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Language, Law and Equality



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Language, Law and Society

Proceedings of the 1993 International
Conference of the International Association of
Language Law (IALL) held at the University of
South Africa, Pretoria, 1-4 April 1993

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University of South Africa, Pretoria

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Contents

Preface	vii
I INTRODUCTION	1
Opening statement by the Mayor of Pretoria – Advocate J. H. Leach	3
The importance of the conference theme: ‘language and equality’ – Joseph-G. Turi	5
II LANGUAGE AND LAW: THEORY AND PRACTICE	25
Language, law and equality in South Africa: a theoretical and practical challenge – Dawid van Wyk	27
Implementing language rights in court: the role of the court interpreter in South Africa – N. C. Steytler	38
Language in Canadian public law – Julius H. Grey	57
‘Language rights, legal rights and plain language’ – Julien Hofman	90
III LANGUAGE RIGHTS AND HUMAN RIGHTS	103
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	105
Language, ethnicity, territory: language rights from human rights to international public law – Roland Breton	122
Language rights and human rights – P. J. J. Olivier	128
IV LANGUAGE AND LAW IN THE AFRICAN, INCLUDING SOUTH AFRICAN, CONTEXT	139
Research notes on language struggles, language rights and political transformation in South Africa – Jennifer Dunjwa Blajberg	141
Language policy: language, law and human rights <i>vis-à-vis</i> the place and role of non-official languages in a democracy in multilingual settings – Mubanga E. Kashoki	151

Language and law: theory and practice in the courts of Lesotho –
Itumeleng Kimane 174

Double, double, toil and trouble: the problems encountered when compiling a
legal dictionary in African languages – M. Jansen 184

V LANGUAGE AND EMPOWERMENT 193

African language and empowerment – C. T. Msimang 195

Language and empowerment: a community educator's perspective –
Buntu Mfenyana 205

Language and empowerment – Zandile Motau 213

'I speak siSwati', Bhozongo explodes: languages rights and the individual in a
Swazi court – Sarah Thembile Mkhonza 219

VI A LANGUAGE POLICY FOR THE SOUTH AFRICAN SITUATION 237

Bilingual and trilingual language policies for South Africa –
G. K. Schuring 239

The position of English in law: the new South African legal order –
A. E. Stewart-Smith 247

Namibians: linguistic foreigners in their own country –
A. D. de V. Cluver 261

VII LANGUAGE CONTACT, CONFLICT, COEXISTENCE, COOPERATION 277

From language contact to language coexistence through language law –
Yvo J. D. Peeters 279

Die Nederlandse Taalunie and its role in the international contacts between
Dutch- and Afrikaans-speaking countries in the world – L. Simons 289

How to handle language disputes through implementing equality in
multi-ethnic countries – Silvo Devetak 298

Some issues on law and language in the Hong Kong Special Administrative
Region (HKSAR) of China – Benjamin K. Tsou 314

VIII CONCLUSIONS 333

Summary – Elize Botha 335

Conference of the International Academy of Language Law:
summary impressions – C. T. D. Marivate 339

Preface

South Africa is on the threshold of a completely new constitutional dispensation. After many years of implicit or explicit apartheid, the new goals are now a non-racial democracy, adequate constitutional rights for all South Africans and a justiciable bill of rights.

A major challenge in the negotiation process is to find a way of unlocking the potential of the country's people and, at the same time, giving adequate protection and peace of mind on a non-ethnic basis to the different language groups.

Against this general background, a number of themes relating to language and the law are examined in the present volume:

- language and empowerment
- the handling of language disputes
- the constitutional status of languages
- the nature of language rights
- the relationship between constitutional clauses and legal rights
- other laws governing the use of language in the public and business sectors
- the role of language in the courtroom
- the accessibility of the language of the law

Experts from different parts of the world (Africa, the Americas, Europe and the East) helped analyse the complex relationship between language, law and political dynamics as reflected in this publication, covering events up to 1992. The volume includes most of the papers read at the Third International Conference on Language Law, held in Pretoria between 27 and 30 April 1992. The conference was a joint endeavour by the International Academy of Language Law, the Human Sciences Research Council and the University of Pretoria. The summaries at the end of the volume contain references to conference contributions and discussions not published as chapters in the publication.

This volume reflects a substantial step forward in the discourse of the past five years or so on a language dispensation for South Africa. This progress can largely be ascribed to the deep interest shown by many of the participants in the conference in human dignity, tolerance and language differences.

This volume of papers is being published because of the stated interest of a wide spectrum of prospective readers. The publication will be useful too for those working in the areas of law, political science, sociolinguistics, language planning, translation and interpreting. It is a book intended for students, academics, decision-makers and laymen who have an interest in the interface of language and law.

Karel Prinsloo

Yvo Peeters

Joseph Turi

Christo van Rensburg

I

INTRODUCTION

Opening statement by the Mayor of Pretoria

Advocate J. H. Leach

It is indeed a privilege to welcome you to our beautiful city, generally known as the Jacaranda City. It is especially an honour for me as a law-trained person myself to attend the opening of this Third International Conference on Language Law, as I regard it a subject of current interest in South Africa.

Pretoria can be considered a judicial city at large, as it educates a large number of the country's future lawyers and advocates at its various educational institutions. Three universities, namely the University of South Africa, one of the largest correspondence universities in the world, the University of Pretoria, the largest residential university in the country, and Vista University with its 27 000 students, all have law faculties. Law courses are also presented at technicons and similar institutions in Pretoria.

This city also boasts the headquarters of many of the judicial organisations in South Africa, such as the Association of Law Societies of the RSA, the Transvaal Law Society and Lawyers for Human Rights, to name but a few. There are also various courts of law in this city, among others the first family court in South Africa.

Pretoria, Atteridgeville and Mamelodi have approximately one million inhabitants and this figure increases annually. This large number of people speak up to 11 different languages. To provide these people with legal advice the 219 registered advocates and 3 892 lawyers in Pretoria therefore have an enormous task to perform.

It is appropriate that you decided to hold this conference in the administrative capital of our country as it is here that many of our country's laws are drafted. The timing of your conference is equally appropriate, as the questions of language, the law and the language law in South Africa have led to much debate in the past two years, especially when the government of Namibia decided to make English the only official language in Namibia, which is said to be the most Afrikaans country in the world.

I know that you are all experts in your various fields and therefore I do not wish to go into details regarding the subject of language law. I have seen the abstracts of the papers that will be presented during this conference and they promise a most enlightening and rewarding conference.

In a country changing as fast as ours at present, it is essential that language issues be addressed at an early stage. We can learn from the mistakes and successes of the rest of the world and attempt to create a language policy that will be suitable and acceptable to all. This is one of the reasons why we are especially grateful to you for the contribution you will be making by your participation in this conference. Something of which South Africa is very proud, and of which you will hear more later, is the legal dictionary being compiled by the Committee for Legal Terminology in African languages. I understand that there is nothing similar in South Africa or, as far as can be determined, in the Western world.

The equalisation of languages in South Africa will have a profound effect on the administration of central and local government. As far as I can see, the accepted principle that it is a person's right to be addressed in his own language by the state will mean that local government, among other things, will most probably have to employ translators who will be able to translate documentation into any of the 11 languages spoken in this country.

Ter afsluiting wil ek graag in my eie moedertaal 'n paar woorde sê, want ek verneem dat daar wel besoekers is wat Afrikaans kan verstaan. Ek wens u 'n aangename en konstruktiewe konferensie toe, want ek weet dat die resultate van u beraadslagings tot voordeel van ons land in sy geheel sal strek. Geniet ook gedurende u vrye tyd al die besienswaardighede wat Pretoria u kan bied!

I wish you all a pleasant stay in our city.

The importance of the conference theme: 'language and equality'

Joseph-G. Turi
Secretary-General of the International
Academy of Language Law

INTRODUCTION

The International Academy of Language Law is very proud to be associated with the Human Sciences Research Council and the University of Pretoria in the organisation of the Third International Conference on Language and Law.

The theme of the conference, 'language and equality', is a very important subject (and not only from the linguistic point of view) and I am very happy that this subject is discussed at this venue.

Major language legislation in the area of language policy is evidence, within certain political contexts, of contacts, conflicts and inequalities among languages used within the same territory. Objectively or apparently, these languages coexist uneasily in a dominant-dominated relationship, thereby leading to a situation of linguistic majorities and minorities.

The fundamental goal of all language legislation is to resolve, in one way or another, the linguistic problems arising from those linguistic contacts, conflicts and inequalities, by legally determining and establishing the status and use of the languages in question.

Preference is given to the protection, defence or promotion of one or several designated languages through legal language obligations and language rights drawn up for that purpose.

Canadian language legislation (the Official Languages Act) is an example of official legislation that applies language obligations and language rights to two designated languages, English and French.¹ Quebec's language legislation (the Charter of the French Language) is an example of exhaustive legislation that applies, in a different way, language obligations and language rights to French, to a few more or less designated languages and to other languages that are not designated.²

Increasing legal intervention in language policy gave birth, or recognition, to a new legal science, comparative language law. Comparative language law is the study of language law throughout the world (as well as the language of law and the relation between law and language). To the extent that language, which is the main tool of the law, becomes both the object and the subject of law, language law becomes metajuridical law. To the extent that comparative language law recognises and enshrines language rights, albeit sometimes rather timidly and implicitly, it becomes futuristic law, since it builds on historical roots. The recognition and implementation of language rights are based on two fundamental principles: the principle of the dignity of all languages and the principle of the equality of all languages. But language equality does not mean language uniformity. The tower of Babel is the manifestation of individual and collective cultural differences among people. As far as the language law takes into account this human reality, it is remarkable, since the growing recognition or historical enshrinement, in time and space, of language rights promotes the cultural right to be different, which is a promise of creativity for individuals and families, as well as for societies, nations and the international community.

As we have said, if today there is an increasing quantity of major language legislation in evidence, it is because fundamentally, within certain political contexts, there are contacts, conflicts and inequalities among languages used in the same given territory. Thus objectively or apparently, in a dominant-dominated relationship these languages coexist uneasily, thereby leading to a situation of linguistic majorities and minorities. However, it must be stated that the reality of these concepts of linguistic majority and minority is historical.

One need only think of Finland and Quebec, where for a long time the Swedes and the English, who were statistically the linguistic minorities,

were to all intents and purposes the local linguistic majorities, which is no longer the case today, however.³

TYPES OF LANGUAGE LEGISLATION

Language legislation is divided into two categories, depending on its field of application: legislation which deals with the official usage of languages and that which deals with their non-official usage. Needless to say, there are grey areas in this classification.

Language legislation can also be divided into four categories, depending on its function; it can be official, normalising, standardising or liberal. Legislation that fills all these functions is exhaustive language legislation, while other language legislation is non-exhaustive.

'Official language legislation' is legislation intended to make one or more designated, or more or less identifiable, languages official in the domains of legislation, justice, public administration and education. Depending on the circumstances, one of two principles is applied: linguistic territoriality (basically, the obligation or right to use one or more designated languages within a given territory) or linguistic personality (basically, the obligation or the right to use one's own language or any language). As such, making one or more designated languages official does not necessarily or automatically entail major legal consequences.

We call 'official language legislation' that legislation intended to make one or more designated languages official in the domain of legislation, justice, public administration and education. One or more designated languages can be made official in different ways: by formally designating them official languages or national languages, or by designating them 'the language' or 'the languages' in certain official domains or by granting them superior legal status in comparison to other languages, by declaring, for example, that only certain official texts written in these languages are 'authentic', as in Cameroon.⁴ In South Africa there are eleven important or principal languages, but only two are official, English and Afrikaans. In certain regional constitutions, such as the Basque and Catalan constitutions, Basque and Castillian on one hand and Catalanian and Castillian on the other are declared to be official languages. However, Basque is declared Basque's 'own' language, while Catalanian is declared the 'special' language of Catalonia.⁵ Some countries, such as Ireland and Malta, make a distinction between the national language (Irish and Maltese) and the official language (English).⁶

In other countries, such as Algeria on the one hand and Pakistan, India and Malaysia on the other hand, French and English are, respectively, provisional official languages. The Philippine constitution makes provision, *inter alia*, for the development of a common national language, called 'Filipino'.

Knowledge of the official or national language is an important requirement in certain situations. In Malaysia to become a registered citizen, an elementary knowledge of Malay is needed, but to become a naturalised Malaysian citizen an adequate knowledge of Malay is required. In Brazil, primary education is given only in Portuguese. In Norway certain highly placed officials must know Norwegian. In Spain, all Spaniards are obliged to know Spanish.⁷

As such, making one or more designated languages official does not necessarily entail major legal consequences. The legal sense and scope of the idea of an official language will depend on the effective legal treatment accorded the language concerned. In certain instances, to make one or more designated languages official in a given political context is only declaratory by nature, and consequently non-executory, and therefore has nothing more than a psychological impact, which should not be ignored, however.

The legal sense and scope of officialising a language depends on the effective legal treatment accorded to that language (for instance, when the law states that only official texts, or only certain official texts, are 'authentic' so that they prevail, legally, over texts in one or more other languages).

'Normalising language legislation' is legislation which seeks to establish one or more designated languages as normal, usual or common languages, in the unofficial domains of labour, communications, culture, commerce and business.

'Standardising language legislation' is legislation designed to make one or more designated languages respect certain language standards in very specific and clearly defined domains, usually official or highly technical.

'Liberal language legislation' is legislation designed to enshrine legal recognition of language rights implicitly or explicitly, in one way or another. But language law, viewed objectively (as legal rules on language), make a distinction in language rights, which are subjective so that they belong to any person, between the right to 'a' language (the right to use one or more designated languages in various domains, especially in official domains) and the right to 'the' language (the right to use any language

in various domains, particularly in unofficial domains). These language rights, based respectively on the principle of territoriality and the principle of personality, are both individual and collective. Moreover, if language rights are also collective rights, they can belong in some cases to artificial persons (e.g. corporations) as well as to natural persons. After all, a human being is not only an individual but also a 'political animal', that is, a person living in a variety of social organisations.

COMPARATIVE LANGUAGE LAW

Language legislation never obliges anyone to use one or more languages in absolute terms. The obligation stands only to the extent that a legal act or fact covered by language legislation is or must be accomplished. For example, the obligation to use one or more languages on product labels stands only if, in non-linguistic legislation, there is an obligation to put labels on products.

Moreover, it is the written form (the language as medium) and not the written linguistic content (the language as message) that is usually targeted by legal rules dealing explicitly with language. Both linguistic content and linguistic form can be the object of legislation that generally is not explicitly linguistic, such as the Quebec Civil Code, the Charter of Human Rights, or the Consumer Protection Act.

Generally speaking, linguistic terms and expressions or linguistic concepts (mother tongue, for instance) are the focus of language legislation only to the extent that they are formally understandable, intelligible, translatable, usable or identifiable, in one way or another, or have some meaning in a given language.

For example, section 58 of Quebec's Charter of the French Language states that, allowing for exceptions, public signs must be solely in French. Therefore, if a word is posted and it is understandable in French, it is legally a French word. In this case, the public sign is legal (for instance, 'ouvert'). In other respects, if a word is posted and it is not understandable in French, it is not legally a French word only if it has some meaning in another specific language and it is translatable into French. In this case, the public sign is illegal (for instance, 'open').

With regard to the concept of 'mother tongue', from a legal point of view, in the *Forget* case of 1988 the Supreme Court of Canada declared that 'The concept of language is not limited to the mother-tongue but also includes the language of use or habitual communication ... there is no reason to adopt a narrow interpretation which does not take into account

the possibility that the mother-tongue and the language of use may differ'.⁸

In principle, language legislation is aimed at the speakers of a language (as consumers or users) rather than at the language itself (as an integral part of the cultural heritage of a nation) unless that legislation is clearly a public policy law (a public policy law is any law comprising legal standards so fundamental and essential, individually and collectively, in the interests of the community, that they become imperative or prohibitive in absolute terms so that they cannot be avoided in any way).

Quebec's Court of Appeal in the *Miriam* case (22 March 1984), Quebec's High Court in the *Gagnon* case (15 December 1986) and the French courts, in a great many decisions, including the *Steiner* case (Paris Court of Appeal, 27 November 1985) all confirm the essential points in the above.⁹

In the *Miriam* case, Quebec's Court of Appeal, in an *obiter dictum* (something said by a judge while giving judgment that was not essential to the decision in the case and therefore creating no binding precedent in itself), concluded that section 89 of Bill 101 (which, allowing for exceptions, permits the generalised use of both French and another language) and the Preamble of the Charter (in which it says that the Act must be enforced in a 'spirit of justice and open-mindedness') enshrined, for all practical purposes, the principle of linguistic freedom in Quebec.

In the *Gagnon* case, Quebec's High Court recognised as French the apparently English term 'office', used instead of the French word 'réception', because it was an expression peculiar to Quebec, not forbidden by the law, and understood in Quebec.

In the *Steiner* case, in a decision rendered on 27 November 1985, the *Cour d'appel de Paris* confirmed the judgment handed down by the *Tribunal de Police de Paris* on 1 December 1984, recognising as French the word 'show', 'because it is found in all good French dictionaries and is easily understood by all, as well as the word *showroom* since there is no French translation of the expression and it would be inquisitorial and abusive to enforce the use of the term *halle* or *salle d'exposition*' (translation).

Thus, anything that is linguistically 'neutral' is not generally targeted by language legislation, as can be seen, among others, with section 20 of the Quebec's Regulation respecting the language of commerce and business.¹⁰ Section 20 of the above Regulation states that: 'Any inscription, any sign or poster, and any commercial advertising may be presented by

pictographs, by figures, by any artificial combination of letters, syllables or figures, or by initials.'

While the presence of a language or the 'quantity' of its usage can be the object of exhaustive language legislation, language 'quality' or correct usage belongs to the realm of example and persuasion where language usage is unofficial, and to the schools and government where language usage is official.

Moreover, it should not be believed nor should the impression be given that language 'quality' is a recent phenomenon or problem. The ancient Greeks spent much time quibbling over the benefits or detriments of 'analogy' understood as an almost religious respect for the rules of grammar and of linguistic tradition and of 'anomaly' seen as a synonym for linguistic freedom and creativity. Furthermore, the modern Greeks had the same discussions some years ago, in 1952, when they drafted their new constitution. That is the reason why section 107 of the Greek constitution of 1952 stated that 'the official language of the country is the language in which the Constitution is written'. The Greek language could not be named, because the Greek language was not universally understood in the same way. Furthermore, that section prohibited any attempt to corrupt the official language!

The same situation applies with the Swiss constitution. Section 116 of that constitution states that French, Italian and German are the official languages of the Swiss Confederation. But which German language, the German of Germany or of Switzerland?¹¹

The problem of the understandability or intelligibility of a legal text is also important: the State of New York has made two consumer protection laws which enact that some contracts must be written in 'understandable' or 'plain' language.¹²

Legal rules in linguistic matters are less severe than grammatical rules. There are four fundamental reasons for this: first, the best laws are those that legislate the least, particularly in the unofficial usage of languages; second, language, as an individual and collective way of expression and communication, is an essential cultural phenomenon, in principle difficult to appropriate and define legally; third, legal rules, like sociolinguistic rules, are only applied and applicable if they respect local custom and usage and the behaviour of reasonable people (who are not necessarily linguistic paragons) whereas grammatical rules are based on the teacher-pupil relationship; fourth, criminal sanctions (fines or imprisonment) and civil sanctions (damages, partial or total illegality), being gener-

ally harsher than possible language sanctions (low marks, loss of social prestige or loss of clients), which are the legal sanctions in the language field, are usually limited to low and symbolic fines or damages.

Jurists are therefore rather prudent when dealing with language policy, and rather reticent when interpreting language legislation exclusively as public policy law.

Since the legal sanctions of a public policy law are formidable (partial or total illegality, for instance), many jurists, especially Quebec's jurists, prefer not to think of language laws as being exclusively public policy laws, except when their legal context is clearly in favour of such an interpretation, as it could be in the official usage of languages.

In the *Sutton* case (23 February 1983), and the *Miriam* case (22 March 1984), the Montreal Court of the Sessions of the Peace and Quebec's Court of Appeal respectively declared that in certain given situations, Quebec's language legislation applies to francophones only if they explicitly request to be served in French. It was thus concluded that francophones can renounce their language rights, which evidently suggests that the legislation in question is not deemed to be a public policy law.¹³

True, the French *Cour de cassation* declared implicitly, in the *France Quick* case (20 October 1986) that French language legislation was a public policy law. In the *France Quick* case, the *Cour d'appel de Paris*, in its decision of 14 December 1986, acquitted a firm accused of using the terms 'giant', 'big', 'coffee-drink', 'bigcheese', 'fishburger', 'hamburger', 'cheeseburger', and 'milkshake', on the grounds that the terms and expressions were either fanciful or understood by the French consumers.¹⁴ France's *Cour de cassation* quashed this judgment, arguing that French language legislation protected the French language rather than francophones, without entering into much detail.¹⁵

However, that did not prevent the *Cour d'appel de Versailles*, in the *France Quick* case (24 June 1987) from considering terms such as 'spaghetti' and 'plum-pudding' to be, for all practical purposes, French terms, that is, to be in keeping with such legislation, because they were 'known to the general public'.¹⁶

The fundamental goal of this legislation, then, is to protect both francophones and the French language. A francophone is anyone whose language of use is French, that is, from a legal point of view, any person who can speak and understand French, in an ordinary and relatively intelligible manner.

In the *MacDonald* case (1 May 1986) and the *Ford* case (15 December 1988), the Supreme Court of Canada recognised and enshrined, to all intents and purposes, the distinction between the right to 'a' language (principal right, foreseen as such in the Canadian constitution, explicitly historical owing to the historical background of the country, in the domains of the official usage of languages) and the right to 'the' language (accessory right, not explicitly foreseen as such in the Canadian constitution, implicitly fundamental, in the domains of the unofficial usage of languages). The Court also recognised and enshrined the main differences between the official and the unofficial usage of languages. In the *Ford* case, the Supreme Court of Canada declared that 'Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice.'¹⁷

According to the Supreme Court of Canada, the right to 'the' language is implicitly an integral part of the explicit fundamental right of freedom of speech. Moreover, in the *Irving Toy* case (27 April 1989), the Supreme Court of Canada confirmed that artificial persons also held certain language rights, such as the implicit right to 'the' language in the unofficial domain of commerce. In this decision, the Supreme Court gave also this definition of freedom of speech: 'Indeed, freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure.' For the Court, freedom of speech means, in principle, any content (any message, including commercial messages) in any form (any medium and therefore any language), except violence.¹⁸

A relatively complete study carried out for the United Nations in 1979, the Capotorti Report, indicates that, although the use of languages other than the official language(s) in the domains of official usage is restricted or forbidden in various parts of the world, the use of languages in the domains of unofficial usage is generally not restricted or forbidden.¹⁹ We arrived at the same conclusion in 1977, when we made an analysis of the constitutional clauses of 147 states in the field of languages.²⁰ Moreover, we should not forget that in the United States, 17 states (including California and Florida) passed language legislation enacting that English language is their official language in the official usage of languages.

It must be pointed out, however, that, in some cases, Turkey prohibits the use of certain languages, languages other than the first official language of each country which recognises the Republic of Turkey.²¹ The prohibitory measures contravene, *prima facie* section 27 of the International

Covenant on Civil and Political Rights, of 1966, which recognises the right of members of linguistic minorities to use their own language.²²

THE LEGAL SENSE AND SCOPE OF THE EXPRESSION 'LANGUAGE RIGHTS'

Let us briefly examine certain decisions relating to language rights in Belgium,²³ the two judgments of the Appeal Court of Quebec in the *Devine* and *Ford* cases of 22 December 1986,²⁴ as well as the six judgments of the Supreme Court of Canada on 13 June 1985 in the case pertaining to language rights in Manitoba, on 1 May 1986 in the *MacDonald* case and the *Société des Acadiens* case on 25 February 1988, in the *Mercurie* case on 15 December 1988, in the *Brown's Shoe* case on 15 December 1988, and in the *Irving Toy* case on 27 April 1989.²⁵

In the European decision of 1968, the Court did state that the right to language was not a fundamental right. However, in this decision, it was a question of official use of languages and more precisely of the right to language in the domain of education. In the decisions in Quebec, the Appeal Court of Quebec declared that the right to language was fundamental and did not form an implicit and integral part of freedom of speech which, in its turn, is explicitly recognised and protected in Canada and in Quebec as a fundamental right.²⁶ The Supreme Court of Canada unanimously confirmed the decision in the *Brown's Shoe* case. In this judgment, as we have said before, the Court declared that 'language is so intimately linked to the form and the content of expression that there can be no real freedom of linguistic expression if one is forbidden to use the language of one's choice'. In the *Irving Toy* case, the Supreme Court said: 'Indeed, freedom of speech ensures that we can convey our thoughts and feelings, in non-violent ways without fear of censure.' For the Court, freedom of speech means, in principle at least, any content (and therefore includes commercial content) in any form (and therefore any language). In these four Canadian decisions, it was a question of the non-official use of language, and more precisely language rights in the fields of advertising and commercial signposting as well as in the field of social relations.

It seems that these judgments make us understand better that the right to language means, to all intents and purposes, the right to 'a' language (one or more designated languages) in the domain of official usage of languages. Under the circumstances, this is difficult to understand because a state cannot usefully employ the languages of all its citizens and may consequently strictly limit itself to practising only its

language or languages that is/are official, or certain languages, in one way or another. So, to take an example, by virtue of article 38 of the Special Statute of Val d'Aosta of 1948, the official texts of this autonomous Italian region may be drafted in Italian or in French, except for legal decisions which can be written only in Italian.²⁷

The right to 'a' language (one or more designated languages) in the official usage of languages is in itself not necessarily a fundamental right. This arises from the *MacDonald* decision in the Supreme Court of Canada, which concluded that the right to use French and English in the Canadian legal domain, in compliance with the written clauses of the Canadian constitution, does not, in itself, necessarily constitute a fundamental right, but rather an historical right. Incidentally, according to the Supreme Court, the right to be understood in any language in a Canadian legal case would be a fundamental right arising out of common law and as such could not even be the object of a derogatory clause on the part of the Federal Parliament or of provincial legislation, because 'it is practically inconceivable that they would completely suppress' this type of fundamental right.

In the dismissal handed down in the language rights in the *Manitoba* case, the Supreme Court of Canada declared: 'The importance of rights in respect of language is based on the essential role that language plays in the existence, the development and the dignity of the human being. It is by means of language that we can formulate our ideas, and give structure and order to the world around us. Language constitutes the bridge between isolation and collectivity, that allows human beings to delimit the rights and obligations that they have towards one another, and thus, to live in society.' Moreover, in the *Société des Acadiens* case, the Supreme Court of Canada decided that 'language rights arise out of fundamental rights', while in the *Mercure* case, it declared that 'it is with difficulty that one can deny that language is profoundly anchored in the human condition. It is hardly surprising that language rights constitute a well known genre of personal rights' and that 'rights concerning the French and English languages are essential to the viability of the nation'.²⁸

Therefore one must distinguish between the right to 'a' language, a right that is possibly fundamental and historical by nature, and the right to 'the' language, a right that is necessarily fundamental and universal by nature.

In principle, the right to 'a' language (one or more designated languages) and the right to 'the' language, to the extent that it is recognised, should include in the official usage of the languages not only the right to express oneself and to communicate, but also the right to demand to

understand, to be understood and served in the language or languages used.

Moreover, in the non-official usage of languages, even though the right to express oneself and to communicate in a given language should not be limited in principle, the right to demand to understand, to be understood and served in a given language should be practically limited in unilateral linguistic situations and recognised in certain conditions in bilateral or multilateral situations.

CONCLUSION

The right to 'the' language will become an effective fundamental right, like other fundamental rights, only to the extent that it is enshrined not simply in higher legal norms, but also in norms with mandatory provisions that identify as precisely as possible the holders and the beneficiaries of language rights and language obligations, and the legal sanctions that accompany them. Otherwise, the right to 'the' language will be but a theoretical fundamental right, like several fundamental rights, proclaimed in norms with directive provisions that cover language rights but have no real corresponding sanctions and obligations.

While the law inhabits a grey zone, and the best legislation is that which says the least, especially regarding unofficial usage of languages, the right to 'the' language (and therefore the right to be different) will have meaning, legally speaking, only if it is enshrined (above all for language minorities) in one way or another (particularly, in the official usage of languages), in norms with mandatory provisions, as the right to 'a' language generally is.

As a historical right (that takes into account the historic background of each country), the right to 'a' language deserves special treatment in certain political contexts, even if it is not in itself a fundamental right. As a fundamental right (right and freedom to which every person is entitled), the right to 'the' language, even if it enshrines the dignity of all languages, cannot be considered an absolute right under all circumstances. A hierarchy exists that must take into account, in ways which are different but not legally discriminatory, the historical and fundamental linguistic imperative of the nations and individuals concerned, including the imperative of reestablishing a definite equality between several languages coexisting in a given political context.²⁹

By ruling, in section 89 for instance, that 'Where this act does not require the use of the official language [French] exclusively, the official

language and another language may be used together', Quebec's Charter of the French language recognises and enshrines the right to 'a' language and the right to 'the' language by creating an interesting hierarchical solution between them in the field of language policy.³⁰

It is very difficult to study the linguistic policies of modern states from a strictly legal point of view, because we do not always have at our disposal all of the pertinent legal clauses. In fact, an exclusively constitutional study, or a study of certain legal texts of a constitutional nature, is not adequate to enable one to arrive at absolutely precise legal conclusions.

The ideal would be to have at our disposal constitutional clauses, ordinary legal clauses, the statutes, the legal and administrative judgments as well as the relevant doctrinal references in respect of linguistic matters.

In reality this is possible only for certain states or for certain member states, such as Canada and Quebec. This is why the juridical-linguistic study of Canada and Quebec is so important and essential in order to properly understand and better site the legal hows and whys of any language policy.

Moreover, it is clear that language rights, and more specifically the right to language, are increasingly being recognised as fundamental rights, but not yet in a satisfactory way. Article 27 of the International Covenant on Civil and Political Rights of 1966, which came into force in 1976, is a good start in this respect. This article recognises in principle the right of members of minority language groups to use their language.

This is why we believe that the time has come for competent international bodies, such as the United Nations, Unesco, the Council of Europe and leading private institutions, to pay serious attention to the phenomena and the problems relating to these, so that a universal declaration of language rights can be drafted and ultimately approved and adopted by all states concerned. In respect of the language policy of a country, this declaration must take account of the domain of official usage of languages and the domain of non-official usage and of the distinction to be made between historical language rights and fundamental language rights on the one hand and between linguistic minorities and majorities on the other hand.

Certain annoying trends must be avoided, such as the insistence on protection for linguistic majorities or the insistence that only linguistic minorities be protected. Obviously, there must be agreement on what is meant by 'linguistic majority' and 'linguistic minority'. Above all, it must

not be forgotten that the tower of Babel is a permanent reality of the human condition, both entrancing and confusing. This means that a linguistic policy should also take into account this reality and avoid excessive language control.

At the beginning of this paper we said that language rights are based on two fundamental principles, the principle of the dignity of all languages and the principle of equality of all languages. These two principles are interdependent. Therefore, any kind of linguistic discrimination or linguistic hierarchy should be unacceptable in itself.

However, not all languages are equal from a historical point of view. There are dominant and dominated languages, leading to situations of linguistic majorities and minorities and thus creating negative situations in linguistic and non-linguistic fields. Language equality, we said, does not mean language uniformity. Nor does language equality among thousands of languages and dialects in the world mean absolute equality among them. It means that all languages, precisely because they are vitally different, must live and let others live equally in different ways. It is the only way to avoid the 'languages war'. And if we want to achieve 'linguistic peace', we must do all we can, legally and politically, to make linguistic peace a true reality. Linguistic peace is possible and desirable in the interest of everyone. Linguistic peace will be a source of extraordinary cultural creativity. So we must proclaim solemnly the principle of equality and the principle of the dignity of all human languages. We must avoid any kind of unacceptable linguistic hegemony.

The language situation in South Africa is very peculiar because of the presence of 11 important or principal languages. I am sure South Africans will find the best suitable solutions concerning their language problems, which are indeed very important and serious. If the principles of dignity and equality among languages are respected, the solutions South Africans will realise could be a remarkable example for all the concerned countries.

The distinctions we make between official usage and non-official usage of languages, between official domains (legislation, justice, public administration and instruction) and non-official domains (culture, communications, business and commerce, and labour), between human language rights of historical nature and human language rights of universal nature, between official and national languages, between central, regional and local languages could help to find the best equitable solutions in the language field. All these distinctions mean that the legal treatment of each of these distinctions can be or must be different, according to circumstances.

The International Academy of Language Law is at the entire disposal of all concerned people in South Africa to help to find, from a technical point of view, the most equitable solutions to the language problems of this country.

The Third International Conference of Language and Law, 'Language and equality', places in a prominent position the importance and the urgency to recognise and enshrine the principles of dignity and equality of all human languages. From this point of view, we do hope it will create significant results.

Notes

- 1 Official Languages Act, RSC, 1970, c. C-02. The Act was substantially amended in July 1988 (see Bill C-72, adopted by the Canadian Parliament on 7 July 1988, and assented to on 28 July 1988).
- 2 Charter of the French Language, RSQ, c. C-11. The Charter was rather extensively amended in December 1983 and in December 1988 (SQ 1983, c. 56; SQ 1988, c. 54). The Charter is popularly known as Loi no. 101 (Bill 101).
- 3 Gambier, Yves, *Bilingual Finland, history, law and realities*, French Language Council, Quebec, 1986.
- 4 In Cameroon, French and English are official languages, but only texts written in French are 'authentic'. For South Africa, see article 89 of the 1983 constitution, which makes provision, inter alia, for several 'black' languages to be used officially in certain territories or in certain situations. Note that article 199 of the previous constitution of 1961, which made provision for 'Afrikaans to include Dutch', has been abolished.
- 5 Articles 2 and 3 of the Fundamental Law Normalising the Usage of Basque (Law no. 10 of 24 November 1982) and article 5 of the law of Language of Normalisation in Catalonia (Law no. 7 of 18 April 1983).
- 6 In this country, if there is conflict between the texts relating to this, it is the text written in the national language which prevails.
- 7 Turi, Joseph-G., *The legal-constitutional clauses of 147 States in respect of linguistic policy*, Québec, CIRB, 1977.
As regards Spain, see article 3 of the Constitution of 1978.
- 8 *The Attorney General of Quebec v. Nancy Forget*, 1988, 2 SCR 90.
- 9 *SFPC v. Miriam*, 1984, CA, 104. *Charles Gagnon v. the Attorney General of Quebec*, decision no. 200-36-000035-86. Decision no. 85-1233 of the 13^e *Chambre des appels correctionnels*, Section B, *Cour d'appel de Paris*, and judgment no. 148-705 of the *Tribunal de Police de Paris*.

- 10 RSQ, c. C-11, r. 9.
- 11 See F. Redard, R. Jeanneret and J.-P. Métral (eds), *Swiss German, 5th national language?*, CILA, Neuchatel, 1981.
- 12 See chapter 747, 1977, and chapter 199, 1978, of the Statutes of New York State.
- 13 *R. v. Sutton*, 1983 CSP, 101; this decision was confirmed by the Quebec High Court in decision no. 500-36-0000136-831, 15 August 1983. For the *Miriam* case, see above, note 9.
- 14 Decision No 1327-84 of the 13e *Chambre des appels correctionnels*, Section B.
- 15 Decision No 85-90-934 of the *Chambre criminelle de la Cour de cassation*.
- 16 The Versailles Court of Appeal was inspired in part by the decision of the *Cour de cassation* (see above, note 15 in its decision of the *France Quick* case (decision No 69-87) of the 7e *Chambre de la Cour d'appel de Versailles*).
- 17 *MacDonald v. City of Montreal* (1986) 1 SCR 460; *Ford v. Quebec* (1988) 2 SCR 712 (see page 748).
- 18 *The Attorney General of Quebec v. Irving Toy Limited* (1989) 1 SCR 927 (see p. 1004).
- 19 Capotorti, Francesco, *Study of individuals belonging to ethnic, religious and language minorities*, United Nations, New York, 1979 (see p. 81, in particular). It must be pointed out that according to the Capotorti Report, however, not only the right to be different is a fundamental right, but also the right to be assimilated is of the kind of a fundamental right (p. 103).
- 20 See above, note 7. See also Skutnabb-Kangas and Phillipson, *Wanted! Linguistic human rights*, Rolig, Roskilde, 1989, Denmark, p. 55-84.
- 21 Republic of Turkey, Law regarding publications in languages other than Turkish, Law no. 2832 (19 October 1983). However, this law was abolished on 12 April 1991.
- 22 The United Nations and human rights, United Nations, New York, 1973. The International Charter of Human Rights, United Nations, New York, 1978. The International Covenant came into force on 23 March 1976.
- 23 Case pertaining to certain aspects of language administration and education in Belgium, 23 July 1968, *Annual report of the European Convention on Human Rights*, 1970, vol. 11, pp. 833-1019.
- 24 *Devine v. Attorney General of Quebec* (1987) RJQ 50 (CA). *Attorney General of Quebec v. Ford* (1987) RJQ (CA).
- 25 *Re Manitoba Language Rights* (1985) 1 SCR 721 (see p. 744). *Société des Acadiens v. Association of Parents* (1986) 1 RCS 549 (see p. 578). *MacDonald v. Ville de Montréal* (1986) 1 RCS 460 (see pp. 501 and 502). *André Mercure v. the Attorney*

- General of Saskatchewan* (1988) 1 RCS 234 (see pp. 32 and 33). *Ford v. Québec* (1988) 2 RCS 712 (see p. 748). *Attorney General of Quebec v. Irving Toy Limited* (1989) 1 RCS 927 (see p. 970).
- 26 Canadian Charter of Rights and Freedoms, RU 1982, c. 11, Schedule B, section 2.
- 27 Barbagallo, Renato, *Codice della Regione Valle d'Aosta*, Musumeci, Aosta, 1971, p. 86.
- 28 See above, note 25.
- 29 Turi, Joseph-G., 'Introduction au droit linguistique', in *Langue et droit – Language and Law*, edited by Paul Pupier et José Woehrling, Wilson et Lafleur, Montréal, 1989, pp. 55–85.
- 30 As regards the non-discriminatory nature of certain provisions of Bill 101 (section 35 of the Act requires that professionals have an appropriate knowledge of French language), see the Supreme Court of Canada decision in the *Forget* case (see above, note 8). With regard to the discriminatory nature of certain provisions of Bill 101 (sections 58 and 69 of the Act, respecting the exclusive use of the French language for signs and posters and for firm names), see the Supreme Court of Canada decision in the *Ford* Case (see above, note No 17). In this judgment, the Court decided that the distinction based on 'language of use', created by section 58 of Bill 101, had the effect of 'nullifying' the fundamental right 'to express oneself in the language of one's choice' (p. 787).

With regard to section 89 of Bill 101, see above, note 9.

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II

**LANGUAGE AND LAW:
THEORY AND PRACTICE**

Language, law and equality in South Africa: a theoretical and practical challenge

Dawid van Wyk

INTRODUCTION

This is an international conference on language and law, with a rider of equality. This first session is entitled 'language and law: theory and practice'. I took the liberty of focusing the title by adding 'equality' and 'South Africa'. Because a number of rather specific papers on aspects of language and law in a South African context will follow, I have allowed myself the further freedom of being somewhat general in my approach. Broadly speaking, I propose to make a number of brief observations about language, law and equality in South Africa, past and present; this will be followed by some random theoretical and practical considerations, and a conclusion.

Language and equality

Language and equality have never been comfortable bedfellows in South Africa. Granted, the law since 1910 has tried to force parts of both into each other's arms when first Dutch (later Afrikaans) and English were given 'equal freedom, rights and privileges' by the Union of South Africa Act 1909.¹ In practice, however, the relationship had always been uneasy. It is trite but true that the language clauses in successive South African constitutions mirrored political attitudes and ideologies. In more or less historical succession, these were colonialism, nationalism and apartheid.

English and Afrikaans were on the scene; African languages, like African politics, were somewhere out there, unimportant, informal, somehow wished away until the grand scheme of institutionalised apartheid allowed them to surface in the form of 'official' languages for homelands. Generations of white Afrikaner children grew up on the 'miracle' of Afrikaans and on their duty to ensure that it achieves its rightful place in South Africa, equal to English in all spheres of life.

Official 'bilingualism' became so ingrained in the hearts and minds of white South Africans that the thought of any permanent inhabitant of this country not being able to understand either Afrikaans or English became virtually inconceivable. To give an example: an African law student writes at the end of an assignment that he cannot complete certain sections. The reason is his inadequate knowledge of Afrikaans, the language of some of the prescribed materials. The (white) marker's comment is telling: 'This is no excuse; we live in a bilingual country.' Formally the reply was correct. To be admitted to legal practice in South Africa, a student has to satisfy the court that he or she has passed prescribed university courses in Afrikaans and English. Real proficiency, however, is seldom tested. Likewise, the question is hardly asked – or answered – whether a person really needs a knowledge of Afrikaans to practise law in South Africa. Lest I should be misunderstood: it is not Afrikaans that is in the dock, as it were, but the efficacy of prescriptive language legislation.

In the absence of a bill of fundamental rights, guaranteeing equality, it should not come as a surprise that South African lawyers have not really interested themselves in the language question beyond the narrow confines of resolving conflicts in documents which were drawn in the official languages. A search through the textbooks and the law journals produces little of significance on the broader issue of language and the law in South Africa, let alone in the context of equality. Some six years ago a visiting German professor delivered a paper on 'Literature, language and the law'² at the University of Pretoria, but his emphasis was more on language as the basis of law. In 1991 Bronstein and Hersch of the University of the Witwatersrand came closer to what I regard as the burning issue with an address on 'Teaching law as a second language in a second language'.³ Their poignant observation goes to the heart of the language problem in the new South Africa:⁴ 'There is no point ... in admitting students unless they are given a real chance to graduate.'⁵

The law reports in South Africa contain a sufficient number of authoritative judgments on how to handle the technicalities of conflicts between texts in the current official languages. However, apart from a recent

judgment on the use of Afrikaans and English in court proceedings,⁶ the silence in our courts on the broader issue of language rights is a reflection of the esoteric nature of that notion in South African law.

From a legal point of view, equality of (the official) languages through the years has been little more than a statutory injunction, meticulously and successfully observed in a vast body of official documentation, ranging from Acts of Parliament to correction notices in the *Government Gazette*. This should not be taken as suggesting that attempts had not made by the authorities – especially since 1948 – to translate this law of linguistic equality into policy and action beyond paper. Especially in regard to the furtherance of Afrikaans, though, these efforts met with less than enthusiastic support. In fact, if Neville Alexander is correct in his assessment,⁷ the Soweto uprising of 1976 highlighted the extent to which rejection of Afrikaans had become a symbol of resistance to apartheid with its inherent nature of inequality and discrimination.

The good news is that, like everything else, the language issue has also landed in the crucible of change created by recent political events in South Africa. The prospects of democracy fanned the simmering debates on language in the constitution.⁸ There are two obvious sides to the matter: on the one hand individual equality without distinction as to language;⁹ on the other the question of the status of a particular language in terms of the law. The South African Law Commission addressed both issues in its *Interim report on group and human rights*¹⁰ and its *Report on constitutional models*.¹¹ The African National Congress made brief proposals in its *A bill of rights for a new South Africa*.¹² The National Party also fired a shot in its *Constitutional rule in a participatory democracy*¹³ by suggesting that 'communities are guaranteed self-determination in regard to ... language', among other things.

Language and the individual

It would appear that the Law Commission and the African National Congress agree on the issue of language and individual equality. In its proposed equality clause¹⁴ the ANC is explicit on this score:

No individual or group shall receive privileges or be subjected to discrimination, domination or abuse on the grounds of race, colour, language, gender, creed, political or other opinion, birth or other status.

The Law Commission, on the other hand, somewhat clouded its initial and unequivocal commitment to the same principle. In its *Working Paper*¹⁵ it is stated clearly:

The right to human dignity and equality before the law, which means that there shall be no discrimination on the ground of race, colour, *language*, sex, religion, ethnic origin, social class, birth, political or other views or any disability or natural characteristic ...

However, in its subsequent *Interim report on group and human rights*¹⁶ this clause is reworded as follows without any direct reference to the question of language in the preceding discussion:

Everyone has the right to equality before the law, which means, inter alia, that save as permitted in this article, no legislation or executive or administrative act shall directly or indirectly favour or prejudice any person on the grounds of his or her race, colour, sex, religion, ethnic origin, social class, birth, political and other views or disabilities or other natural characteristics.

Unless I have missed the explanation for the omission of language in the reworded article – which is not impossible in view of the volume of the report and the absence of an index of words – it is unclear whether the omission was deliberate or by mistake. An argument for the latter is supported by the lack of reference to language in the discussion and by the fact that in the summary of its recommendations the following occurs:¹⁷

As wide a spectrum as possible of civil and political rights is covered. Of particular importance is the *prohibition of the state's favouring or prejudicing* any person on the ground of race, colour, *language* [own italics], sex, religion, ethnic origin, social class, birth, political or other views or disabilities or other natural characteristics.

The argument for a deliberate omission of language in the equality clause could be based on the fact that the word was also left out of article 3(1) at the end of the Commission's report where the proposed bill of rights is reproduced in full.¹⁸ This is by no means conclusive, given modern word processing technology which allows parts of texts to be moved and copied. A more convincing reason would be that the proposed article 18¹⁹ deals with equality in respect of language by using language which echoes the general equality provision:

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.

Without going into technical interpretations, it is maintained that in order to avoid any doubt, the better approach would be to include language in the general equality clause as well.

The views of the Law Commission and the ANC diverge in respect of the protection of language(s). The ANC proposes²⁰ that eleven languages be declared 'the languages of South Africa'. It would further enjoin the state to 'act positively to further the development of these languages, especially in education, literature and the media, and to prevent the use of any language or languages for the purpose of domination or division'.²¹ The state would have the further task of promoting respect for all the languages spoken in South Africa.²² When it is reasonable, one or more of the eleven languages could be designated for 'defined' purposes at the national or regional level.²³ It is significant that the adjectives 'official' and 'national' are carefully avoided in the ANC proposals.

The Law Commission criticises these proposals for being too vague and summary, and for giving the governing party under a new constitution the discretion to decide which language(s) should be official. It recommends that the matter be dealt with in a separate chapter of the constitution.²⁴ The Commission may have been somewhat harsh in its criticism. Apart from a brief introduction, the ANC's document does not contain any reasoned exposition of the contents of its bill. Its language clauses are far too nuanced not to have been debated extensively, a glimpse of which may be gleaned from Albie Sachs's *Protecting human rights in a new South Africa*.²⁵

The Commission's own views are found in chapter 11 of its Report on Constitutional Models. The 54-page chapter contains a wealth of information on the way in which languages are dealt with in constitutions. The Commission eventually identifies nine 'practical' options for a future South African constitution.²⁶ The Commission itself does not express a preference for any of the options, however.

The role of language in the state

The consequences of including language in the equality clause, and specifying languages in the constitution (in whatever form) are potentially enormous. Leaving them out, however, could lead to disastrous results, especially in a country where ethnic awareness, regardless of the correctness of the reasons, is present in some form or other. Even in the United

States of America, where it was said²⁷ that 'English is the pot in which the melting takes place', the last decade has seen a proliferation of groups advocating the recognition of language rights.²⁸ It is not altogether unsurprising that this movement came as a reaction to various attempts during the last number of decades to introduce English as the official American language. There are at least two significant sides to this development.

The first is that the language issue is linked to ethnicity. In the fairly recent words of two American authors:²⁹

For ethnic groups ... a national language has important functions: it affirms the group's ethnic identity and provides an important boundary between themselves and others. Because language has expressive as well as instrumental uses, it is also important as a vehicle for individual identity and intimate social relations within an ethnic group. Language use also functions as a political tool; it fashions in-group solidarity, as well as expressing relations of dominance and sub-ordination within the civic culture. Moreover, language, unlike national costume, is not a relic. Its ability to adapt to new situations enables it to become part of the vitality of an ethnic culture.

The second noteworthy aspect concerns equality. Vernon van Dyke, whose name is not unknown in South African political and constitutional circles, puts it concisely in a recent work:³⁰

Problems about equal treatment are inevitable in communities where more than one language is spoken, above all when, as in the United States, one of the languages is dominant. To have equal opportunities in life, those who speak a minority language must learn English, which puts a burden on them that other do not share.

I have used the United States as point of reference for a specific reason. It is a classic instance of the tension between what Limage³¹ calls the monolingual hegemony of an industrialised nation and the upsurge of demands for equality of other languages. It would appear that in the United States, as elsewhere, a root concern is the effect of a diversity of languages on the unity of the nation.

This opens up a new hornet's nest of questions about the role of language in the state and the ability of the law to regulate that role in a way which is inherent to law, namely equal. The pitfalls in trying to argue the case are manifold. The first question is whether there are universal truths about the phenomenon of language(s) in the state. At first glance the reply would seem to be positive: the amount of conflict generated by linguistic disputes, for example, suggests that Tollefson³² has a point when he

maintains – with reference to the current crisis in Yugoslavia – that ‘the foundation for rights is *power* and that constant *struggle* is necessary to sustain language rights’. In a South African context it would not be too difficult to find one or more significant political factions subscribing to this thesis.³³ The point is that there is something inherently unequal about the notions of power and struggle.

On the face of it such an approach rules out, as an alternative to ‘struggle’, tolerance of the intrinsic tension that goes with diversity or plurality. Struggle, more often than not, is destructive. Tolerance, on the other hand, may (in principle at least) lead to the creative management of the tensions caused by conflicting demands and aspirations.³⁴

Tolerance is an accepted value of democracy. At the same time, it is one of the values for which democracies emerging before the ‘new world order’ of the last two or three years had not been noted. Within a constitutional context it implies that the social and political consequences of the administration of diversity should be the fostering of a ‘critical and open pluralism’, instead of a segmentation and isolation of groups in a larger society.³⁵ Such an approach, it is suggested, should lead to language being seen not in ideological terms as a tool of unification or separation, but in more practical terms of what is best understood at certain levels. This is another way of stating the difference between the ‘ideological’ perception of language as the bearer of a particular culture and language as a cultural phenomenon in itself.³⁶

There will probably not be much resistance to the inclusion of language in the equality clause of a future South African bill of rights. The same applies to the right of every individual to use his or her own language.

The more difficult issue to resolve will be that of specific languages in the constitution, whether in an official, national or merely nominal capacity. There are positives and negatives involved. The following aspects will have to be considered:

- The make-up of South Africa’s multilingual nature is such that every resident individual will have to know at least two languages. Since the political/ideological edge of the current system of official languages would be gone, encouragement to acquire as many languages as possible should not meet with opposition.
- The argument for a unifying language with a view to nation-building has been overtaken by events; as a result the acceptance of a particular language, such as English, as *lingua franca*, could in principle be

managed in a rational as opposed to an emotional way. The words of Tollefson³⁷ should be a constant reminder, however, that 'human institutions may not yet be able to provide a social structure in which everyone can live their lives using their own language(s), but we should not deceive ourselves into thinking that second language acquisition [wat vir die meeste Suid-Afrikaners die geval met Engels is] guarantees equal economic opportunity, political participation, and justice'.

- The identification of the areas where proficiency in an 'official' language matters should be undertaken and special affirmative action programmes developed to ensure that those who need a certain level of proficiency could be assisted to acquire the same. Useful comparative materials are available.
- Structural equality, that is 'a system for making decisions in which individuals who are affected by policies have a major role in making policies',³⁸ and a commitment to democracy would be required to encourage attitudinal changes needed to solve the problems of inequality in a multilingual state. In the words of Braën:³⁹ 'although the law relating to language clearly reflects the principle of equality, true equality is never achieved without profound attitudinal changes.'
- The tension between the equality clause of the constitution, and an 'official/national' language provision (which seems inevitable in South Africa) should be handled in a pragmatic, as opposed to a dogmatic, way.
- The psychological impact of the 'resurgence of ethnic-minority nationalism all over the world'⁴⁰ and the attendant readiness to 'struggle' for language rights should not be underestimated, especially during the period of transition.
- It will have to be accepted that in some cases the best compromise may be the one in which equal disadvantage overshadows the lack of any significant equal benefit. In discussing the Namibian policy of official English, Tollefson⁴¹ concludes: 'In a sense, English will equally disadvantage much of the population, unlike indigenous languages, which would grant privileges to entire groups.'

A participant in Codesa observed recently in passing that the language issue will be one of the easier ones to solve as far as the constitution for a new South Africa is concerned. It can only be hoped that this was not too optimistic a view.

Notes

- 1 Section 137, succeeded by the Republic of South Africa Constitution Act 32 of 1961 section 108 and the Republic of South Africa Constitution Act 110 of 1983 section 88. Reyntjens, 'Juridische aspekten van taal in Afrika' in Symoens and Vanderlinden, *Les langues en Afrique à l'horizon 2000/De talen in Afrika in het vooruitzicht van het jaar 2000* (1991) 19 this vertical, non-hierarchical approach is typical of North Atlantic countries; Africa by contrast preferred a horizontal, hierarchical system of language protection.
- 2 Grossfeld 1987 *De Jure* 217.
- 3 1991 *South African Law Journal* 159.
- 4 *Ibid.*
- 5 The South African Law Commission put this principle in more explicit terms in its *Interim report on group and human rights* (1991) 190 where it refers to the 'vicious circle that cannot be broken: pupils who are not even fully literate in their own language switch to a second language as the medium of instruction at an early stage. This results in communication, learning and other problems, which means that the product that is eventually turned out by the school is in most cases unequal to the demands of later life.'
- 6 *Matenane v Magistrate, Alberton* 1991 4 SA 613(W).
- 7 *Language policy and national unity in South Africa/Azania* (1989) 38.
- 8 For some details of which see South African Law Commission *Report on constitutional models* (1991) 479 *et seq.*
- 9 The Law Commission *Interim report on group and human rights* 461–462 adds three further 'language rights', namely the furnishing of reasons for arrest in intelligible language; communication of a criminal charge in a familiar language; and assistance by an interpreter in criminal proceedings. These should not be seen as conclusive, though.
- 10 *Idem* 374 *et seq.*
- 11 (1991) chapter 11 – for a summary see chapter 2.I.
- 12 (1991) articles 1.2 and 5.5–9. The proposals were amplified in the writings of ANC spokespersons such as Prof. Albie Sachs: see, for example, *Protecting human rights in a new South Africa* 162–163.
- 13 (1991) 20.
- 14 *A Bill of Rights for a new South Africa* article 1.2; own emphasis. Reyntjens in Symoens and Vanderlinden, *Les langues en Afrique à l'horizon 2000/De talen in Afrika in het vooruitzicht van het jaar 2000*, maintains that it is a common phenomenon for equality clauses in Africa to include language.

- 15 *Project 58: Group and human rights* (1989) chapter 15, article 2, reproduced in *Interim report on group and human rights* (1991) 283.
- 16 At 303.
- 17 *Interim report on group and human rights* 662.
- 18 *Ibid.* 686.
- 19 *Ibid.* 380.
- 20 *A bill of rights for a new South Africa* article 5.5.
- 21 *Idem* article 5.6.
- 22 *Idem* article 5.9.
- 23 *Idem* article 5.7.
- 24 *Interim report on group and human rights* 379.
- 25 At 162–163. Its proposal regarding the designation of one or more languages for 'defined' purposes even finds support in the constitutional practice of countries referred to by the Commission itself: see *Report on constitutional models* 464 par. 11.25.
- 26 *Report on constitutional models* 491–493.
- 27 *New York Times* 1987–09–27 at 30, as quoted by Norgren and Nanda, *American cultural pluralism and law* 185.
- 28 Piatt, *Only English?* (1990) 23.
- 29 Norgren and Nanda, *American cultural pluralism and law* 185–186.
- 30 *Equality and public policy* (1990) 87.
- 31 'Language policies in Western Europe and the Union of Soviet Socialist Republics' in Adams and Brink (eds), *Perspectives on official English* (1990) 83–84.
- 32 *Planning language, planning inequality* (1991) 167.
- 33 The Law Commission *Interim report on constitutional models* 500 refers to the 'strong resistance' that could be expected from Afrikaans-speaking people if that language were deprived of its official status; similar sentiments were echoed in the official mouthpiece of the FAK, *Handhaaf* June/July 1991 at 4 ('n Nuwe Taalstryd?').
- 34 See Lewis, 'The morality of bilingual education' (1978) as quoted by Limage in *Perspectives on official English* 84.
- 35 Limage in *Perspectives on official English* 94.

- 36 Tollefson, *Planning language, planning inequality* 2 captures something of this when he says: 'The role of language is essentially arbitrary, meaning that human beings through their action have made language a determinant of most of our social and economic relationships.' See also Sachs, *Protecting human rights in a new South Africa* 163.
- 37 *Planning language, planning inequality* 210.
- 38 *Idem* 211.
- 39 'Language rights', in Bastarache (ed.), *Language rights in Canada* (1987) 3.
- 40 Srivastava, 'Linguistic minorities and national languages' in Coulmas, *Linguistic minorities and literacy* (1984) 99.
- 41 *Planning language, planning inequality* 5.