There are many reasons for wanting to reform legal language. The most compelling reason is that obscure language can deprive ordinary people of their legal rights. When language is obscure, ordinary people have to consult an expert to learn about their rights. If they are unable to do this, they have no rights. They are at the mercy of whoever claims to know what the language means.

There are accusations from every age that lawyers deliberately use obscure and difficult language.\(^1\) If everyone could understand the law for themselves, no-one would need to consult a lawyer. This paper tries to get behind the suspicions. It looks at the advantages and the disadvantages of plain language reform. Its conclusion is that the constitutional changes that are taking place in South Africa call for changes in the language and style in which statutes are drafted.

**LEGAL AND STATUTORY LANGUAGE OBSCURE?**

All the indications are that ordinary people do find legal language difficult to understand. Goodrich speaks of the 'common social experience of legal regulation as a profoundly alien linguistic practice, as control by means of an archaic, obscure, professionalised and impenetrable language ...'\(^2\) Van den Bergh’s research into how well people understood statutory language showed that many did indeed have difficulty in understanding the passages he used.\(^3\)
For the English language version of the South African statutes it has been possible to test the readability of statutory language on a wider scale. A computer style-checking program processed the nearly 2,500 statutes in force at the end of 1992. The program produced a variety of statistics relating to readability. The full results need detailed analysis in a separate paper. In their present form they certainly suggest that only well-educated South Africans can be expected to understand the language of most statutes. For the many South Africans with few years of schooling the legislation might as well be in Latin as in one of the official languages of the country.

Lawyers are not under any legal duty to use the language of the statutes for their ordinary business. Statutory language and ordinary legal language are closely connected, however. Where a statute provides for a matter directly, a lawyer will usually repeat the language of statute. And even where a statute does not provide for a matter directly, a lawyer writing in that area of the law will often adopt the statutory style. Statutes, after all, carry the authority of parliament. Imperceptibly, unless great care is taken, the language and style of the statutes become a lawyer's language and style.

It has not yet been possible to carry out wide-ranging checks on the language used in judgments, pleadings, contracts, wills and academic writings. Van den Bergh did apply the Flesch reading test to selected legal documents. He found he had to extend the scale to take into account language which was more complex than those who drew up the scale had envisaged.

Random computer sampling suggests that non-statutory legal language will not score much better for readability than the statutes on tests. Obscurity seems to be a feature of all kinds of legal language in South Africa. It is probably easier, however, to begin by dealing with the problem of obscure language in statutes.

THE ADVANTAGES OF OBSCURE LEGAL LANGUAGE

Before looking at the arguments for reforming statutory language we need to understand why obscure language is a recurring feature of law. Obscure language is a recurring feature because it also plays a part in protecting legal rights.
Predictability

Law not only protects rights in the present; it also aims at giving people advance notice of the existence of rights and duties in the future. This allows people to plan their lives in the way that best suits them. To keep the law predictable, courts are reluctant to change the interpretation that an earlier court has given to an expression in a statute. Courts try to freeze the meaning of statutory language so that people can rely on the original interpretation.

Experts in the theory of language say that fixing the meaning of language is something beyond the powers even of parliament and the courts. In practice, however, lawyers have been successful at fixing the meaning of technical legal language. This is probably because legal language deals with a limited range of human activity. The meaning of popular language, however, goes on changing as part of a process that is beyond parliament’s control. As this happens so legal language begins to diverge from popular language. Eventually only the expert understands legal language.

The legal rules for interpreting a statute show the tension between legal language and popular language. A basic rule is that when interpreting a statute a court should take the language of the statute in its ordinary or popular sense. In Beedle v Bowley, for example, De Villiers stressed that the language of statutes is the language of ordinary people. But with the passage of time the meaning of statutory language remains the same while the ordinary meaning of the language changes. Statutory language can acquire a legal meaning at variance with the ordinary meaning. In patent law, for example, the expression ‘true and first inventor’ does not refer to the true and first inventor but to the patent agent. Specialists in patent law may be comfortable with this usage. In Lonrho Ltd v Salisbury Municipality it misled even professional lawyers.

The law does not only embalm words and phrases. Whole passages or sections of a statute that are in themselves far from clear acquire with time a settled meaning. The drafters of new legislation prefer to reproduce the obscure passage rather than try their hand at reformulation. The drafters rely on the courts reading the passage in the same sense as before. Many rules in the law of interpretation of statutes ensure that a passage carries the same meaning from one piece of legislation to another. The rules aim at certainty but make it difficult for the ordinary reader to know what the statute means.
Creating community

Difficult legal language may play a part in holding society together. At a basic level the law keeps society together by subjecting everyone in a society to the same laws. The law is most cohesive, however, when everyone begins to take part in the legal system. When this happens, law takes on some of the features of cricket in the West Indies or rugby in Wales.

It might seem that wide participation in the legal system is more likely if everyone can understand the law. But simplicity is necessary only for entry-level participation. Complex legal language allows for the possibility of different degrees of participation and encourages people to become more expert and more involved.

English land law, for example, used to be considered incomprehensible to foreigners and a challenge even to the English. Yet it survived for generations as a workable system. The complexity of the law presumably expressed the complexity of English social and economic relationships and helped to hold the people concerned together. In a stable society it may be more important that the law should be cohesive than clear.

Another example is the constitution of the United States of America. In its day, the language of the constitution was a model of clarity but it often no longer means what it appears to say. Constitutional convention and Supreme Court interpretation have worked significant changes so that understanding the American constitution is not an easy matter. Yet generations of foreign immigrants built a powerful nation around this constitution, a nation (it may be no coincidence) in which lawyers now make up a high proportion of the population.

Complex legal language may keep a society together in less worthy ways. It may help to deter foreign traders and so give local industry a competitive edge in the home market. And this brings us back to the suspicion that lawyers deliberately keep legal language obscure to protect their position.

A TIME TO CHANGE

It is understandable that lawyers should have their specialised terminology. But lawyers form a community that depends on the wider community. For most lawyers, talking with non-lawyers is as important as talking with each other. And lawyers can talk with non-lawyers only if legal language and ordinary language are not too removed from each
other. Botanists may use botanical language to talk to each other about trees or plants. But in legal conversations there is usually a client who is not a lawyer. And the client wants to understand why the law operates as it does.

The law is not, sometimes tragically, the only way of settling a dispute. If the gulf between legal language and ordinary language becomes too wide the lawyer will not be able to explain why the law is as it is. And if the lawyers cannot explain the client will be tempted to use other means of obtaining justice. Before this happens the convenience of traditional legal language must give way to the requirements of better communication.

**EXAMPLES OF THE REFORM OF LEGAL LANGUAGE**

Language reform is not something new in our legal tradition. But language reform in the past has often led reform in the substantive law. And lawyers, who like to think their business is with substance and not with form, tend to pass over the importance of language reform. For this reason we look again at three well-known turning points in legal history. We will see that language reform played an important part.

**Abolition of legis actio procedure**

In the second century BC the Romans had problems with obscure legal language. Gaius tells us that the law insisted on old-fashioned and inappropriate language in legal pleadings. A litigant who called vines 'vines' rather than 'trees' lost the case.11 The solution was legislation which introduced pleadings in language that reflected the facts of the case (*per concepta verba*). It is commonly held that this change marked the beginning of the growth of Roman law from the law of a small city state to the law of a universal empire. The details of how this took place are complex and need not concern us. But it was the conviction that legal language should reflect ordinary language that began the process. This simple change put Roman law in touch with new ideas and values when it was in danger of doing no more than reflecting a disappearing past.

**Nineteenth-century codifications**

In nineteenth-century continental Europe codification resulted in new legal systems for the new societies that emerged in the wake of the French revolution. Codification involved reform of the substantive law. But codification was also about the reform of legal language. Many codifications,
such as the French and Swiss, took special care to use language the ordinary people would understand. During the preparation of the French Civil Code, for example, Napoleon regularly sat in on proceedings. He influenced some substantive provisions but he also insisted he should be able to understand the language which embodied them. The novelist Stendahl regarded the code as a model of French prose. He is said to have had passages from the code read to him to improve his literary style.

**Huig de Groot and the *Inleiding tot de Hollandsche Rechtsgeleertheyd***

In Holland simpler legal language began in 1631 with Huig de Groot’s *Inleiding tot de Hollandsche Rechtsgeleertheyd*. De Groot was an outstanding legal scholar whose writings in Latin, such as *De Jure belli ac pacis* (1625), earned him an international reputation. The *Inleiding* was probably the first legal work to appear in the Dutch language. De Groot did not mean it to be an original work. He wrote it while he was in prison as an introduction to the law for his children and it was ten years before he published it. Yet the work revolutionised legal scholarship in Holland. It soon replaced the Digest as the basis for legal commentaries and its clear and simple language became the model for a new generation of Dutch legal writing.

**Language reform and legal reform**

To survive and flourish legal systems need a periodic return to the language of ordinary people. This, in its turn, promoted growth in the substantive law. Legislative reform of procedural language in Republican Rome made possible the growth of the *ius honorarium*. The codifications transformed the legal systems of continental Europe. In Holland codification took place under French influence. In South Africa the work of De Groot and his successors made it possible for uncodified Roman-Dutch law to continue to develop until the present day.

These examples show that the reform of legal language does not necessarily depend on legislation or direct administrative intervention. This was the case with the nineteenth-century European codifications. But in Rome legislative change in the language of procedure soon spread to the language of the substantive law. And in Holland a private initiative brought about the necessary reforms. There are different ways of rejuvenating legal language.
CONTEMPORARY CALLS FOR REFORM OF STATUTORY LANGUAGE

The English common law tradition

The call for the reform of statutory language is heard mainly in countries that follow the English common law tradition of statutory drafting. South Africa, once a member of the Commonwealth, has a mixed common law tradition. When it comes to legal language and statutory drafting, however, it follows the English tradition.

In England the last important step towards making legal language easier to understand was in the seventeenth century when parliament and the courts abandoned the use of Latin and French. Those who now want legal language that is easier to understand argue that legal language is overdue for reform.

Aspects of the plain English movement

In England itself there is an organised Plain English Campaign.11 The Plain English Campaign operates on different levels. It supports measures to improve English and ridicules examples of bad language. Recently it has sponsored redrafting in plain English. The Plain English Campaign, however, has no monopoly of its cause. And not everyone who supports the cause would agree with the way the Plain English Campaign operates.

Writers such as George Orwell fear the outcome of misusing language.14 Political leaders and the press manipulate consciousness by manipulating language. In South Africa, for example, the mere title of the Suppression of Communism Act15 led many South Africans to condemn people and political movements that had little in common with communism.

Plain English as part of consumer protection is another aspect of the call for the reform of legal language. There are also government departments who have found that using plain language in circulars and forms saves money.16 This approach to Plain English aims at clarity rather than literary accomplishment. In particular, it has drawn attention to the importance of typographical layout and design when it comes to making documents easier to understand.

Plain English and legal language

For some time now lawyers themselves have been agitating for the reform of legal language. In England there is a Statute Law Society which campaigns for better drafted legislation.
In other countries there have also been efforts to improve statutory language. The most substantial contributions towards promoting plain language in legislation have come from the Law Reform Commission of Victoria, Australia. The Commission claims that it is possible to draft statutes in plain English without any loss of clarity or increase in length.\textsuperscript{17} The Reports of the Commission have provoked discussion in other Commonwealth countries.\textsuperscript{18}

Project 25 of the South African Law Commission also has as its objective 'the establishment of a permanently simplified, coherent and generally accessible statute book'. Unfortunately it seems that the Law Commission has not yet looked into the possibility of making statutory language easier to understand.

**Resistance to plain language legislation**

Resistance to a program of plain language legislation has come from some surprising quarters. In Lon Fuller's classic work *The morality of law*,\textsuperscript{19} the failure of King Rex to make law illustrates in a dramatic way the eight fundamental requirements of law. One of these is that the law should be clear. Yet for Fuller there are limits to making law clear. He accepts the experience of an informant from Poland, a former Minister of Justice, who assured him that 'making the laws readily understandable to the citizen carried a hidden cost in that it rendered their application by the courts more capricious and less predictable'.\textsuperscript{20}

Lord Renton is another distinguished supporter of better legislation. The Report of 1975 that bears his name looked into ways of improving the drafting of statutes.\textsuperscript{21} The Report made many useful proposals that the Westminster Parliament ignored. The Report also considered the suggestion that drafters should abandon the traditional style of legislative drafting and adopt a Plain English approach. The Report was not in favour of a radical use of Plain English.\textsuperscript{22} It opted instead for improvements to the traditional style of drafting so that the certainty that goes with drafting in the traditional forms was not lost.

Finally, some lawyers have expressed reservations whether parliament will be prepared to accept the uncertainty which they claim is implicit in the approach that Victoria Law Reform Commission advocates.\textsuperscript{23}

None of the opponents of Plain English oppose clearer legislation or better drafting. What they reject is the kind of revolution in statutory
language that codification produced in nineteenth-century continental Europe.

CONSTITUTIONAL CHANGE AND THE PLAIN LANGUAGE REVOLUTION

The discussion surrounding plain language drafting seldom raises the constitutional implications of the problem. Yet the present tradition of statutory drafting was the product of a particular constitutional situation. It has to do with the relationship of the courts to parliament. Again, a little legal history may bring out the point.24

Present tradition of legal drafting

The current English tradition of statutory drafting developed after the 'Glorious Revolution' of 1688. Parliament had disposed of the Stuarts with their claims to rule by divine right. It determined never again to put the monarch in a position where he could govern without parliament. When circumstances made it necessary to add to the prerogative powers parliament took care to do this in the narrowest terms. The monarch, for example, was the constitutional commander of the army and the country needed a professional army. But parliament would not allow the monarch a standing army. Each year an Act of parliament was necessary to renew the existence of the army for the following twelve months.

For a time the courts tried to share with parliament in the constitutional victory over the theory of the divine right of kings. The United States of America enshrined Locke's ideas on the 'natural rights of man' in their constitution.25 These were no more than an idealised statement of the principles of the English common law of the time.26 But in England parliament did not want the courts to challenge its supremacy. Parliament began to take the same attitude to the courts as it had initially taken to the monarch. The statute became an instruction into the courts in detailed terms.

The statutory 'bad man'

When statutes were directed to the ordinary person the drafters did not adjust their drafting technique. From doling out powers to a potentially absolutist monarch drafters moved to thinking in terms of restricting the conduct of the potential 'bad man'. The ideal statute was not one that informed an individual of the law but one that prevented that person from escaping the operation of the law. A tradition of professional drafting
began to develop that embodied this attitude. Towards the end of the nineteenth century a distinguished judge put it this way:27

I think my late friend ... made a mistake on the subject, probably because he was not accustomed to use language with that degree of precision which is essential to everyone who has never had, as I have had on many occasions, to draft Acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand: but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand.

To this attitude the courts responded with an equally minute but often unsympathetic style of interpretation.28

**Ideal of modern legislation**

This style of drafting and interpretation ought to be a thing of the past. Modern legislation in democratic countries is not aimed at curtailing either the prerogative powers of the monarch or the discretion of the courts. It is usually passed at the instigation of the executive. And, unless it goes counter to a fundamental common law idea of justice, it will usually be given a sympathetic interpretation by the judiciary. Those responsible for drafting apartheid legislation may have felt their work would encounter a hostile judiciary. Modern drafters can free themselves from the restraints which belong in the past. They should try to express the law in language that ordinary people can understand.

**COMMENTS FOR SOUTH AFRICA**

**Constitutional reform**

South Africa is contemplating major constitutional reform. This is a good time for a major overhaul of legal language. It is probably not necessary to embark on the kind of reform associated with codification. South Africa already has a unified system of law. Codification may not even be possible given the demands which are already being made on the limited legal expertise the country has at its disposal.

A new constitution, however, might well opt for plain language drafting of any future legislation. A bill of rights could give the courts the power to be more critical about the language of legislation. Legislation that the ordinary reader could not understand should not bind.29
It would not be necessary to throw out the settled meanings attaching to existing legislation. But the courts could apply stricter tests for newer legislation. With the passage of time new legislation would replace the old. Meanwhile the new language would be developing something of the precision that existing statutory language claims.

**Official languages**

Official recognition of African languages is unlikely to solve the problem of difficult legal language in South Africa. It is true that most discussion of reform of legal language refers to Plain English. This is only because most of the countries that follow the English common law tradition use the English language. The problem is not with the English language but with legal language. In South Africa Afrikaans is a young language that should not carry the English burden of archaic terms and words encrusted with meanings. Yet indications are that Afrikaans-speaking South Africans find Afrikaans legal documents and statutes equally difficult to understand. It is the underlying style of legal language that appears to cause difficulties. If this style does not change, an increase in the number of official languages will not make South African statutes easier to understand. An African-language version of a statute may be even more difficult to understand than one in English or Afrikaans. The problem is one of plain language, not plain English or plain Afrikaans.

**Educating legal drafters**

There has been talk recently about the composition of the judiciary and membership of a constitutional court. There has also been talk about educating judges in the new constitutional system. Little has been said about educating those who are going to have to draft the legislation in the new South Africa. Drafting is not a simple matter. South Africa has legal drafters who have achieved a high degree of expertise in a particular style of drafting. A new South Africa will need their services as much as it will need the services of the present judiciary. If we expect the drafters to begin to adopt a different style of drafting they will need the opportunity to learn how to do this. The legal profession will also need to come to terms with any new style of drafting.

**Notes**

1 Accusations to this effect go back as far as Cicero *Pro Murena* xii (26).

I am grateful to Chris Merritt and the staff at Jutastat who worked hard to make the survey possible.


Op cit., page 7.


Beedle & Co. v Bowley 12 SC 401.


See Cant, S. 'Legalese' 1991 (21), Businessman's Law 73 and 107.

Gaius, Institutes 4.11, 30.


Act 44 of 1950.

Administrative Forms in Government 1982 Cmnd 8504 introduced a policy of plain language for government forms and circulars in Britain. There are estimates that this policy saved many millions of pounds.


Page 45.

The preparation of legislation. Report of a Committee appointed by the Lord President of the Council (Renton Report), presented May 1975, Cmnd 6053.


Stephen J. in *In re Castioni* [1891] 1QB 149 at 165.


To some degree, this is already accepted with respect to subsidiary legislation. Under a bill of rights it may be possible to extend this approach to Parliamentary legislation. See Aigler, Ralph W., 'Legislation in vague or general terms' 21 (1923), *Michigan LR* 831; 'Note: The Void-for-Vagueness Doctrine in the Supreme Court' 109 (1960) *U of Pennsylvania LR* 67.

After independence, Zimbabwe was aware of and attempted to tackle the problem of statutory drafting. Seidman, Robert B., 'How a bill became a law in Zimbabwe: on the problem of transforming the colonial state' 53 (1982), *Africa* 56; Makamure, Kempton, 'The Diploma in Legislative Drafting at the University of Zimbabwe: an experience from the New Commonwealth' [1985] *Stat LR* 21.
III

LANGUAGE RIGHTS AND HUMAN RIGHTS
The language of negotiation, and of a post-apartheid constitution: the choice between expressivism/nihilism and formalism/determinism as language law and legal theoretical frameworks

N. J. C. van den Bergh

‘Lewis – that is your real name, isn’t it?’

‘You heard Bellingford call me Lewis. He’s known me since university days.’

‘I can’t say that I cared for him that much,’ Hanna said. ‘What was he like then?’

‘What, at Oxford?’ Lewis answered carefully. ‘I didn’t see much of him. He worked very hard at social connections.’

‘That’s an English way of saying that he was a creep, isn’t it?’

‘I suppose it is.’
'No wonder Americans think you people are so crazy. You use language like a secret code. Why can't you just say what you really mean?'

Lewis smiled. 'We live in a tiny, overcrowded island with the most intricate class-system in the world. Constant plain-speaking leads to confrontation. Real English is the polite, evasive speech that most people use in everyday life.'

'That is probably why there has been no real confrontation in Britain,' Hanna said.

'We have had our share,' Lewis said. 'Our strikes and our riots.'

Hanna shrugged. 'Not like the French. When they have a riot there is a lot of blood on the streets.'

Lewis tapped his case with the proofs in it. 'We cut off a king’s head once. That was hardly an act of reconciliation.' (Michael Molloy, *The black dwarf*, pp. 83–84 Coronet Books, 1985.)

Every civilisation or human grouping, unified by its own language and traditions and rallying around its own preferred concepts and symbols, must have had to face, at one time or another, similar problems in relation to the relevance of thought to word. But what is clear from the records is that the integrity of the thinking process, and therefore also the integrity of the culture itself, is greatly dependent upon the careful use of words (Bozeman 1971:4).

**Proposition 1**

The views on the role of language expounded here are based on two diametrically opposed legal theoretical approaches, namely Singer’s nihilism/irrationalism as the most extreme point of the Critical Legal Studies movement on the one hand, and the existing/traditional legal theories as accepted by Bozeman (1971) on the other. The semiotic contribution of Tomaselli (Lous & Tomaselli 1991; Tomaselli & Shepperson 1991; Tomaselli, Louw & Tomaselli 1986) (as it rests on the historical materialism of Volosinov) is also involved. Furthermore, the eclectic approach followed here flows from the realistic utopianism of De Jouvenel, Bloch-Laine and Sears (Manuel 1967; Bloch-Laine 1967:201–218; De Jouvenel; Sears 1967:137–149; Ulam 1967:116–132; Van den Bergh 1982).
Proposition 2

A philosophical problem is the 'product of the unconscious adoption of assumptions built into the vocabulary in which the problem [is] stated - assumptions which [must] be questioned before the problem itself [can be] taken seriously' (Singer 1984:7, quoting Rorty).

The thesis in this argument is that the Codesa debate, an exchange of views between two traditional enemies, will achieve nothing as long as the participants continue to work within the traditional legal theoretical approach and the existing Western mindset (which is formed within and by a particular idiom), and that only if the Codesa participants adopt an expressivistic legal theoretical approach and break out of the Western mindset, will the Great Indaba at Codesa eventually lead to pragmatic and viable social institutions. A 'new type of constitution' born from a Codesa, and which aims at a realistic utopianism, will incorporate the goals, striving and ideals of all the citizens of the 'new South Africa'.

Old antagonists are sitting down together and working out how we can all live together as equals in this country (Nelson Mandela, *Sunday Times*, 8 March 1992).

Without again spelling out the underlying theory, we can accept that language is the loom on which, in which, through which and with which we weave our whole structured and therefore comprehensible (and sometimes also our chaotic and incomprehensible) reality. (It goes without saying that 'our reality' includes all social structures and institutions.) It is then also the semiotic web of our reality and existence, the interpenetration of the psyche, the material and the historical context. The sign/symbol (which is both subjective and objective) is the junction where the psyche (the subject, consciousness) and the object (society) cross (Tomasel-li).

Proposition 3

The traditional legal theories create by means of words and terms a so-called rationality, a holographic shadow reality in which it appears as if (at least) our legal reality is an objective, neutral, established and establishable reality structure in which values and norms are likewise included as objective, neutral, established and establishable entities based on the rational. This holographic reality is projected and built up in and by terms and words and an idiom that endeavours to confirm and actualise the illusion's existence.
... legal reasoning is a way of simultaneously *articulating* and *masking* political and moral commitment (Singer 1984:6, my italics).

A conscious manipulation of terms is used to distort the projection repeatedly.

For Volosinov, signs and meaning are inherently dialectically (dia-logically) fluid. Meanings are not fixed. They are dynamic and may even be contradictory. In South Africa, for example, the meanings of specific signs are continually shifting and being shifted. Three basic processes can be identified. The first is by means of semantic engineering. By excluding, for example, the apostrophe from 'people's' (as in 'peoples'), the state’s language planners encoded the idea of 'nations', 'races', and 'genetic units' connected to hereditary 'homelands'. Thus, when state officials talk about 'people's', they intend foreigners to understand this use in conventional terms. This is necessary to convince the world that 'apartheid is dead'.

But the racist sub-text is understood, intuitively and sometimes explicitly, by all South Africans.

Wilful co-option of counter-hegemonic terms that have become troublesome to the existing order occurs. Prime examples include the government/capital alliance's attempts to use for their own purposes Mass Democratic Movement terms such as 'non-racial' and 'community'. The movement encoded into 'non-racial' a content that assumed a transformed society, not just one without racism. In contrast, until early 1990 the government meant a class-based multi-racialism where 'groups' (i.e. 'races') were permitted to integrate in the workplace, in leisure and some living spaces, but not in state schools, white living spaces, state health facilities, and so on. The racially integrated areas and activities were administered by 'general affairs' bureaucrats, while the segregated areas and activities came under the 'own affairs' administrations of the 'white', 'coloured' and 'Indian' Houses within the Tricameral Parliament and the bantustans. This political structure remained in place even after the government had announced the desegregation of these facilities in mid-1990. 'Own affairs' and 'general affairs' were terms engineered to deflect attention away from the previous racist terminologies of earlier white governments, for example Department of Bantu Affairs, and the earlier Native Affairs. In terms of the discursive logic popularised by the NP government after February 1990, the shift in discourse will have to be complemented with the dismantling of 'own' and 'general' affairs departments within the state. By September 1990, however, this bureaucratic manifestation had yet to bow to the change in ideological discourse.
'Community' was another word for 'apartheid' as the state's definition statistically segregated 'communities' in terms of 'race', language and ethnicity, irrespective of geographical, cultural or class differences. So, for example, we have in state discourse the 'black', 'Indian', 'coloured' and 'white' communities, each with corresponding specific and separate political structures. Advertising discourse thus targets markets based on these categories, ignoring class and income disparities and therefore potential sales of the products advertised.

'Natural mutations' occur as material conditions change. 'Nationalist', for instance, is moving from meaning white Afrikaner-inclusiveness to a white-inclusive phenomenon (including English speakers who on the whole vote for the liberal opposition).

Societies in conflict are marked by struggle between different discourses. Where governments try to rule through a balance of coercion and consent, the media and language become crucial in the job of ideological regulation.

Dressed up in the avant garde liberal vernacular of democracy, the State President and cabinet ministers now talk of negotiation, minority rights, free enterprise, devolution of power, freedom, the right to own property, deregulation, privatisation, and so on in the face of its actions to the contrary. By colonising liberal discourse, the state had hoped to render apartheid structures invisible through introducing a new set of terms in conjunction with certain legislative rearrangements.

Clearly, a process of relexification is at work here. As each term takes on prejorative overtones, new 'cleansed' terminology is engineered to replace it. In the example of apartheid, euphemism fulfils two associated functions: the need to dissociate the previous term from negative connotations (separate development for baasskap (white supremacy); plural relations for apartheid), and the need to reinforce/manufacture positive connotations (separate development; separate freedoms). The purpose of this relexification is to conceal the inherent contradictions subsumed in the term and, by so doing, obscure the relations of power and domination. This is done by minimising the negative aspects. The rate at which relexification has taken place since 1976 is indexical of the seriousness of the crisis of legitimacy facing the state.

Relexification is one way of redefining the ideological ground. The same effect can be achieved by syntactical methods, in which the negative connotations of a term are exercised by simply omitting, rather than backgrounding them.
By continually substituting new words and obscured contexts for apartheid, the government hoped to determine the preferred readings of different audiences: insiders who, as with the psychologist's inkblot, would see what they wanted to see.

Each time the State President addresses a public or televisual audience, he is struggling to find a code in which his preferred meaning will be the dominant, most frequently decoded, one. Detractors on both sides of the ideological spectrum have penetrated the naturalness of the code and have deconstructed the common sense on which it is based. The contradictions are pinprick sharp, and language has become an increasingly important site of struggle.

The appearance of the holographic reality can be undone by simply negating the working of the terms, words and the idiom in which it is projected and built up, and to see it for what it actually is - a mere illusion.

Legal theory should 'edify', that is, it should 'help ... readers, or society as a whole, break free from outworn vocabularies and attitudes, rather than ... provide 'grounding for the intuitions and customs of the present' (Singer 1984:8, quoting Rorty).

The illusion of the quasi-reality in which quasi-values and quasi-norms result from a so-called rational argument, and in which a so-called rational consensus can be obtained, must be replaced by the real reality in which the true values and norms (as created by and incorporated in other terms and words and as they issue from the pre-rational) are identified and caught up by and in a person-to-person dialogue (in which the yearning for a rational consensus has no place since rational consensus is likewise hazy and nebulous); it once again takes place in language in which the real values find expression. Thus: an expressivistic event. This is the essence of Singer's view.

Rather, our views of what we should do are that result of experience, emotion, and conversation. This conversation occurs in a social and historical context. The conversation will continue as long as human beings live in a society that permits them to talk freely with each other. And so long as the conversation continues, we will reconsider and sometimes revise our beliefs (Singer 1984:31).

**Proposition 4**

Every civilisation is woven in the loom of language, and uses its own and unique weaving thread, such as thought patterns, values, norms, sociocultural structures and institutions.
... in the final analysis cultures are different because they are associated with different modes of thought. In fact, it even appears that the very meaning of the word 'thinking' is likely to vary from one cultural tradition to the next. The successive generations of any given society will be inclined to think in traditionally preferred grooves, to congregate around certain constant, change-resistant themes, and to rebut, whether intentionally or unconsciously, contrary ideas intruding from without (Bozeman 1971:14).

The garb of Western civilisation, woven in an industrial and technological environment, differs fundamentally from the African garb in which industry, religion, values, myths and symbols are integrated (including the legal system and the theory behind it), resulting in a totally different texture and cut. The basic characteristics of Western civilisation are briefly as follows: it is a written civilisation in which a vision of the future is built into an abstract time dimension, and in which the individual as the smallest and most basic (contracting) unit is singled out (as testified to by the putting into writing of, for example, human rights), and in which conflict is handled in juridically determined procedures, with the accent on the solution.

... the language of modern politics has certainly been borrowed from the West, yet some of its most significant ideas cannot be readily rendered in the face of culturally different realities (Bozeman 1971:26).

... the Occidental political order evolved into a pluralistic society of equal sovereign states, all in substantial agreement on certain normative values, among which the following were the most important ... Peace ... Power ... Unity ... Understanding ... Diplomacy ... honesty ... good faith. Furthermore, the entire vocabulary of internationally significant values was commonly rendered in the language of law (Bozeman 1971:46).

The basic characteristics of African civilisation are briefly as follows: it is an oral civilisation which, in terms of time, exists in the here and now, and in which the individual is seen as a component in the group-unit, which serves as the smallest and most basic unit. Written human rights documents are consequently irrelevant. Conflict management takes place in a way in which the procedural aspect is more important than the content. The law is not accepted as the most important framework, and groups of people are held together by religion, etiquette, the stabilising effect of war and conflict, and the superior wisdom that is ascribed to selected persons. Westernisation does not lead to radical changes in in-
digienous societies. Indigenous norms, customs and values remain the 'controlling frames of organisational reference', since Africa has an 'ancient and remarkably resilient culture world'. Political freedom (as experienced in South Africa today) that is manifested in independence, activates traditional views and institutions. Imported Western forms/structures/values cannot accommodate this newly liberated African spirit.

The meanings carried by law and organisation within the small, ethnically and linguistically unified community stipulate enmity and suspicion in intercommunity relations. Wars, feuds, raids, and other types of conflict has thus been endemic in this continent; in fact in the African world they are accepted as fixed institutions and organising principles in their own right. European ideas of unity and peace through law, or of federalism within a constitutional framework – all the outgrowth of a long experience with the territorially conceived state and contractualism in international relations – are thus fundamentally alien to Negro Africa (Bozeman 1971:111–112, my italics).

Essential African values (as well as legal values), which form the only suitable basis for future African societies, are consequently being rediscovered and developed. The cultural identity of the inhabitants of Africa is embodied in a complex, non-verbal symbolism and mythology, which ensures the functioning of all politically significant institutions. Because the spoken word (and not the written word) is the method of action, and because the immediate personal 'encounter' takes place in speech, a future-directed way of thinking (which is so essential for Western institutions such as the law and political organisations) is not easily accommodated in an African way of thinking. Constitutions that are essentially language-based and written political mechanisms do not work in Africa.

... in the traditional order the accent was on the group as basic juridical unit, and that modern Ghanaian developments do not substantially detract from this commitment to social collectivism. Although the individual person is officially recognised today as the carrier of rights and responsibilities, he continues to stress his basic traditional obligation, namely, to support and assist members of his extended family or his village. Constitutional bills of right, assuring the individual of his powers and duties as either an autonomous human being or a citizen, have therefore no organic connection with traditional African modes of political organisation (Bozeman 1971:96, quoting Asante, my italics).
The African way of thinking is realised rather in reference frameworks of kinship and religion that make their influence felt in one-party states. Because of the absence of the contract idea, the basis of constitutionalism and bills of human rights are not given their due. The group and its solidarity eliminates any view about individualism (as found in bills of human rights). Political and social institutions are determined in and by the shared religious heritage of Africa and tribal affinities and organisation. Since individual freedoms and the concept of 'rule of law' are alien, and legislations and constitutions do not have the same effect as they do in Europe, Western institutions cannot properly take root in Africa.

All areas of African life are today encompassed in legal categories, some suggested by English law, civil law, Roman-Dutch law, Hindu law and Islamic law, others newly fashioned in response to social, economic and political factors peculiar to African conditions. After surveying the present state of the law in formerly British territories, a rule of law 'has not fared well' in the face of preventive detention acts and suspensions of bills of rights. Challenged everywhere by the executive power as expressed in the army, the police, and above all the ruling personality in the state, viewed in many circles either as a legacy of colonialism or as an ineffective device, law appears fundamentally uncongenial where a traditional respect for individual liberties is lacking, or where it is not understood, as the uncompromising anti-force to violence (Bozeman 1971:103–104).

Indeed, in the African scheme peace and war rank much lower in the list of priorities that Mazrui calls 'human rights at large', meaning the rights of groups rather than of individuals. South Africa's domestic policy of apartheid is thus generally viewed in African circles as a much more serious assault on human liberty than, for example, China's genocide in Tibet (Bozeman 1971:120, my italics).

Biological patriotism and ethnic particularism are the primary structuring principle. The resolution of conflict takes place through talking, not through the law. It takes place through persuasion, through language (speech). Because of the dependence on the spoken word, the ritual/form in which conflict resolution takes place is more important than the decision/outcome.

Colonial forces have folded Africa in Western garb, but the dress, which never really fitted, has been rejected and put to the torch by the rising urge for freedom, and the African dress, which all the while was worn as an undergarment, took its place as the outergarment in the post-colonial period. The Western dress is inappropriate, unacceptable
and useless in Africa; the chosen values, words and meanings, the political and constitutional are too different.

What we are witnessing today, then, are multiple attempts, some quite deliberate, other involuntary, to transform the core concepts of the United Nations Charter and the general Occidental vocabulary of law and political organisation so that these may come to stand for the preferred African form of identity ... the Kenyan scholar Ali Mazrui remarks that the Anglo-Saxon liberal idiom may well continue to play a part in African diplomatic discourse, but that affinities between words and the ideas covered by these words are becoming increasingly deceptive. Terms like self-determination, sovereignty, and ministerial responsibility, are certainly still in use, he writes, but the constitutional language is being rapidly outdistanced by contrary political developments with which only pigmentational self-determination and sovereignty make any sense (Bozeman 1971:119-120).

... certain alien words and concepts have been proven increasingly useful as solid yet mobile platforms upon which to solidify acquired positions and from which to project desired objectives. Thus it bears remembering that modern African societies derived their new identities as states from the original meanings with which the West has invested the words ‘self-determination’ and ‘sovereignty’ ... these concepts have forfeited their utility value in Africa ... Yet this demise of meanings has not been permitted to dislodge the words themselves, as Ali Mazrui convincingly shows. Having proved their potency once, they are now being ‘re-tooled’ to stand for other things, of the opposites of the meanings they carried before (Bozeman 1971:24).

**Proposition 5**

President Kenneth Kaunda, addressing an audience in South Africa, blamed Africa’s woes on ‘economic and political systems forced on them by the West’ (*Sunday Times*, 1 March 1992).

South Africa is currently in the middle of the liberation reality of the majority of its inhabitants. The holographic quasi-reality with its Western political and constitutional institutions is unworkable in Africa (Bozeman) and in itself an illusion (Singer).

Western leaders are holding fast to the illusion that their own vocabularies and values in the sphere of politically significant behavior and organisation are still meaningful in the rest of the world. Acquies-
ring in short-lived semantic victories and the establishment of pseudo-orders, they are programmatically ignoring a truth richly documented in history and society: namely that political systems are, in the final analysis, carried and informed by substratal cultural forces...

The swift devaluation of that part of the Occidental vocabulary for which worldwide applicability has been claimed suggests that we have relied and are relying much too heavily still upon the wealth of universals that distinguish Western science, Western philosophy, and Western political thinking from non-Western systems of thought. Obsessed with the task of creating an egalitarian, world-spanning conceptual order, reluctant to face up to natural diversity and disorder in human affairs, we have tended to force our preferred structures and typologies upon institutions and modes of thinking which... may well not have any such structures at all, and which may not be capable of being analysed by means of this kind of logical machinery (Bozeman 1971:29-30, quoting Richards, my italics).

Codesa's (or whatever negotiating body there may be) problem is therefore many-sided: the validity and reality of the values and norms as they are embodied in the sociocultural institutions are called into question (Singer), as well as the workability of these (e.g. political, constitutional and legal) institutions in our African landscape (Bozeman). In addition, the achievement of rational consensus is merely a dream. Besides all this, the conflict management mechanisms of Africa differ from those of the West.

The alternative to traditional legal theory, then, is to view legal theory as expressive rather than determinative.

Legal theory cannot tell us what to value, but it can help us (judges, scholars, citizens) make choices by helping us to articulate what we value (Singer 1984:62-63).

Rational consensus is the most common decision procedure that traditional legal theorists contend provides an objective foundation for legal rules. Rational consensus does not assume merely that it is possible for intelligent people to agree on important moral and political issues if people think carefully about them; it assumes that rational agreement is the ultimate source of those values or is the foundation on which they rest. It assumes not only that if reasonable people talk long enough they will agree but that reason will generate an accurate picture of our society's rational consensus (Singer 1984:35-36).
The challenge facing the Codesa participants is to weave a coat of many colours for South Africa on an expressivistic language loom, with a cut that will fit South Africa as a whole. A clear distinction will have to be made between the idiom that governs the value references, and the idiom that is used only for political rhetoric or comfort. The latter is the idiom in which people can be at cross-purposes because of the vagueness of the terms, but which nevertheless creates an illusion of consensus.

Traditional theorists have reified the idea of rational consensus by treating it as a basis for what we do, as a source of answers, as a generator of outcomes. But consensus, if it exists, is not something that just happens to be there, that we could describe accurately. It must be created, and the work of creating it is the work and play of daily life, of living, contending, sharing, and being with other people. Like law, consensus must be made, not found.

To know – in the tangle of separate idioms found within one and the same society – just which vocabulary supplies the governing value references and which, on the other hand, is preferred only for reasons of rhetoric or expediency; to discern which grafts are likely to be rejected and which, by contrast, are fit to be accommodated in some form or another – these and similar questions are of major significance, which require answers if the general goal of order and understanding in international communications is ever to be approximated (Bozeman 1971:18-19).

The appearance of objectivity is generated by combining two assumptions: intersubjectivity and logical technique. To appear intersubjectively valid, the first principles of legal reasoning are made sufficiently vague so that it will appear that there is, or should be, general agreement about their validity. No one is against liberty, fairness, efficiency, or equality. The generality, ambiguity, and impersonality of these concepts allow enemies to appear to agree. These concepts are further removed from specific outcomes by a process of legal reasoning that itself appears impersonal and logical rather than controversial and ideological. This process may take the form of balancing tests, social contract theories, or economic analysis. Both the first principles and the decision procedure appear to be removed from the specific outcomes and unrelated to them in any obvious, direct way. To assume that this method justifies legal rules is therefore to assume that our intuitions have no independent validity (Singer 1984:31, my italics).

Expression will have to be given to values, ideals, needs and human realities in terms other than the terms of the rhetorical-political idiom of the quasi-reality, and without endeavouring to achieve national consen-
A solution can be found only in universal human terms (i.e. the idiom that governs value references); universal human terms expressed in realistic utopianism: Tomaselli’s ‘good’ and ‘true’ values, Singer’s ‘better life’, De Jouvenel’s ‘good day’, Bloch-Laine’s ‘happy person’, all fall within Sears’ ecosystemic wellbeing and prosperity vision. The words that basic human values create, capture and expose are as old as man himself, but brand new on the negotiating table.

... orientation of thought limits the number and variety of perceived ways to resolve conflict (Singer 1984:21).

The question is now: what word matrix should be used to expose hidden and unexpressed values and to verbalise them so that they can ultimately be concretised in (alternative) social structures and institutions?

Legal theory can help create communal ties and shared values by freeing us from the sense that current practices and doctrines are natural and necessary and by suggesting new forms of expression to replace outworn ones. For example, Gabel and Harris have suggested replacing our current rights orientation with a power orientation. They would shift our focus from viewing individuals as abstract citizens whose relations to each other are governed by rights enforced by the state to viewing them as active participants in shaping their relations in daily life. Such changes in language may help focus our attention on facts we had previously ignored and make us more keenly aware of alternative social arrangements (Singer 1984:64-65, my italics).

To overcome this problem, I propose that we turn to the realistic utopianism of Tomaselli, Singer, Bloch-Laine, De Jouvenel and Sears, in which real values are embodied in another terminology. Naturally, and in line with the preceding discussion, values and words will be looked at together.

To exercise our utopian imagination it is helpful first to expose the structures of thought that limit our perception of what is possible (Singer 1984:58).

With both Tomaselli and Singer it is a matter of the expression (articulation) of the ‘good and true values’, a matter of the ‘better life’. With Bloch-Laine and De Jouvenel it is a matter of the happiness of the individual as such, whereas Sears gives more attention to the happiness of the state/community in which the individual finds himself. Both the individual (in the Western sense) and the group (in the African sense) are involved.
... the utopian ideal is not necessarily situated outside of time. Its definition permits the affirmation of 'values' that one can hold and respect right away, the setting of 'objectives' that can be achieved one by one, and the choice of permanent 'scope' (Bloch-Laine 1967:204).

... what we need is to address ourselves to the ordinary day of the ordinary man. Take this man when he wakes up, follow him through to the time of sleep. Plot, as it were, the sequence of his pleasurable and unpleasurable impressions, and now imagine what a 'good day' should be. Picturing this 'good day' is the first step into a modern utopia; then you will have to seek the conditions which can bring about this good day (De Jouvenel).

When a man awakes, he recovers awareness of his surroundings. If he thinks gladly of his family and looks forward to the day's work, he can be called happy, though I would like to add to these criteria a less essential but important component, the pleasantness of his surroundings (De Jouvenel).

You cannot make men contented through entertainments but only through achievements ... You cannot have a Good Society if you do not offer to each man a man-sized job, which he can take joy and pride in. This is an immensely difficult problem but quite an essential matter (De Jouvenel).

Basic, virtually universal human values can be drawn from realistic utopianism: people want to be happy in society and want to be integrated in it, they want to experience a 'good day' every day of the year, they want to be educated, and have a job in which they are happy; they also want to relax, they want optimal opportunities for self-realisation, they want the means of participating in the material prosperity of the community, they want to drink clean water, to eat healthy food and to breathe unpolluted air, and to experience a time in which there is no human suffering, cruelty, loneliness and no invalid and undemocratised hierarchies. Clearly, all social structures are involved. However, the word stock in which the good and true values are embodied is different, is somewhat new for negotiating purposes, but at the same time very old and general: good day, better life, happiness, education, work, living, self-realisation, money, eating, drinking, breathing, sleep, no suffering, no loneliness, no cruelty, a direct say in all institutions concerned with social ordering. Does this word stock illuminate previously unexposed and concealed, yet potential and alternative social arrangements? I think it does. It definitely exposes universal human values, and thus also Western values and African values.
Proposition 6
The African value and thought systems in South Africa have been partially distorted and changed by the industrial and technological realities in the country. Material prosperity forms part of the above African system, and the black man wants to share in the pleasure the white man seemingly experiences in his luxurious ‘good day’. The gulf between Western and African civilisations can disappear in and through a nation-building process (however, Tomaselli and Singer, and Bozeman are sceptical about nation-building that is built on Western as well as African structures of civilisation). The industrial and technological component can serve as a catalyst, as Ulam confirms:

The current critic of Western civilisation and its values .. is tempted to see the new nations as free from the materialism and power striving of the old. They in turn listen gratefully to the Westerner who has instructed them about the evils of imperialism from which they have suffered and who extols their revolutionary élan. But such visions cannot withstand a scrutiny of the facts. The emerging nations are clamoring for automobiles and washing machines. Their brand of socialism upon closer examination is exhibited as nationalism created with a thin veneer of foreign slogans and symbol (Ulam 1967:133–134, my italics).

Proposition 7
The question of a ‘new type’ of constitution cum human rights manifesto is what it is: a question, seen against the preceding argument. Stereotyped Western capitalistic and stereotyped African socialistic thought patterns, terms and idiom will have to fall away and make way for a ‘good day in South Africa’ vision and the accompanying (‘simplified’) (cf. Van den Bergh 1982:740–644; Van den Bergh 1984a) word stock. It seems that constitutions and human rights charters within a centralised political order have no meaning for the majority of the inhabitants of South Africa, for the reasons already given. My own view is, like Singer’s, somewhat nihilistic/irrational, or even defeatist, and I doubt whether Codesa will be able to implement at grassroots level and within a local government and group context a ‘good day in Africa’ vision that is formulated in everyday terms and in a kind of mini-human rights charter – but this possibility can perhaps be looked at from closer by.

In the post-apartheid situation, the reconstructive planners will need a semiotic programme for altering in (Volosinovian) tandem both the
material and ideological (linguistic) 'components' of apartheid (Tomaselli, Louw & Tomaselli 1991:102).

... attempts to solve the conflict in the terms of Eurocentric paradigms common to the ideomythical discourse of both capitalist and socialist sides of the war often turn out to be ludicrously inadequate (Tomaselli & Shepperson 1991:17).

Note

1 See Singer 1984. Although Singer's view ran into difficulties (cf. Chow, Stich, it is used for the purposes of this argument.

References


Language, ethnicity, territory: language rights from human rights to international public law

Roland Breton

A person's right to use his own language, the language of his parents and his ancestors, is a part of private law, like the right to practise a religion. But this right has two aspects: first, the exercise of a choice of expression, and second, the exercise of an option of identification or conscious loyalty toward a group; because language is a sign of belonging as much as a means of expression and communication. To claim a language is to proclaim oneself as part of an ethnolinguistic group, of an ethnie. And, from that point, divergences and conflicts may begin to appear between the civil powers and individuals.

SOME FUNDAMENTAL RIGHTS OF PERSONS AND ETHNIC GROUPS

Thus, beyond the right to use one's language in privacy, at home or elsewhere, between individuals and with whom one likes, and to transmit it to one's children (and that has not been obvious under all regimes), arises the question of public and collective use - as in religious practices, on the public highway, in public places and buildings and in specific places, ruled by specific institutions.

Then comes the question of the services and benefits that individuals should be in legal position to receive in their own language. To whom may somebody speak in his own language, and from whom may he require an
answer in the same language: the language of the private person or the language of the public service? The right to education and access to justice and administration in a particular language necessitates the provision of specialised materials, staff, organisation and finance. Therefore the concern of the authorities is not only to acknowledge the linguistic needs of a particular group, but also to adjust the scope of collective life and public services to those needs.

The language problem does not occur only for one or several individuals, but for a group, for a linguistic community which is tolerated and recognised as such, and which can consequently seek the satisfaction of particular collective rights. Language rights are a matter for the Law of Nations, since nations, peoples or ethnies are groups united, among other things, by a culture transmitted through the living use of a language, serving as the cement of their unity and permanence.

FROM TERRITORIAL ASSET TO GEOGRAPHICAL DELIMITATION

Next comes the question of taking into account the territorial assets of the group. Since the group is recognised as having specific linguistic needs, does this mean that the satisfaction of those needs should be organised for a mere collection of individuals or for a whole society settled in its own environment? The answers may vary according to whether the group is historically established as a majority, or is, for instance, a minority of migrants, of temporary refugees, of nomads, etc. Being indigenous, historically and geographically, may be considered as having a primary right over the cultural development and planning of a territory. But many states do not grant special attention to 'First Nations' and, at best, give them the same treatment as newcomers. Among the inhabitants of a territory, or the citizens of a state, anteriority rarely confers any privilege, or even consideration: the law of the present majority prevails alone, in Language Right as in other areas.

Nevertheless, it is from the anteriority of majority occupation of a territory that the geographical delimitation of administrative divisions has allowed most multilingual states to reach a solution in the matter of language rights and obligations. From Switzerland, where this delimitation has long been very strictly fixed across the country and its federal units or cantons, through a variety of well-known examples such as the former USSR, India or China, to Belgium, where delimitation has at last been imposed, the question of the rigidity of linguistic borders has been solved in diverse ways. But everywhere it has had to be established as the framework for language rights.
TERRITORIAL LINGUISTIC SOVEREIGNTY

In fact, the general delimitation of linguistic territory, as practised for instance in Switzerland, leads to the notion of sovereignty, or at least of linguistic sovereignty. This is particularly true when, as in Switzerland and Belgium, borders delimit monolingual areas. Language, in this case, is considered to be a permanent and exclusive aspect of the whole population of the delimited territory. That is the condition of its safeguard as the legal expression of local culture: one language, and one language only, holds sovereignty over the delimited territory and over all its inhabitants, whatever their origins. And this sovereign language is the one used, in absolute priority, for all public and collective purposes, starting with schooling, in order to preserve the original linguistic character of the localities involved, whatever the traditional bilingualism or even diglossia of some social or local sections of the population might be.

This concept of multilingualism, within a state divided into monolingual areas, leads us on to consideration of the practices and doctrine of nation-states which have been resolutely ‘monolingual’ in spite of the ethnolinguistic diversity of their component population (nation-states of which ‘Jacobine’ and Napoleonic France may seem the archetype) although the plurisecular policy of the United Kingdom against the Welsh, Scottish Gaelic or Irish languages was similar in practice. The essential difference is that monolingual areas within officially multilingual states are delimited on linguistic grounds, whereas nation-state borders in other cases have been based on conquest.

SHARED HIERARCHIC LINGUISTIC SOVEREIGNTIES

In contrast to nation-states of more or less ‘Jacobine’ style, which have spread the absolute monopoly of their national language outwards from the centre, multilingual states of the Swiss type have recognised their internal division among adjacent linguistic areas, and have organised a geographical division that allows a stable balance among local monopolies, among linguistic sovereignties all equal in right. Somewhat different is the shared double monopoly over a whole national territory, without inner territorial subdivision, as found in South Africa between Afrikaans and English, in a state which is officially bilingual over its entire multilingual area.

Various adjustments to these kinds of absolute linguistic sovereignty and monopoly have appeared in many countries. Beneath the overall sovereignty of certain national languages, some subordinate positions
have been granted to certain regional languages on delimited portions of the national territory, where they may assume an auxiliary and associated official role. Present-day Spain, since the adoption of ‘autonomies’, provides an example of such linguistic division: between Spanish, the sole national official language of the whole kingdom, and Basque, Catalan and Galician, official languages alongside Spanish within their respective ‘Communities’ (autonomous regions). Such a division is also found in many regions which benefit from an exceptional status: Wales, the Faeroes, Aland, Valley of Aosta, South Tyrol, Corsica, etc. These situations of shared, or hierarchic, sovereignty among two languages – national and regional – all concern territorial communities assumed to be homogeneous. A close equation is maintained between language population and territory. Within each such region, a special legal status allows a sharing of linguistic sovereignty which may remain static or evolve, depending on the subsequent actions and attitudes of its inhabitants and of national and regional governments.

FREEDOM OF THE HEAD OF THE FAMILY AND CHOICE OF IDENTITY

Beyond this territorial approach to the balance of sovereignty between regional and national majorities remains the problem of safeguarding the rights of local minorities which lack any recognised territorial setting. This is another case in which the Law of Nations and the principles of human rights sometimes appear to be opposed. This opposition becomes evident especially where it is asserted that an area must keep its fundamental cultural character, in other words its language, even at the price of imposing its priority use on all of its inhabitants, natives or newcomers, from school education onwards.

Beyond this apparent privilege of indigenous collective culture, one has to consider the right of individuals, of families, and of groups of migrants or non-migrants, to preserve their cultural heritage, including their ancestral language, in private and public life. Controversies arose recently in Quebec, and also in Belgium, about the refused freedom of the head of the family to choose the school language of his children, a freedom which has never been given in Switzerland; or about the control of public advertising in a particular language. This illustrates the conflict between a territorial community’s historical right to cultural sovereignty, and the attachment of migrants, or of indigenous minorities, to their cultural and linguistic difference.

In such a context, it is increasingly evident that tolerance of cultural differences should involve a recognition of everyone’s freedom of choice of
identity, in both private and public expression. But linguistic sovereignty, of a particular language over its particular territory, also requires the recognition of its priority use, especially in education, to preserve the personality and original character of each region, and of each society. Hence the fundamental question, anticipating sociocultural changes, of what should be given long-term priority; either the overall cultural domination by a native majority population of its own spatial environment, or the distinctiveness of minority groups of recent or ancient origin? Because of the possibilities of quick acculturation through schooling, but also of cultural pluralism through the modern media, the political choices hinge on the balance between the minimum linguistic sovereignty necessary to safeguard the interests of the native majority and to ensure easy communication and – on the other hand – the preservation of an enriching and stimulating diversity of cultures and identities.

TOWARD A RELEVANT SCALE OF TERRITORIAL DELIMITATION

If this is agreed, one of the next questions is that of the territorial scale to be adopted for linguistic sovereignty. It can be that of the entire country, as in largely monolingual nation-states, deliberately neglecting and marginalising regional variations, or as in states where the whole national space has been considered 'bilingual', such as South Africa or Trudeau's federal ideology for Canada. Or it can be the provincial scale, as in the Quebec nationalist option (where 'provincial' becomes 'national'), the evolution of Belgian federalist or confederalist ideology, the constitutions of India, or present-day Spain.

It can also be the local scale, across sub-state units endowed with political power, as in Switzerland, where linguistic borders may divide cantons and urban agglomerations. The adoption of the linguistic territorial principle generally leads to the division of space in fixed and juxtaposed rather compact areas, corresponding to real political units, either national states or regional and federal substates. But delimitation at the local scale, closer to linguistic groups distribution, may lead to more fragmented delineations with frequent enclaves, as anticipated in the Canadian option for 'bilingual districts', and as instituted in Belgian ‘townships with facilities’.

The protection of minority linguistic rights, as adopted mostly in countries which ignore strict linguistic territorial delimitation, normally involves a legal quantitative threshold. For what minimum percentage of inhabitants, or users of a school, etc., are authorities obliged, for instance, to open a class in a minority language? Most liberal regimes such as
Finland and the former Yugoslavia have agreed on a threshold of around 10 per cent, which may vary according to whether it is a question of opening or terminating facilities.

The conciliation of human rights – the freedom of individuals to keep their family language or to choose another – with the Law of Nations – the right of a people to preserve the original character of its ancestral territory – can be achieved only through joint respect of both goals: the general sovereignty of the majority indigenous language, plus the safeguarding of cultures, including languages with local auxiliary status, for minority groups who wish to maintain their roots.

The links between language, society and territory should not be underestimated. Language is the attribute of groups more than of individuals, because it is through language that individuals manifest their ethnic membership and loyalty. And the right of an ethnic group to survive can never be better guaranteed than inside the framework of its territorial homeland, in which it appeared, has developed and will evolve. With this in view, the territoriality of language is the pledge and warranty of its long-term preservation, within a stable community in its home environment. The necessary protection of other languages in the same political unit, spoken by minorities without the anchor of territorial sovereignty, can allow their limited cultural and linguistic survival, although inevitably reduced to a secondary position.
Language rights and human rights

P. J. J. Olivier

It is common knowledge that South Africa finds itself in an unprecedented process of transfiguration. The change that we are experiencing from day to day is brought about by strong emotional reactions and counter-reactions to the political, economic and social systems which have shaped our past and still colour the present.

For many of our citizens, the present is a victory over a past of inequality and discrimination, of exploitation and poverty, of dehumanising powerlessness and existential triviality. For others, the present is the tragic demise of a proud and heroic past of civilising a dark continent. For others, still, the present bears the seeds of a new power struggle, a terrible second Mfecane.

Despite all the very good reasons for being pessimistic about the future of our country and all its people, there are some hopeful signs, not the least being the awareness by all major parties and groups of the need for much better protection of human rights than in the past. There seems to be a majority opinion that the new constitution should be based upon a justiciable bill of rights, which has its foundations on justice and equity. We have never had a bill of rights on our statute book before and the new regime will require a completely new approach. For the first time we will be looking at the conflicting interests of many groups in many fields from a human rights perspective, for example political representation, economic fairness, the distribution of wealth, protection of minorities.
It is true that South Africa is a multilingual country. According to the 1980 census figures the number of users of the various home languages in South Africa are as follows:

<table>
<thead>
<tr>
<th>Language</th>
<th>Users</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Afrikaans</td>
<td>6,1 million</td>
<td>15.66%</td>
</tr>
<tr>
<td>English</td>
<td>3,4 million</td>
<td>8.08%</td>
</tr>
<tr>
<td>Nguni languages:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ndebele</td>
<td>0.8 million</td>
<td>2.02%</td>
</tr>
<tr>
<td>Swazi</td>
<td>0.9 million</td>
<td>2.34%</td>
</tr>
<tr>
<td>Zulu</td>
<td>8.5 million</td>
<td>21.61%</td>
</tr>
<tr>
<td>Xhosa</td>
<td>6.9 million</td>
<td>17.44%</td>
</tr>
<tr>
<td>Sotho languages:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Northern Sotho</td>
<td>3.4 million</td>
<td>8.70%</td>
</tr>
<tr>
<td>Southern Sotho</td>
<td>2.6 million</td>
<td>6.71%</td>
</tr>
<tr>
<td>Tswana</td>
<td>3.6 million</td>
<td>9.11%</td>
</tr>
<tr>
<td>Tsonga</td>
<td>1.4 million</td>
<td>3.54%</td>
</tr>
<tr>
<td>Venda</td>
<td>0.75 million</td>
<td>1.93%</td>
</tr>
</tbody>
</table>

There are also significant numbers of people whose home languages are other European languages, such as German, Portuguese, Italian, Greek, etc.

In spite of the large number of users of black languages, English and Afrikaans have been the only official languages for the whole country. This policy was later modified to a certain extent with the creation of the self-governing and independent black states. In the self-governing territories a third official language is allowed, viz. in KwaZulu – Zulu, in Lebowa – Northern Sotho, in Gazankulu – Tsonga, in Kangwane – Siswati, in KwaNdebele – Southern Ndebele, and in QwaQwa – Southern Sotho.

In the four independent territories, the position as regards official languages is as follows:

- In the Transkei Xhosa is the official language with Southern Sotho, Afrikaans and English permissible languages for official use.
- In Bophuthatswana the official languages are Tswana, Afrikaans and English.
- In the Ciskei Xhosa and English are the official languages.
In Venda Venda is the official language, with Afrikaans and English as permissible languages.

From this it follows that each of the eleven major languages spoken in our country is given official status, at least in some part of the country.

As regards language as a medium of instruction, the position is as follows. In white, coloured and Indian schools instruction is offered through the medium of either Afrikaans or English. In black schools under the control of the Department of Education and Training, the medium of instruction is the mother tongue, that is, a black language, from Sub-standard A to Standard 2 (i.e. for four years). From Sub-standard B one of the official languages is offered as a subject, and from Standard 1 the other official language must also be taken. From Standard 3 onwards the medium of instruction is either one of the black languages or English or Afrikaans, whichever the parent body of the school decides upon. The latest available figures indicate that in 1986 42.3 per cent of black schools had chosen English, the rest a black language. From Standard 5 onwards the medium of instruction is mainly English and the mother tongue is used in religious education and other non-examination subjects such as physical education.

Finally, in the courts the official languages must be used in all pleadings, legal arguments and judgments, but witnesses may give testimony in any language they choose. Translation services are provided by the state in criminal matters and, in most cases, also in civil matters. In criminal matters, the verdict of the court is translated to the accused in his language.

In examining the question of the use, recognition and protection of languages in the new South Africa, one can start with a few important observations:

- Languages do not have rights – only people can be the bearers of rights and duties. When we speak of language rights, the misnomer is meant to refer to the rights of individuals or groups in respect of the use of a particular language. Likewise, strictly speaking there can be no language conflict, since conflict between languages is not possible. Conflict between the speakers of different languages in respect of the status of a particular language is possible, however.

- Language conflict, to use the term for the sake of convenience, arises primarily in the context of competition between ethnic or ethnic-nationalist groups. Language is the central marker of the socio-cultural identity of a group of people. As the most obvious symbol of group
identity, it easily becomes the first battlefield in intergroup conflict, for example as in Belgium.

• For each group, especially in a situation of intergroup conflict, its language becomes the symbol of and a link with its heroic past and its history. It becomes the symbol of unity and loyalty. The universal experience has been that if the status of a group’s language is threatened, the group itself feels threatened and will react strongly.

• Traditionally, a bill of rights deals with the rights of individuals, for example the right of a citizen to own property, or freedom of speech and expression. Traditionally, a bill of rights does not deal with so-called group rights. For technical reasons, it is also very difficult to deal adequately with so-called group rights in the context of a bill of rights. Usually, group rights, especially those dealing with the status of languages, are dealt with separately in specific chapters in the constitution, so that more detailed provisions can be formulated than is possible in a bill of rights.

• Whether the status of languages is dealt with in a bill of rights, or in a specific chapter of the constitution, the guiding principle must be that of fairness, equity and reasonableness. If a group is left with the idea that it has been treated unfairly, that it has been discriminated against, we would not have succeeded in solving conflicts and avoiding future antagonism.

• Philosophically, the question is: what is fair and equitable? In particular, in a multilingual country, how does one deal with the status of the various languages so as to ensure fairness and equity? Some would answer: equity and justice lie in equality, in equal treatment. This leads to the crux of my theme today.

• One should look at equality in respect of the use of language, first, from the perspective of an individual member of society. Undeniably, there is a human right of expression, sometimes called freedom of speech. Undeniably, there should be freedom to use one’s own language in expressing one’s thoughts and ideas. Certainly to prohibit an individual from using his or her own language appears to be contrary to this basic freedom. Yet this has happened twice in our history. On both occasions it left deep scars on our national pride. It was done first by Lord Milner shortly after the end of the Anglo-Boer War by his policy of anglicisation, especially in the schools. Dutch was not allowed in the government schools. This policy created a great deal of bitterness and was a major factor in the awakening of
Afrikaner nationalism. It was done for the second time in the apartheid era when the use of Afrikaans was made compulsory as a medium of instruction in black Transvaal schools. This was one of the main causes of the Soweto riots of 1976 and the escalating violence afterwards (Davenport 1988:430).

It is now generally accepted that, apart from the institutionalised use of a particular language or languages for specific purposes, there should be freedom to use any language in private interpersonal communication. This freedom should be enshrined and protected in a bill of rights, because it is a basic freedom of the individual. This means that the legislature and executive may not outlaw or inhibit this freedom. Conversely, of course, it cannot create legally enforceable obligations and duties on other citizens. It is the right of my neighbour to choose to speak to me and all other people in Zulu, but there is no onus on me to learn to understand him or to communicate with him in Zulu. If we wish to communicate, a private and personal solution must be found by the two of us; it is of no concern of the legislator to intrude into this sphere.

The freedom described above seems to have wide support. In 1990 in Bloemfontein, President de Klerk stated that: 'All languages should enjoy requisite recognition and protection, and they should be afforded the opportunity of realising their full functional potential.'

The South African Law Commission in its October 1991 Interim Report on Group and Human Rights, formulated article 18 of a draft bill of rights as follows: Everyone has the right, individually or in community with others, freely to practise the religion and culture and freely to use the language of his or her choice, so that there shall be no prejudice to or favouring of anyone on account of his or her religion, culture or language.

Apparently this was also the view of the ANC. In the 1955 Freedom Charter it was stated that: All people shall have equal right to use their own language and to develop their own folk culture.

Speaking from a human rights perspective, I would plead, in the first place, for the enactment of the fundamental freedom to use a language of choice in all private and personal forms of communication, such as is contained in clause 18 of the Law Commission's Draft, as a basic right.

If this right is recognised in a bill of rights, it follows that the system used at present in the judicial process should be retained. Pleadings and other documents will have to be in the official or permissible languages, but witnesses must be free to give evidence in the language of their choice.
and the state will have to provide translation services. Judgments, verdicts and sentences must be translated according to the litigant’s or accused’s choice. But this is not sufficient. In the Draft Bill of Rights the SA Law Commission has worked out the following scheme:

- The right of an arrested person to be informed as soon as possible after the arrest in a language which he or she understands of the reason of the detention and of the charge (clause 6(b)).

- The right of an arrested person to be informed as soon as possible after the arrest in a language which he or she understands, of the right to remain silent and the right to refrain from making any statement and to be warned of the consequences of making a statement (clause 6(c)).

- The right of an accused person to be informed in a language which he or she understands of the reasons of his or her conviction and sentence (clause 7(k)).

- The right to be tried in a language which he or she understands or failing this, to have the proceedings interpreted (clause 7(1)).

The basic right to communicate in a language of one’s choice, which I deem the basic language right, brings us then to the field of education.

In a study done in 1988 for the Human Sciences Research Council, Haasbroek and Botha (1988:97) came to the conclusion that in developing, multilingual countries

- pupils taught through the medium of their mother tongue communicate more spontaneously in the classroom and ultimately attain better scholastic results than pupils taught through the medium of a foreign language, and that they also have to repeat a school year less frequently than pupils taught in a foreign language;

- pupils taught through the medium of a foreign language often have an insufficient vocabulary in that language for them to understand the subject.

Of course there are various arguments for the early introduction of a second language as a medium of instruction, particularly because pupils in South Africa are being prepared for careers in which in most cases they will have to communicate in English, Afrikaans or even other European languages. It follows, therefore, that provision should be made for a free choice between mother-tongue education or some other language. This choice is to be exercised, obviously, in the light of the practicality of
education in the medium of small groups, for example Germans, Italians or Portuguese whose numbers, especially in rural areas, hardly justify special schools.

In view of this, the South African Law Commission offered the following clause in its Draft Bill of Rights: Every pupil is entitled, in so far as this is attainable, to be taught all school subjects through the medium of his or her mother tongue or through some other language as a language of choice from the first to the last school year.

There is a further fundamental human right in the field of language and education. It is the right to be taught the official language or languages of the country. This right is recognised in article 5 of the Convention against Discrimination in Education, adopted by Unesco in 1960. Fortunately, this right has always been recognised in our country and there should be no problem to include it in our own bill of rights.

This brings us then to the question of an official language, official languages and permissible languages for our country. How is this question to be viewed from the human rights perspective?

To say that a particular group has the right to claim that its language should be accorded official or any other legal status raises very difficult legal problems. Can groups have rights? How are the groups to be defined? How are the rights to be enforced? And lastly, what if there are competing claims by several groups, such as in South Africa?

In spite of all the theoretical and academic arguments for and against the idea of group rights, it is obvious to a practical lawyer that it is futile to speak of group rights where there are conflicting claims if no criterion is suggested for reconciling these rights. The basic principle to be borne in mind with regard to 'human rights' is that these rights do not fall like manna from heaven; however great the need for protection may be, there will be no effective protection until that need has been recognised by the community and given legal sanction or positivation in the sense of statutory protection. Usually the existence of a need and positivation of a right lie far apart. That is why human rights are often the central issue of a struggle, even a fierce struggle. Human needs are inherent; human rights have to be acquired. This also applies to the so-called group rights. Every society is made up of a diversity of groups, each with its own needs. Many of these needs are of fundamental importance to a member of the group, for example, the recognition of a particular language as an official language. But as in the case of individual needs, one can only speak of 'group rights' in the legal sense if the needs concerned have been recognised and
positivised in laws. International conventions, analogies from foreign multilingual countries, and the tragic consequences of the non-recognition of language needs elsewhere in the world are material for fine arguments in favour of positivisation of particular languages, but the process of positivisation will have to spring from our own soil.

Having said that no group in South Africa has a 'right' to have its language declared an official or even permitted language, I clearly do not imply that strong claims by competing groups do not exist. Clearly a group such as Afrikaans-speakers will not passively allow Afrikaans to lose its official status. The same can be said of English-speakers. And so one can continue to define many conflicting demands. The question is how to bring all these demands into equilibrium.

Various solutions have been offered in our country that are based on a wide range of considerations, such as historical and vested rights, utility, numbers of users, etc. It is not my task to discuss all these solutions. My brief is to consider the question from the human rights, legal perspective. From that viewpoint, it strikes me that the solution to be found must be a legitimate one. That means that it must be so manifestly just and equitable that the vast majority of a population will accept it as good and binding. Participation in making the choice is therefore essential. From this perspective a solution based on the choice of the strongest is no solution and spells doom.

Many models for selecting an official language or languages and permissible languages for our country have been proposed in recent times. I do not intend to discuss the merits and demerits of these proposals. No doubt other speakers at this conference will deal with that topic. But, from the human rights perspective, a few remarks may be helpful:

- First, in choosing official and permissible languages, it must always be kept in mind that we have to balance the claims of majority groups between themselves, on the one hand, and minority groups, on the other hand. It has often been said that we are a country of minorities and that, in fact, what appears to be a numerical or political majority, when measured against all other groups, is merely a minority.

Viewed from that perspective, we are dealing with the claims of a number of minorities. This is important from the human rights angle, because of the worldwide concern with protecting minority rights. For example, article 27 of the International Covenant on Civil and Political Rights provides as follows: In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such
minors shall not be denied the right, in community with the other members of their group to enjoy their own culture, to profess and practise their own religion, or to use their own language.

- Second, the question of language rights in a divided society cannot be divorced from the political aims and aspirations of various groups. Much is made at present of the right to self-determination and partition. The right of self-determination is recognised in article 1(1) of the this covenant and reads as follows: 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.

Manifestly, if self-determination in the sphere of culture and language is frustrated, it will lead to stronger claims for self-determination in the political sphere.

- Third, the choice of official and permissible languages will eventually be a political one, made by politicians. It may come about as a result of negotiations and agreement, or may be made unilaterally by the strongest group. Obviously one would prefer the first alternative. But whatever the method, the point is that the choice will probably not be made only on academic, scientific or human rights considerations. Hard politics will play a decisive role, and the pure academic may well be disappointed with the outcome.

- Fourth, the choice of official and permissible languages cannot be divorced from the choice of a form of the new state. If a centralised unitary state is decided upon, the language question will obviously be dealt with in a particular way which will differ fundamentally from the choice if a federal regional or cantonal system is adopted. Once again, political and economic considerations will probably govern the choice of the form of state and, according to that choice, the rights of the various groups may be served better or worse. Conversely, however, the question of protecting minority groups and also their language interests could, and probably should, be a major factor in choosing the form of state. My plea to the politicians of our country is not to ignore these interests. Politics and political parties come and go, but the claims of cultural and linguistic groups remain forever. Each mistake we make now will haunt us to the last generation.
The challenge, surely, is to find a just and lasting solution which can unlock the potential of our people and which will give adequate protection and peace of mind to all language groups.

References