expressed in the Constitution in relation to languages thus also entails a rejection of the classical liberal concept of state neutrality. Whereas the integration of minority (linguistic) groups into broader society is as a rule encouraged by international instruments, assimilation of minorities against their wishes is prohibited. This stems from the close relationship between language and human dignity as well as between language and identity. The benefit for the 21<sup>st</sup> century state in recognising and promoting the languages of minority groups lies in the prevention of conflict and the obverse: securing peace in the relations between different communities. By granting internal self-determination, the threat of external self-determination or secession can thus be averted. In the last few decades, international law has moreover developed certain common standards in relation to language protection. These relate both to the different levels of government and to its different branches. The state's obligations in relation to education (and the media) likewise feature prominently in international instruments in relation to language.

## **2 International law norms**

International law norms have developed from the selective protection of certain minority (language) groups in the 16<sup>th</sup> century to the universal recognition of the rights of persons belonging to (linguistic) minorities. The provisions of the South African Constitution in relation to international law obliges one to take account of these developments, and to interpret the Constitution as well as ordinary legislation, in harmony with international law. As was mentioned above, international law today provides not only for the formal equality of members of (linguistic) minority groups in relation to the majority, but also for substantive equality. These forms of protection are furthermore available to all, including immigrants, whether long-established or recent, indigenous people, and even groups that are not marginalised. International law norms today however also go further in that they protect minority languages as such. As noted in the introduction above, this stems from a realisation of the inherent value of languages and the danger of extinction which is faced by many languages today. The Constitution in section 6 follows a similar approach in as far as no rights are granted there directly to individuals, but the obligations are imposed in relation to languages themselves. Apart from English, all the other official languages (as well as the languages at serious risk of extinction, that is, the Khoi, Nama and San languages), are spoken only in Southern Africa. Their disappearance in Southern Africa would mean their death, and their protection and promotion is therefore of the utmost importance. Such protection and promotion would obviously hold great benefits for the speakers of these languages as well. The European Charter for Regional or Minority Languages as well as section 6 of the

South African Constitution thus calls for language policies and legislative measures which will in their turn create rights for individuals.

Insofar as the specific protection to be accorded to languages and to persons belonging to minority linguistic groups is concerned, international instruments can be said to lay down the following two principles:

- legislative measures should be clear and sufficiently detailed so as not to grant too wide a discretion to administrative authorities;
- in adopting language policies, states are to be guided by the principles of proportionality and substantive equality.

### **3 The interpretation of the relevant constitutional provisions in relation to language**

The aim of this thesis was to establish the meaning of the language provisions of the constitution, with the main focus on section 6. The international instruments just mentioned, and their interpretation by the appropriate bodies, are of the utmost importance in this respect. The South African Constitutional Court has since its inception adopted a contextual approach to the interpretation of the Constitution as well as to legislation giving effect to the Constitution. This approach also entails taking note of the purpose of a specific provision or of a set of provisions. Such an approach is clearly appropriate in the interpretation of section 6 (and other language provisions of the Constitution) and would prevent a reading which seeks to understand each clause and criterion (such as usage, practicality, expense, regional circumstances, the needs and preferences of the population concerned, equitable treatment, and parity of esteem) separately without taking account of the broader setting of these requirements. This



'broader setting' of course includes the developments sketched above in relation to international law. A contextual approach to the language provisions of the Constitution requires that effect be given to the principles of proportionality and substantive equality, as laid down in international law. It is however important that these principles be applied with sensitivity in this context: application of the principle of proportionality must mean that precisely the weaker and smaller languages should in some respects receive more (that is, strictly speaking, disproportionate) support from the state; and application of the principle of substantive equality means that there should be continuous progression in relation to the development of the historically marginalised (and threatened) indigenous languages, but not necessarily equal treatment in every respect. Each language should thus be viewed as a special case.<sup>1</sup>

#### **4 Implementation on the three levels of government**

An evaluation of the measures thus far taken on the national, provincial and local levels (insofar as data are available) show that there is some recalcitrance on all three levels insofar as converting the provisions of section 6 into actionable rights is concerned. Some commendable steps have nonetheless been taken. On the national level, a language policy has been adopted, but the 2003 South African Languages Bill was abandoned. The Bill was furthermore short on detail and granted wide discretionary powers to administrative authorities in conflict with the principle of legal certainty. As a result of litigation, the Department of Arts and Culture is currently on terms to enact the necessary legislation within a

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<sup>1</sup> See in this respect Woehrling *The European Charter for Regional or Minority Languages* (2005) 97.

two year period. The 2011 Bill is similarly problematic in that it grants wide discretionary powers to each government department in adopting a language policy. It furthermore does not seek to regulate the position in relation to language in parliament or the courts. On the provincial level, a number of provinces (five) have thus far adopted language policies, some at this stage only in draft form (two of the five), and two provinces have enacted language legislation. This lack of progress in most of the nine provinces is in clear violation of the provisions of section 6 of the Constitution. The Western Cape Province is at the forefront in this respect, but even here, it appears that policies and legislation have not as yet been fully implemented. Some of the policies, for example in Gauteng, are furthermore not very detailed and largely leave it to administrative authorities themselves to decide on implementation. The Free State (draft) language policy can be commended for its detail and commitment to multilingualism. The language legislation of the Limpopo Province is in some respects not properly drafted, showing for example contradictions in respect of the languages in which legislation should be enacted. Insofar as local government is concerned, it appears that the languages policies of especially the smaller municipalities are often of an informal nature. Some of the bigger municipalities have however adopted detailed language policies which show a commitment to multilingualism.

## **5 The Pan South African Language Board**

From an analysis of the powers and functions of PanSALB it appears that this body has the potential of playing an important role in ensuring the adoption of language policies as well as their implementation on all three levels of

government. PanSALB is however in need of greater powers to enforce compliance. Attention should be given to this in the envisaged South African Languages Act. To enable PanSALB to properly fulfil their constitutional obligations in relation to the languages in danger of extinction, Statistics South Africa will in future have to provide information in the National Census in relation to the numbers and concentration of the Khoi, Nama and San languages. In municipalities with Nama, San and Khoi language speakers, specific attention should be given to the accommodation of these speakers in the provision of local services. The implementation of section 6 of the Constitution also requires that figures be provided in the National Census in respect of the use of sign language and other non-official languages spoken in South Africa.

## **6 Obligations in respect of the legislature**

The South African parliament currently enacts legislation in English as well as another official language, in the latter respect on a rotational basis. This appears on the face of it to comply with section 6(3)(a) of the Constitution which requires the use of at least two official languages. Parliament also allows the use of any of the official languages in debates and committee meetings, but requires 48 hours' notice when a language other than English will be used. Documentation to parliamentarians is generally available only in English. Parliament's website is only in English. Parliament needs to set the example in respect of multilingualism. Section 6 of the Constitution, read in a broad and purposive manner in light of the principle of legal certainty, a principle derived from the rule of law, which is in turn a founding value of the South African Constitution, requires that legislation must be enacted in all eleven official

languages. For practical reasons, and at least for an initial period, it should suffice if legislation is adopted in English and only subsequent to adoption translated into the other official languages. Insofar as parliamentary debates are concerned, members of parliament should at any time be allowed to use any of the 11 official languages in legislative debates. Translation services should be available at all times into all the official languages. For reasons of practicality, and at least initially, notice periods may have to be imposed in the case of committee meetings where a language other than English is used.

A similar approach should be followed in the provincial legislatures and municipal councils in respect of languages designated as official on these levels. Once specific languages have been designated as official in the province or municipality concerned, legislation should be enacted in all these languages and it should be possible to use all these languages in legislative debates as well as in committee meetings insofar as practicable. Translation services should be available as a matter of course. It is therefore not advisable to designate a multiplicity of languages as official languages if there is no intention to meet with the obligations that go along with such designation. Where multiple languages are used within a province or municipality, it is advisable to draw a distinction between 'official' and 'other provincial' or 'other local' languages, and to accord a different status to the latter languages. Where there are financial or resource difficulties in immediately giving effect to a language policy that recognises more than one official language, provision can furthermore be made for implementation in phases.

## **7 Reconciling differences between different language versions of an enactment**

Section 82 of the Constitution does not contain the same provision relating to the resolution of conflict between different language versions of statutes as found in previous constitutions. It merely states that the signed copy of an Act of Parliament provides conclusive evidence of the provisions of that Act and that it must, after publication, be entrusted to the Constitutional Court for safekeeping. The approach followed by the courts until the coming into effect of the 1996 Constitution, was that both versions could be consulted and that in the case of ambiguity in one version, the other version could be used to clear this up. Use was also made of the highest common factor approach. Only in the case of irreconcilable differences between the two versions, would the court rely on the version that was signed. The practice since 1998 has been for legislation to be enacted in English as well as one alternate official language, on a rotational basis. The English language version of a statute is as a rule signed. In principle, following the present practice, it should still be permissible to refer to the version that was not signed. If the proposal set out above is followed, that is, the enactment of legislation in all 11 official languages, comparison of the different language versions should likewise be possible (depending of course on the language abilities of the lawyers and judges concerned). The 1996 Constitution furthermore does not provide specifically that only one version of a statute may be signed by the president. In light of the provisions of section 6 of the Constitution, it could be argued that the President should sign all the language versions of an enactment. The approach prescribed previously in the case of a conflict between the different language versions of an enactment was no doubt

somewhat arbitrary. As there is no similar provision in the 1996 Constitution, it could be argued that this rule has been abolished and that all signed versions (of which there should be 11) should be equally authoritative.

## **8 Obligations in respect of the executive**

In respect of the executive/administrative arm of government, different functions are at stake in both oral and written form such as internal communication, interdepartmental communication, and external communication with the public. The intended audience of a specific form of communication should play a determining role in determining the language(s) to be used. The Free State language policy is commendable in this regard and can be (partly) relied on as a basis for a general policy on all three levels of government:

- For purposes of internal oral communication, any language which is understood by all participants can be used, and translation services, including sign language should be provided where required.
- Minutes of meetings are to be kept in English for record-keeping purposes.
- For internal written communication within and between departments, English is to be used.
- Where necessary, provision must be made for Braille and large print, where required by officials.
- Officials may draft documents in any of the official languages, and then request translation of that document into English.

- Requests can be made by officials for the translation of documents into any of the official languages.
- For external oral communication with the public, the language of the target audience is to be used, with translation services, including sign language being made available where required.
- Appointments to offices directly dealing with the public should be made, taking account of the language(s) used in the specific area.
- For written communication with the public, the language should be that used by the member of the public.
- In line with the principle of legal certainty, regulations, rules, proclamations and policies which affect the general public must be published in English as well as another official language, to be determined on a rotational basis.<sup>2</sup> Within a reasonable time, such regulations etc. must be published electronically in all the official languages.<sup>3</sup>
- Documents containing essential information to the public, for example in relation to health and good order, and specifically in relation to HIV/AIDS must be published not only in the official languages, but also in other non-official languages spoken widely in the area concerned.
- Official advertisements should be in the language of the target audience.

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<sup>2</sup> As pointed out above, however, rotation is an arbitrary method to use in respect of language use. The policy should thus not be followed in this respect.

<sup>3</sup> The Government Gazette should be made available online free of charge.

- Signage should be in the official languages mostly used in the area concerned.

A particular difficulty arises in relation to notices published in the Government Gazette, specifically on the national level. Similar to delegated legislation, these affect rights, albeit on an individual basis. These Gazettes are sometimes so voluminous that the cost implications would be enormous if translation in all 11 languages is required. It is submitted that the minimum requirement of the Constitution, that is, at least two official languages, English and an alternate official language, should be used in this respect, the other language to be determined by the most likely audience. In provinces the volumes are not as high, and publication in all official provincial languages should take place in principle.

## **9 Obligations in respect of the judiciary**

The Constitution, interpreted in a broad and purposive manner, and with reference to the principles of proportionality and substantive equality, clearly requires that all the official languages become languages of record in court proceedings. The languages that are most widely spoken within a certain province should be the languages of record within the specific province. This would be in line with developments in international law. Distinctions should furthermore be made between the different levels of the court structure and between civil and criminal proceedings.

In as far as criminal proceedings are concerned, section 35(3)(k) provides for the right to a fair trial, and in this respect requires that, as a rule, the language should be the language which the accused understands, even if he or she is not fluent in



that language. Section 35(3)(k) does not however exhaust the rights which an accused has in terms of the Constitution. Section 6 requires more and goes beyond the right to a fair trial. It places a duty on the state to provide for legal proceedings to take place in the chosen language of an accused. This is in line with developments in international law where the right to be heard in the language of choice is starting to develop into an international norm. In Canadian law an accused has the right to be tried by a judge who understands the chosen language of the accused. In as far as appeals and reviews from magistrates' courts are concerned, the make-up of the judiciary in most provinces is such that it is likely that there would be no need for translation up to High Court level.<sup>4</sup> In the High Courts themselves, it should be possible for criminal proceedings to take place in any of the official languages, depending on the province concerned. Language competence should be taken account of in the assignment of cases to judges and prosecutors. It is only if a matter reaches the Supreme Court of Appeal or the Constitutional Court that translation may become necessary in order to ensure that a quorum of judges can decide the case and be able to read the documentation. This will clearly not lead to an increase in costs, but much more likely make translation necessary in fewer instances.

Insofar as civil proceedings are concerned, all the official languages should likewise be used as languages of record. The dominant languages in a specific province should again be determinative of the languages that can be used for this purpose in a specific province. In the appointment of judicial officers, capacity to understand the provincial official languages should play an important role.

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<sup>4</sup> This is difficult to determine exactly because, as far as could be established, no data are available on the language abilities of judges and magistrates in South African courts.

Where parties cannot reach agreement on the language to be used in court proceedings, the party who institutes the proceedings should in principle be able to choose the language of record and translation facilities should be provided by the state where they are required. Parties should of course not be allowed to abuse this process, and should attempt to accommodate the language abilities of the opposing parties. Where it would be unreasonable to proceed in a specific language because of the potential costs involved (for the state), that language should not be used. At the trial stage, the presiding officer should furthermore be able to decide on the language to be used based on what is the most reasonable under the circumstances. Based on the present make-up of the judiciary, it should be possible to follow this approach on magistrates' court level, as well as in the High Courts. Where a matter is taken on appeal to the Supreme Court of Appeal or the Constitutional Court, translation in English would have to take place (at state expense). In the specialised courts, the language of record may have to be restricted to English.

To prevent balkanisation in the long run, it is essential that legal practitioners should have a working knowledge of at least three official languages. The learning of indigenous languages should be addressed on school level and should continue at higher education level. The dominant languages within a province should in other words form part of the law curriculum at universities.

## **10 Obligations in respect of education**

Mother tongue instruction is internationally considered to be the best approach to education. Various international law instruments prescribe the use of mother tongue instruction in respect of minority languages. The language policy adopted

by the education department in promoting multilingualism through mother tongue education, in accordance with the principle of additive bilingualism, is in this respect commendable. This policy nonetheless faces serious implementation difficulties, partly because of the legacy of apartheid. Mother tongue education was under apartheid used to provide an inferior education to black children. Because of the poor state of education in black schools, many parents send their children to formerly white, Indian and Coloured schools where the language of instruction is English. There are furthermore indications of an unwillingness and/or inability on the side of government to implement its own language in education policies. Pressure should be exerted on the government to implement its own policies, through a constitutional challenge, if necessary. Such a challenge could be based on a combination of constitutional provisions, such as section 6(2) of the Constitution, which as we saw places a duty on the state to 'take practical and positive measures to elevate the status and advance the use of these [the indigenous] languages'; section 9(3) which prohibits discrimination based on inter alia language, read with section 9(2), the affirmative action clause; section 10, the right to human dignity; section 28(2) which provides for a child's best interests to always be of paramount importance in matters concerning that child; and section 28(2) which provides for education in the language of choice, a choice which has to be a 'real' one.

The debate in relation to single-medium educational institutions has in a sense been concluded with the decision of the Constitutional Court in the *Ermelo* case. Worthy of note in the judgment of Moseneke DCJ in the *Ermelo* case is that the consideration of a school's language policy is a matter requiring continual consideration, for purposes of redress, as well as to ensure that the policy

complies with the constitutional demands laid down in section 6. The court, in line with developments in international law, moreover rejected the view that single medium schools, particularly Afrikaans single-medium schools, are the ideal manner in which to ensure that the Afrikaans language retains its status as one of the official languages. Whilst the maintenance of a collective identity is protected by the Constitution, this should not stand in the way of broader societal integration. To fully implement section 6 of the Constitution, it is furthermore required to in some ways go beyond the language in education policy, and to require of all learners to learn an indigenous language.

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