

IV

LANGUAGE AND LAW IN THE AFRICAN, INCLUDING SOUTH AFRICAN, CONTEXT

Research notes on language struggles, language rights and political transformation in South Africa

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Language struggles generally take place in resistance to language imposition. South African history is replete with examples of such struggles, for both British colonial and apartheid language policies favoured the development of language attitudes akin to the political attitudes of fostering exclusivism and prejudices. In a strict sense we cannot so far speak of a national language policy in South Africa.

On the other hand, new political-cultural attitudes have emerged in the process of assertion on non-racialism in South Africa since the 1980s, which foster integration and tolerance, and this can ultimately lead to be true national policies, including national language policies.

While there is no freedom of language choice in South Africa, there will be no freedom of opinion and expression, which is a fundamental freedom in order to achieve universal human rights.

Political transformation in South Africa is also part of an international process of assertion of human and people's rights, which goes hand in hand with the development of both international and national instruments to that effect, including the combat of racism and racial discrimination.

Language rights in South Africa are thus bound to become important constitutional and legislative issues, despite the present ostrichism as

regards the language question – one of the most contentious issues to be dealt with in the present process of political transformation.

LANGUAGE IMPOSITION

The precolonial situation in South Africa was characterised on the one hand by the existence of nation-states with their own respective languages and on the other hand by coexistence of these languages brought about by economic relations between them. Language imposition was not the rule but, rather, language integration took place through mixed marriages and military conquest.

Under Dutch colonialism, non-Dutch settlers were forced to abandon their own languages and cultures. A large measure of social uniformity was imposed on the white community by the church and the state. The slaves and the Khoi had their distinctive cultures crushed and contributed to the emergence of creolised Dutch, later known as Afrikaans. Under British imperialism attempts at eliminating the Dutch influence through a deliberate imposition of English in education, administration and law, introduced the first language laws in 1823, 1825 and 1827. English colonisation brought about the imposition of mother tongue instruction in Natal to avoid competition from the Africans, who were developing a preference for the English language acquired through education.

Conflicts between the settler groups were also expressed as language struggles, as a Dutch (Afrikaans) language movement emerged against English language imposition. The Afrikaans Language Movement evolved as a language struggle for the recognition of Afrikaans.

While Dutch was placed on a par with English as an official language of the Union of South Africa (1910), giving origin to the peculiar South African policy of language imposition through state bilingualism, Afrikaans gained ground against Dutch, especially as it had been recognised by the Afrikaner petty-bourgeois intellectuals as a means of political mobilisation since the 1870s. In 1918 it replaced Dutch in schools as the medium of instruction. In 1925 it became an official language on a par with English.

In an attempt at cross-cultural political unity state bilingualism was adopted in order to foster white supremacy. Four decades later the apartheid state had a strong linguistic component, furthering state bilingualism to foster white supremacy, while mother-tongue instruction became a state instrument in the ethnolinguistic fragmentation of the African population, as cornerstone for bantustan policy.

Compulsory bilingualism resulted in the promotion of Afrikaans to catch up with English; Bantu education and subsequent bantustan policy were aimed at underdeveloping African people and their language, while imposing Afrikaans as a second language.

While compulsory state bilingualism was aimed at achieving equality of opportunities for the white speakers of English and Afrikaans, the teaching of any African language other than the mother tongue was discouraged. Non-participation of the Africans in policy-making as well as in language policy led to a rejection, especially in the urban areas, of the imposition of mother-tongue instruction. This rejection benefited the *de facto* imposition of English by market forces onto the urbanised African.

One of the most blatant forms of language imposition was the 50/50 rule in secondary education for Africans, in accordance with which the African youth were supposed to have two media of instruction (the official languages English and Afrikaans) with the imposition of Afrikaans as medium of instruction in social studies. The struggle for language rights by the African youth led to the Soweto uprising in 1976.

STRUGGLE FOR LANGUAGE RIGHTS

Some of the features and successes of the Afrikaans language struggle, although waged within the framework of a political struggle for cultural exclusivism, point to possible ways of language development and of assertion of language rights in the present political transformation of South Africa.

It is worth mentioning that the advocates of Afrikaans as opposed to Dutch were concerned with the convergence between written and spoken language.

This trend was later abandoned; Afrikaans became a language of domination. Albocentrism based on the misconception that the written language would be more pure than the spoken one was an instrument to guarantee the language rights of the white speakers of Afrikaans but not those of the non-white. Furthermore, the state-sponsored development of the Afrikaans language in order to counter the imposition of English by national and international market forces is an indication of that the promotion of language equality in South Africa will necessarily require state support for the promotion of all other South African languages besides English and Afrikaans (i.e. Sndebele, Sepedi, Sesotho, Siswati, Setswana, Tsonga (Shangaan), Venda, Xhosa and Zulu).

Resistance against language purism has been a form of language struggle, of assertion of language rights, in a set-up of standard and non-standard varieties of the official languages. In South Africa, Afrikaans is the most striking example of the way in which a non-standard language variety could supersede a standard language variety (Dutch), as a result of a political language struggle. On the other hand the so-called coloureds, who represent about half of the speakers of Afrikaans, have been marginalised under apartheid and precluded from active participation in the development of the language.

The marginalisation of large sections of the black population induced by apartheid, whereby such sections either conform to imposed norms, values, diction or styles of the European language speakers in their labour relations or they are compelled to relate to them, leads to language mixing or pidginisation. Both 'Township English' and 'Mixed Afrikaans' spoken by the marginalised sections of the black community are illustrative of this trend. Naturally, completely negative attitudes reflected by non-consideration of these speech varieties or styles exist on the part of dominant white groups in as far as these linguistic phenomena have been widely ignored. In this context language mixing constitutes a concomitant phenomenon of linguistic marginalisation under state bilingualism.

With the institutionalisation of apartheid in 1948, government policy was totally directed at forestalling assimilation, acculturation and upward social mobility of South African 'non-white' populations and their integration into the urban-industrial society.

The struggle against Bantu education (in as far as the African community resisted the government measures for educational underdevelopment) also represented a struggle for language rights in the resistance against the imposition on mother-tongue instruction and compulsory bilingualism of media of instruction.

There was a perception that the imposition of mother-tongue instruction was aimed at furthering ethnic fragmentation for the implementation of the divide-and-rule apartheid policy.

The attempt of the apartheid government to impose Afrikaans in high schools for Africans, which culminated in the Soweto uprising in 1976, for the first time put the Africans in the centre of language struggles in education, the major domain of deprivation of the right to freedom of language choice.

In the nineties, however, the language situation of South Africa has been characterised by an emergent national multilingualism. The struggle

against apartheid, both within South Africa and internationally, received an impetus from the Soweto uprising, further raising the issues of struggling against linguistic apartheid.

Language defiance through the use of non-standard varieties of the official languages, language mixing and increased interpretation and translation across all South African languages became politically practical, arising from the need to counter isolation and exclusivism promoted by apartheid language policies.

POLITICAL TRANSFORMATION AND LANGUAGE POLICY ISSUES

The ideology and practice of white supremacy in South Africa has turned countless legislative instruments enforced by racialist monopoly of power to its own account.

Political transformation leading to the elimination of apartheid thus involves a national agreement on a democratic South Africa, which is currently taking shape, and which can create a climate for political debate and enactment and enforcement of democratic legislation based on universal human rights.

The freedom of language choice is related to all universal human rights, and especially to the fundamental freedom of opinion and of expression. Universal human rights are enshrined in all instruments adopted on human rights in the constitutions of several multilingual countries and in the constitutional proposals of the African National Congress of South Africa.

However, the incorporation of such rights into a new South African constitution without taking cognisance of the inequality in the present status of South African languages (that is their unequal function allocation) will reduce language freedom in South Africa to a myth.

For of what use is it to recognise the rights of every South African speaker to use his or her native tongue in the domain of public access, when in practice the language is reduced to home use and to relative underdevelopment compared with English and Afrikaans, while no provision is made in terms of providing them with the right of freedom to develop, a right of which the majority of South Africans have been deprived.

Equality in a South African context should therefore be construed in such a way that it takes into consideration the administrative needs of a future South African state to foster national unity while providing for

language freedom through the recognition of language and cultural diversity.

More significant than language differences is the existence in South Africa of a common history, a common economy and now a common culture and a common state in the making. That does not necessarily mean that any language should be privileged with the status of single official language under the guise of being a 'common' language, as seems to be the position of advocates of the informal imposition of English.

Some decades ago and still today in South Africa, experts had it that the English language had an unassailable position in Africa in view of its importance in the process of modernisation and nation-building.

In post-colonial Africa, mother-tongue instruction has been replaced in most countries by metropolitan languages (English, French, Portuguese) and this has not necessarily contributed to further economic, technological or social development of the continent.

The present situation of language inequalities in South Africa awards English an informal privileged position. The most powerful economic sector has even traditionally been qualified as English-speaking. Its instrumental use for most South Africans on account of labour market constraints surely limits the freedom of language choice.

Apartheid has imposed on the African languages the following limitations:

- Almost the entire African population, who should have been instrumental in developing their own languages, are marginalised.
- The creation of bantustans was aimed amongst other things at curbing the advance of language integration amongst Africans.
- Widespread illiteracy among the black population.
- These languages are used mainly for primary education, while secondary education followed the imposition of state bilingualism, and later the choice between English and Afrikaans.
- An acute lack in literature, except for trivial literature or government propaganda.
- Banning and censorship have had a profound and negative effect on publication of African literature of any kind, tending to have either a prohibitive or deterring effect.

- Communication media, especially the electronic ones, have been used to foster language exclusivism. The so-called Bureaux for Language and Culture have been instrumental in setting limits to technical vocabulary and bringing the African languages to further differentiation.

This indicates that the right of participation of native speakers in the development of the African languages is fundamental. The South African oppressed have indeed inherited ready-made formulae devised about them, presumably for them, but never by them. The striking absence of the African in South African scientific production has thus to be addressed and not only so far as linguistics or the human sciences are concerned.

The provision of official state bilingualism, arising not from democratic conditions of cultural coexistence, but from language imposition, favoured the development of other varieties of English and Afrikaans emerging from marginalised social, cultural, economic and last but not least political environments. How are the older varieties to be dealt with in a deracialised South Africa, in order to safeguard the language rights of their speakers? The issue of freedom of public access should consequently be dealt with.

Since the elimination of apartheid does not in itself generate the universal human rights for the South African population at large, there is a need for clearly stated democratic principles to overcome our peculiar colonial and apartheid legacy.

Language bias and elitism have condemned the poorest sectors of the South African nation to silence, not only through the absence of freedom of speech but also through established language purism.

A general consensus is emerging at most forums at which the language issues are discussed, and opinions are converging on the issue of unity in diversity in future South African language planning. (Unity in diversity alludes to the motto of the Swiss confederation, the language policies of which are not necessarily a model for South Africa since one of the strongest proposals for a democratic South Africa is that of a unitary state and not of a federal one.)

Once democratic principles concerning the freedom of language choice, derived from the freedom of opinion and expression, are duly enshrined in a constitution, the access of the population to these freedoms will also have to be supported by state initiative to redress the imbalance caused by colonialism and apartheid. One of the practical questions which arise is surely how to promote multilingual communication while equally

safeguarding and promoting the culture underlying all South African languages.

One of the possible answers is that the elimination of apartheid involves the abolition of state bilingualism. The present pattern of state languages in South Africa originated from a convention of colonial representatives. In the present process to achieve a democratic South Africa, in which direct and/or representative participation of all the South African people is expected, it is hoped that consensus will be reached on the adoption of national multilingualism as state policy.

Whether all South African languages will have official status or whether they will have an established status of working languages for regional purposes is still a controversial political matter rather than a technical one.

However, there are issues of a practical nature – economical and technological – which concern the development of equal opportunities and the redressing of imbalances in such economic activities in which language is one of the main objects. These include printing and publishing, communication, advertising, production of documentation, translation, interpreting, language teaching and learning, information services and office automation.

State support will be required for equal opportunities in these so-called language industries – more specifically when one considers the transnational activity of English language industries.

Language industries can also be described as the area of information technology which 'works with words' and, besides relating to the above activities, is also involved with design, production and communications, with tools, products and services which today call for an automatic processing of natural languages.

Thus, in order to promote multilingual communication in the present political transformation of South Africa, the state has to deal equally with all South African languages, but with the aim of redressing the existing imbalances.

Consequently, possible provisions to prevent language discrimination and to promote South African languages equally as forms of guaranteeing the freedom of language choice should be researched and subsequently submitted to debate in all South African constituencies.

References

- African National Congress (SA) 1991. Discussion document: Constitutional principles and structures for a democratic South Africa. Centre for Development Studies, University of the Western Cape, Bellville, April 1991.
- Alexander, Neville. 1982. *Language polarities and national unity in South Africa/Azania*. Cape Town, 1989.
- Brosnahan, I. F. 1963. Some historical cases of language imposition. In John Spencer (ed.).
- Calvet, J. L. 1974. *Linguistique et colonialisme*. Paris.
- Dunjwa Blajberg, Jennifer 1980. *Sprache und Politik in Suedafrika, Stellung und Funktion der Sprachen unter dem Apartheidsystem*. Bonn: ISSA.
- Dunjwa Blajberg, Jennifer 1979. Die Stellung der Sprachen in der Republik Suedafrika. Doctoral dissertation. University of Vienna.
- Dunjwa Blajberg, Jennifer. 1987. Background paper on language in post-apartheid South Africa. CASA Conference, Amsterdam, December.
- Dunjwa Blajberg, Jennifer 1989. The psycho-social dimensions of language in South Africa, and considerations concerning post-apartheid language policy. Paper delivered at the Seminar on Language organised by the African National Congress (SA), Department of Education, 17–19 July 1989, Tanzania.
- Dunjwa Blajberg, Jennifer 1992. A historical background to recent and existing language policies in South Africa. Commissioned Report, National Language Policy Investigation, Language Policy Research Group, Johannesburg, Cape Town, Rio de Janeiro.
- Fishman, Joshua A. (ed.) 1972. *Readings in the sociology of language*. Paris: Mouton.
- Kachrii, Braj R. 1991. Liberation linguistics and the quirk concern. *English Today*, 7(1):3–13.
- Malherbe, E. G. 1970. Bilingualism. In *SESA*, vol. 1.
- Muller, Piet 1992. Die tragedie van Afrikaans. *Insig*, Maart:18–19.
- Ngugi wa Thiong'o 1986. *Decolonising the mind: the politics of language in African literature*. London, Nairobi: Heinemann.
- SESA 1970. *Standard Encyclopaedia of Southern Africa*. Cape Town, volumes 1–4.
- Sebeok, Thomas A. (ed.) 1971. *Current trends in linguistics*, vol. 7. The Hague.
- Unesco (United Nations Educational, Scientific and Cultural Organisation) 1972. *Apartheid. Its effects on education, science, culture and information*. 2nd edition revised and enlarged. Paris: United Nations.

United Nations 1988. *Human rights – a compilation of international instruments*. Centre for Human Rights, Geneva, New York: United Nations.

United Nations 1991. *Second decade in combating racism and racial discrimination – global compilation of national legislation against racial discrimination*. Centre for Human Rights, Geneva, New York: United Nations.

Language policy: language, law and human rights vis-à-vis the place and role of non-official languages in a democracy in multilingual settings

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In my paper entitled 'On the notion and implications of the concept of mother tongue in literacy education in a multilingual context: the case of Zambia' (Kashoki 1989) the thrust of the central argument was to question 'the appropriateness of the continued, firmly established emphasis on the mother tongue as the key to the effective imparting of formalised knowledge in adult literacy programmes'. This line of argument threw down the gauntlet by inviting serious second thoughts on what I labelled 'the now almost sacrosanct notion of the imperative need to impart literacy skills through the mother tongue' (p. 3). In more direct terms, I was more especially concerned to demonstrate whether this emphasis did not generate more problems than it was intended to solve particularly from the point of view of multilingual countries or nation-states faced with the realities and practicalities of severely limited resources.

In pursuit of this central thesis to its logical conclusion, the final point was made that, from the vantage point of various salient considerations (viz. economic, political and (socio)linguistic), the principle underlying

the notion of mother-tongue education as the *sine qua non* in the task of imparting literacy skills in both early formal and non-formal education is not sustainable from a practical viewpoint in the context of multilingual settings. Focusing on the economic or cost factor, for example, the point was made that where only a few selected languages are involved in the educational process or in government business generally, the financial investment to be made is not so great. Where, on the other hand, mother tongues in their tens (and sometimes in their hundreds and even thousands) are involved, the cost factor becomes significantly more salient and crucial. Similarly, from the viewpoint of political considerations, it would be extremely difficult, if not altogether impossible, for any government, however democratic or responsive to the popular will, to attempt to accommodate every democratic call insisting on the inclusion, without exception, of the entire range of the country's stock of mother tongues in the principal domains of government business (such as education, broadcasting, administration of justice, etc.) at the taxpayer's expense. The pivotal question here is whether governments that rely for the most part on limited financial and other resources have the ability and capacity to give a democratic responsive ear to every demand, however legitimate, put forward for favourable consideration by the citizenry.

On linguistic and sociolinguistic grounds too, the conclusion drawn was that there was a case for supporting language policies, in the context of the complex linguistic mosaics of multilingual modern nation-states, in situations in which for practical reasons only a few languages are selected and prescribed for formal use by a government, with particular reference to medium of instruction. The salient argument in this case was that, where close linguistic affinity exists among the languages concerned (as is often the case among certain closely related groups of Bantu languages), it stands to good reason to go for the lingua franca (or national languages of wider communication) rather than the mother tongue as the vehicle for pursuing literacy programmes, both formal and non-formal. This point is reinforced by a related social phenomenon so common in multilingual social environments, namely the fact that, no doubt as a coping or survival mechanism, the adult individual competently manipulates two or more languages in his communicative repertoire.

On the basis of all this the conclusion seemed inescapable that 'the lingua franca', as I argued, 'rather than the mother tongue is politically a more feasible proposition to translate into practical effect. Where the emphasis on the lingua franca gives greater scope to governments to mount educational programmes more effectively and at less cost, em-

phasis on the mother tongue acts to multiply and aggravate problems of implementation' (p. 13).

It is evident from the general thrust of this argument that the standpoint that ranges one on the side of the practicability of selecting only a few languages from a national stock of many is dictated largely by the severely constrained capacity of governments to meet their obligations to the people who put them in power as equitably as is practically possible. It is a standpoint, in other words, that does not consider the individual and the individual's basic human rights as the point of departure. It is also an argument that has the effect of letting fundamental human rights play second fiddle to pragmatic considerations dictated by practical societal limitations.

However, if individual and fundamental human rights are to be the basis of a sound language policy (or any other policy for that matter), then one's focus and emphasis have to be shifted in quite a fundamental way. Accordingly, the central thesis of the present paper will seek to stand the earlier argument on its head by thrusting the individual and not the government on to the centre stage. This shift in focus and orientation is rooted in the philosophical persuasion that if indeed language, as a systematised form of verbal communication, is what separates *Homo sapiens* as *Homo loquens* from the rest of the animal species, then the right of the individual to use his or her primary language (i.e. mother tongue or first language in fulfilling his or her human potential) should be considered as being among the fundamental freedoms to be enjoyed by citizens of a country and should therefore be so enshrined in the laws or policies of democratic modern multilingual nation-states.

UNDERLYING ASSUMPTIONS

The central argument of this paper, shortly to be elaborated in the final section, that non-official languages ought to be accorded a strategic place and an appropriate role in democratic nation-states in multilingual settings is predicated on a number of underlying assumptions, some of which are outlined here. These assumptions provide the foundation on which the justifications for a call for giving non-official languages some formal recognition and status in language policies of democratic, multilingual countries rests.

Primary, for our present purposes, are the provisions of the OAU's Cultural Charter for Africa (1976). Article 2(c) deserves special mention. 'In order to fulfill the objections set out in Article I,' the article states, 'the

African States solemnly subscribe to the following principles: (c) respect for *national specificities and local peculiarities* in the field of culture' (italics mine). Elaborating and giving greater force to this provision, article 3 goes on to state: 'The African States recognise the need to take account of national specificities and local peculiarities, cultural pluralism being a factor making [for] a balance within the nation [as well as being] a source of enrichment for the various communities.' 'To cap it all', article 4 leaves the charter's intentions in no doubt by stipulating that: 'Cultural pluralism and the assertion of national identity must not be at the cost of impoverishing or subjugating other cultures.'

Lessons or experiences derived from other parts of the world are also germane to this basic issue. For example, one of the most persuasive propositions of book IV (i.e. *The cultural contribution of other ethnic groups*) of the Canadian government's *Report of the Royal Commission on Bilingualism and Biculturalism* (1969) aptly reminds us that:

Integration, in the broad sense, does not imply the loss of an individual's identity and original characteristics or of his original language and culture. Man is a thinking being; severing him from his roots could destroy an aspect of his personality and deprive society of some of the values he can bring to it. Integration is not synonymous with assimilation. Assimilation implies almost total absorption into another linguistic and cultural group. An assimilated individual gives up his cultural identity, and may go as far as to change his name (p. 5).

Similar lessons and inspiration are to be drawn from other sources. In this instance Dr Debi Prasama Pattanayak, formerly the Director of the Central Institute of Indian Languages, in his article 'Third World experience in language use' has pertinently observed that 'In the third world, if language is to be used to inform and educate the public, to mirror the society, to interpret the development process and to mediate in social change, then it is only common sense that all prevalent languages should be considered as resources and *all these resources be exploited for national self-realisation*' (1982:28, italics mine).

And just in case the crucial point here is lost sight of, Dr Pattanayak goes on to counsel that whereas the Western (or developed) world, generally speaking, has traditionally operated under a belief-system of dominant monolingualism whose basic premise may be said to be that, in his words, 'two languages are considered a nuisance, three languages uneconomic and many languages absurd, [in] multilingual countries many languages are facts of life, [and] any restriction in the choice of language use is a nuisance and one language is not only uneconomic but absurd' (p. 28).

Turning to yet another part of the world, in Australia where before World War II the prevailing language policy was exclusively in favour of one language – English – later developments have been characterised by a notable departure from this emphasis on monolingualism. As we learn from *A national language policy*, being a 'Report by the Senate Standing Committee on Education and the Arts' (October 1984), the preoccupation of the Commonwealth Government of Australia, especially since the 1970s, has been directed at evolving a national language policy that takes due account of the present multicultural and multilingual character of the country. For, as the report points out, whereas 'despite the fact that immigration from southern Europe, Germany and eastern Europe increased during the 1920s and 1930s, the period from 1900 to 1946 saw the consolidation of the English language in Australia', subsequently 'the post-war migration program reversed the process of increasing English monolingualism' (p. 8).

This reversal of earlier trends is described more succinctly by Michael Clyne and Ross Steele (1984) who inform us in these vein:

Until World War II Australia had a predominantly Anglo-Celtic English speaking society. After World War II the Federal Government instituted a vigorous policy for attracting immigrants to Australia.

The official attitude towards post World War II immigrants was blatantly assimilationist. They had to learn English and there was little recognition of their difficulty in gaining access to social support services because of their lack of competence in English. During the 1960s this attitude gradually changed to an awareness of the multicultural nature of the new Australian society and, during the 1970s, to official encouragement for the maintenance of the languages of the ethnic communities' (p. 1798).

The end result was that '[i]n late 1972 the policy of assimilation was replaced by a policy of integration which respected cultural and linguistic diversity' (p. 1798).

What the Australian experience demonstrates, and the point is germane to the philosophical underpinnings of the present paper, is that the increased ethnic diversity of immigrants after World War II, resulting in correspondingly increased numbers of languages used in Australia, has caused the country to come to grips with the reality of the changed multicultural and multilingual character of the nation. Today, as we glean from the Senate Report already cited, although 'by 1983 about 83 per cent of the Australian population spoke English as a mother tongue', (*op. cit.*,

p. 8), the present overall linguistic panorama shows that 'About eighty different immigrant languages as well as 150 Aboriginal languages are currently spoken in Australia' (p. 9).

What has been stated thus far suggests some quite fundamental philosophical assumptions which may now be restated in summary form as follows:

The first, and perhaps the most obvious, is that language, being man's unique gift and a distinguishing mark from the rest of the animal species, ought to be regarded as one of the most basic human rights to be accorded a special place in the bill of rights as enshrined in constitutions or laws of democratic nation-states. Here Pattanayak's reminder is particularly germane: 'The mother tongue is the centerpiece in an interdependent network of communication, which presupposes complementary use of languages, language varieties, styles and registers, which in turn ensure emotional and intellectual virility, creativity and innovativeness' (1984: 1831).

The second, closely related to the first as a philosophical proposition, is that all languages, irrespective of the numerical size of their speakers, are valuable national resources or ought to be regarded as such. As resources, all the languages spoken in the country should have a role to play at different levels and in different conditions in the complicated matrix of national affairs.

Bearing directly on these two points as underlying philosophical assumptions is the principle of equity. It is mainly in the principle of equity that respect for multiculturalism and multilingualism is anchored. As we have seen, the OAU's Cultural Charter has placed a special premium on respect for national specificities and local peculiarities which, for our purposes, is just another way of according special importance to the intertwined concepts of multiculturalism and multilingualism. Certainly, a country that gives due recognition to national specificities and local peculiarities cannot at the same time escape the obligation to place its whole gamut of cultures and languages at the core of its national policies. Subsumed in this principle also is the need for governments to give concrete expression to the preservation of the various cultural identities of the communities that constitute the nation.

Finally, language policy, like all other policies in organised human societies, can be understood essentially as a social manipulative mechanism by means of which the society in question is subjected to, or governed by, formal arrangements often expressed in the form of restrictive rules

and regulations. As such, these rules and regulations as components of government or state policy inevitably raise questions of social control, domination, discrimination, exclusion or, in general terms, denial of (fundamental) rights. They thus touch equally inevitably on basic constitutional or legal issues such as those relating to fundamental freedoms, particularly freedoms of expression, assembly, association and movement. Implicit in these freedoms, and without doubt essential to them, is the notion of communication. For, individuals will not be in a position to enjoy the freedom of expression, the freedom of assembly and association and the freedom of movement unless they possess in the first place the ability – indeed the freedom – to communicate with others with whom they will associate as they go about enjoying the freedoms of expression, assembly and movement. Thus a nation, or more specifically a government, that sets little store by, or that pays only lip service to, the essential importance of language in the practical expression of the freedoms that are often enshrined in national constitutions is thereby embarking on national policies that do not in the first place give due regard to the primacy of language policy as a constituent part of the overall web of those national policies.

It is therefore in order at this point to attempt a brief survey of law and practice in a few selected countries in order to provide an illustrative bird's eyeview of the present 'state of the art'.

A BRIEF SURVEY OF LAW AND PRACTICE

Different countries in their peculiar sociocultural and political settings, informed and influenced by the ideologies or perceptions of national destiny that largely shape the policies that are conceived and formulated, have approached the language factor in their national affairs as multilingual societies at different points of human history in varied ways resulting in the appearance of a diversity of constitutional or legal provisions that we see today. In some countries sensitivity to the centrality of language in national affairs, including the developmental process, is duly reflected in appropriate constitutional provisions. But, more commonly, in many others utilisation of the languages spoken in the land finds expression in separate pieces of law, such as those pertaining to education and broadcasting, and not in the constitution itself. In other cases, the utilisation of the nation's languages in the different domains of government business is arrived at by administrative rather than juridical arrangements as, for example, when the executive branch and not the legislative branch decides which language(s) will be used for what purpose(s). Sometimes, but less often than otherwise, governments in their constitutional or legal provi-

sions do pay due regard to the imperative of safeguarding and promoting the linguistic rights of individuals with a special eye on the rights of minority communities.

The next few pages attempt to give a bird's-eye view of the constitutional and/or legal provisions evident in a few select countries, the object being to provide an illustrative sample of the varied approaches that have been adopted by different countries in their response to the crucial factor of language in the conduct of human affairs in modern societies. The illustration is also intended to serve as a prelude to the conclusions that are to be drawn in the final section of this paper.

India ranks among the few countries in the world that have taken a conscious step to provide a constitutional framework in which the use of language by society is given explicit legal expression. Hans R. Dua (1985:200–205) divides the Indian constitutional framework into four subsets of articles. The first subset comprises articles 120, 343 and 344 which address in more detail the question of the use of Hindi as the official language of the Union with particular reference to parliamentary debate, but which also deal with other purposes of government business. These articles also place limitations on the use of English and include a time-frame within which English is expected to give way to Hindi as the dominant official language of the Union.

The second subset (articles 210, 345, 346 and 347) serves to 'provide policy statements about the use of regional languages in state legislatures, the adoption of one or more languages including Hindi as official languages, the official language for communication between one state and another state and between a state and the Union, and finally, the special provision relating to the recognition of any language of state by the President as an additional official language for specific purposes or in specific parts of state' (pp. 200–201).

Articles 348 and 349, as the third subset, are concerned with legal arrangements relating to language use in the judiciary, while articles 350, 350A, 350B and 351 'constitute special directives of official language policy which provide the right to the citizen to use any language for official purposes' and require state governments to provide facilities for the use of the mother tongue as medium of instruction at the primary stage of education. The constitutional provisions also allow for the appointment of a special officer 'to investigate all matters relating to safeguards provided to linguistic minorities'. Meanwhile the duty of the Union government to develop Hindi and promote its spread also forms part of these provisions (p. 201).

These four subsets are complemented by articles 29 and 30 which more specifically 'provide certain rights to linguistic minorities, but also make provision as to how these rights can be best safeguarded and realized' (p. 263).

As is clear from the picture just painted, the Indian constitution is numbered among the few constitutions in the world in which the outline of a language policy, with special reference to the right of the citizen to use the mother tongue and other acquired languages as means of self-actualisation, is specifically provided for. A similar picture is evident elsewhere.

In neighbouring China, we gain a glimpse of the constitutional or legal provisions pertaining to language use from Professor Sun Hong-Kai's (1988) outline of language planning in China vis-à-vis linguistic minorities in the *New language planning newsletter*. No doubt as a reflection of the multicultural and multilingual character of the country as a multinational state composed of some 56 nationalities, the fourth article of the constitution, in the spirit that all the nationalities in the Republic are equal, stresses the importance of equality and equity in that, according to Professor Hong-Kai, 'The State protects the lawful rights and interests of its minority nationalities and upholds and develops the relationship of equality, unity and mutual assistance among all of China's nationalities.' This legal framework prohibits 'discrimination against and oppression of any nationality' as well as tendencies that either undermine the unity of the state or instigate secession (p. 2). Of particular relevance here is the principle, as Professor Hong-Kai has put it, that 'The people of all nationalities have the freedom to use and develop their own spoken and written languages and to preserve or reform their own ways and customs' (p. 2).

Complementary to the fourth article is the sixth article of the Criminal Procedure Law which stipulates, as paraphrased by Professor Hong-Kai, that 'citizens of various ethnic groups all have the right to conduct proceedings in their native spoken and written languages' (p. 2). Relevant also is article 21 of the constitution which attaches special importance and emphasis 'to the use of the spoken and written languages commonly used by the nationality which exercises the national autonomy in the region' (p. 2).

It is within this legal framework that China apparently has sought to formulate and implement in more elaborate and specific form language policies at both national and subnational (or regional) level that aim at protecting and promoting the culturo-linguistic rights of minorities. It is also within this framework that practical expression can be given to the

spirit embodied in the constitution that all China's nationalities in the eyes of the law are equal.

From a language policy point of view, Australia and the United States of America share several similarities. To begin with, up to this point both can be categorised as having only a *de facto* and not a *de jure* official language. Second, despite nascent tendencies that point to heightened sensitivity to the right of other cultures and other languages to be accorded a place and role in national affairs, English has been maintained as the sole dominant linguistic medium for the conduct of government business and national affairs generally. Third, only more recently have moves away from the assimilationist (or melting-pot) concept been discernible in both countries. For example, as has already been indicated, the post-1970 period has seen Australia exhibit clear inclinations towards a more sensitive appreciation and recognition of the social benefits that may be reaped from placing multiculturalism and multilingualism at the centre of national policies.

Similarly, in the USA the last few decades, particularly after the Bilingual Act of 1968, have been characterised by a notable shift towards a growing emphasis on bilingual education, an emphasis which has seen Spanish in particular accorded at least a limited role in education and the media, a phenomenon unknown and even unimaginable previously while the national disposition of assimilation held sway. In general, it may be said that the winds of change in favour of multiculturalism and multilingualism that appear to be sweeping across most political landscapes of multi-ethnic nation-states today are also having a similar influence in the USA.

But there is one area of particular relevance to the concerns of the present paper in which the similarity is most striking, and this refers to the importance of community or local initiative in the maintenance and promotion of non-official languages. In Australia Clyne and Steele (1984:1810) report that during the period immediately following World War I, when bilingual education was outlawed, 'The main LM [that is, mother-tongue] institutions outside the family and friendship networks were: the large non-English press, the ethnic religious denominations, the emerging ethnic clubs and societies, and, to a much lesser extent, "continental" shops, cafes and restaurants', adding that 'The ethnic societies and churches took it upon themselves to organise part-time schools for LM within the younger generation.'

However, of greater relevance are practices evident in the recent past and as they continue to be manifested up to date. Here Clyne and Steele (1984:1810–1811) have this to say:

In the past decade, the number of secondary schools offering a CLOTE [i.e. community language other than English] has risen considerably. In New South Wales, for instance, 23 languages are examined as matriculation subjects, including Arabic, Serbian, Croatian, Chinese and Latvian. Children wanting to learn a language not available at their school can attend Saturday classes run by the Education Department (apart from those conducted by ethnic communities and subsidised by the governments). Several CLOTES are studied by children from other ethno-linguistic backgrounds. In many schools the consciousness is cultivated that languages such as modern Greek, Turkish, Polish and Hungarian are the common heritage of the Australian nation.

The maintenance and promotion of community languages (or what Clyne and Steele refer to as CLOTES) by the communities themselves, but often with (partial) government assistance, finds expression in other domains as well. For example, in broadcasting, each Australian capital city has a radio station broadcasting in community languages with Sydney and Melbourne having a government station transmitting programmes in over 40 languages (Clyne & Steele 1984:1812). Libraries, too, have lent support to the programme of community language maintenance. As Clyne and Steele (1984:1812) state it, 'Another "official" institution that has "discovered" multilingualism is the municipal libraries, which have recently pursued an active acquisition policy in books from immigrant source countries.'

In the USA a similar but slightly different picture emerges. In his article 'Non-English-language ethnic community schools in the USA' (in short NELECS), Fishman (1989:27) states that 'The universe of NELECS in the USA (schools maintained and operated by ethnic communities, usually without any sort of governmental or other 'outside' support) is quite large - some 6 500 units at last count'. He (pp. 26–27) tabulates altogether slightly over 50 community languages that are involved in the enterprise. In contrast to the partial assistance extended by the state governments in Australia to communities exercising some form of self-reliance in the maintenance and promotion of their languages, in the USA Fishman decries the fact that '[t]he absence of national bookkeeping in connection with these [community] schools sadly reveals the extent to which the language resource that they constitute is neither recognised,

appreciated, nor fostered' (p. 27). Characteristically these community-run schools 'fulfill all of the requirements of the public education authorities during part of the school day and use their remaining time (typically, two to three hours per day) to pursue their ethnic linguistic, religious, and cultural educational goals' (p. 28). Another characteristic of these schools is that for the most part 'they have become second-language acquisition schools and are testimony to the continued sociocultural validity of sidestream languages, even after they are no longer mother tongues, and of sidestream cultures, even after substantial Americanisation has occurred' (p. 29). Third, as a phenomenon, non-English language ethnic community schools in the USA have demonstrated a substantial increase only in the recent past, doubling from the early 1960s to the early 1980s, a pointer in itself to a heightened revival of ethnic identity in the USA. Or as Fishman has put it: 'This increase is not attributable to immigration but to the *Zeitgeist* of the ethnic revival' (p. 29). Finally, in terms of (self-) management, the majority of NELECs 'are maintained by or affiliated with local religious units' (p. 29).

The situations described as obtaining in Australia and the USA yield two relevant lessons that will have a direct bearing on the conclusions of this paper: (a) a growing recognition in recent years around the world of the salience of multiculturalism and multilingualism as the cornerstone of nationhood in multi-ethnic nation-states, and (b) the role that has to be played by the (ethnic) communities in the processes and programmes of preserving and promoting their cultures and languages.

Turning to experiences and lessons to be drawn from the African continent itself, Namibia provides perhaps one of the most apt illustrations of a country that has taken a conscious step to reflect in its constitution the principle that culture and language represent the heart of the nation by regarding them as fundamental human rights. Concerning language, after establishing in article 3(1) English as the official language of the state, sub-article 3(3), as a measure designed to safeguard the use of other languages as national resources, goes on to state that: 'Nothing contained in sub-article (1) hereof shall preclude legislation by Parliament which permits the use of a language other than English for legislative, administrative and judicial purposes in regions or areas where such other language or languages are spoken by a substantial component of the population.'

This constitutional provision is given even greater force by article 19 which stipulates that 'every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion

subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest'. The significance of this provision is that it appears in chapter 3 which deals specifically with 'fundamental human rights and freedoms'. These provisions, it will be noted, have close parallels with those enshrined in the Indian constitution.

In the majority of other African countries legal provisions concerned with matters pertaining to language use are normally restricted to prescribing the official language(s) to be used in certain domains of public affairs. Thus they tend to appear in the form of specific pieces of law (or, in effect, language policies) that set out to prescribe in some detail what language(s) will be used for what (official) purposes. By and large the domains for which official languages are prescribed include education, dissemination of official information, legislation, parliamentary business, administration of justice, commerce and industry, etc. Even where constitutional provisions are involved, these also, more often than not, deal with matters concerning parliamentary debate, eligibility for holding certain public offices and naturalisation. For example, the newly revised Constitution of Zambia Act (1991), ushering in the Third (multiparty) Republic, provides in article 64(c) that 'a person shall be qualified to be elected as a member of the National Assembly if, and shall not be qualified to be so elected unless, he is literate and conversant with the official language of Zambia' which is stated in article I(3) to be English.

A notable common feature of legal provisions in Africa, as elsewhere, that concentrate on selecting and prescribing one or several languages as official languages is their resultant emphasis on exclusiveness or discrimination rather than on inclusiveness or accommodation. In other words, in their effect they end up placing a premium on selection and exclusion at the expense of recognising that all the languages spoken in the land constitute a valuable reservoir of communicative resources that should be pressed in the service of national development and national welfare. How this can be achieved is the subject of the next, concluding section.

A CASE FOR NON-OFFICIAL LANGUAGES BEING ACCORDED A NICHE AND ROLE IN A DEMOCRACY IN MULTILINGUAL SETTINGS

There are several pertinent and important factors that can be enumerated as constituting the basic rationale for sustaining the argument that, in multilingual nation-states where of necessity it is almost always prudent to select and prescribe only one language or at best a few languages as official languages, non-official languages also have or ought to have a role

to play in the conduct of public affairs in modern, multicultural and multilingual countries. However, an exhaustive catalogue of all these factors is not possible in a paper of this length and the focus here will therefore be confined selectively to a few as illustrative samples rather than a complete inventory.

Language as a human right

At the top of the list of these factors is undoubtedly the recognition that, as it has already been argued, language as man's principal tool for communicating with other human beings, or as the vehicle of communication within as well as across social groups, stands out as one of the fundamental human rights. Implicit in this assertion is the assumption that all languages, being the possession of individuals as a basic human right, deserve to be not only protected, but nurtured and promoted. This further translates into saying that, as in the case of cultural diversity itself, instead of constituting a problem, the very diversity of a country's many languages should be perceived as a source of national strength. As such, the steps that are required to be taken in multilingual contexts in terms of the positive exploitation of this source of strength are to husband and harness the prevailing linguistic diversity as an aid to national progress. To be borne in mind here also is that each language, however big or small, occupies a particular niche and has a special role to play in the society in which it is spoken. Both this niche and this role can be given a well-defined context in which to achieve functional social value through language policies that treat all languages as partners in national development and progress. This in turn accords special importance and emphasis to the principles of equality and equity.

And as earlier stated, it is only through language as a medium of human communication that freedoms of expression, association, assembly and even movement, as enshrined in national constitutions of democratic countries, can find practical fulfilment to the fullest. In other words, citizens in democratic countries will not express themselves, will not associate, will not assemble and will not enjoy the freedom of movement unless in the first instance they have a medium through which they can communicate with fellow human beings.

It is especially in this sense that language as a human right is critical to the very essence of democracy.

Language as a resource

Arising from the notion of language as a human right is the cognate notion of language as a resource. In the past there has been a tendency to regard the phenomenon of the multiplicity of languages in multilingual nation-states as one of the stumbling blocks to nationhood or national integration. Happily, in more recent years a notable shift in philosophical orientations has manifested itself. The new orientation is exemplified by the attitude adopted by David R. Smock and Kwamena Bentsi-Enchill (1975) who point out that:

The preservation of some loyalty to particularistic groups is not necessarily incompatible with national integration. Ethnic loyalty and national integration do not represent two fixed and irreconcilable points on a continuum, for national identity is not an all-or-nothing proposition. The experience of several nations, including the United States, Switzerland and the Soviet Union, demonstrates that the maintenance of residual cultural values, attitudes, and commitments does not preclude the emergence of a strongly held national identity. National integration merely requires that identification with the national community supersede in certain situations more limited ethnic loyalties (p. 5).

It is partly as a result of this new attitudinal orientation and partly as a result of a growing appreciation of multiculturalism and pluralism, together with political pluralism itself, as cornerstones of democracy in multi-ethnic and multilingual nation-states that language has come to be seen more in the light of a resource than a problem. In this new perspective language as a resource complements language as a human right.

Broadening opportunities for participation

Language both as a human right and as a resource is directly linked to another equally important principle – participation of citizens in national affairs. If understood as rule by the governed and predicated on the acceptance and practice of the principle of equality of rights, opportunity and equitable treatment, democracy, to have legitimacy and social meaning in the eyes of both the government (or the rulers) and the citizens (or the ruled), presupposes as well as entails the broadest possible participation by the nationals of a democratic state. Thus, democracy as defined here in effect is not democracy, or is of limited legitimacy, in situations in which the vast majority of the people are prevented from having an

effective say in national affairs that directly or indirectly affect their personal lives. This is likely to be the case, and in fact is the case, in those settings where (as for example in much of Africa south of the Sahara) by not utilising languages spoken by the majority of the people, the prevailing language policies effectively exclude from political and economic competition and involvement a very large segment of the population. If participation is to be broadened and a greater proportion of the citizens are to be given the opportunity of taking part in shaping the destiny of their nation, the surest road to this end is the utilisation of, if not all, at least as many languages spoken by the national population as possible. This is particularly important in countries where democratic governance places a special premium on local government. In most African countries local languages rather than the prescribed official language(s) constitute the more important means of communication and the media through which participation by rural (and even urban) populations either in local or in national affairs is at all possible. It is particularly in this context that language has to be seen as a resource and non-official languages as playing a crucial role.

Access to and dissemination of information

For citizens in democratic societies to participate effectively in national affairs, it is imperative that they should be provided with opportunities that enable them to have access to different types of information. A knowledgeable or well-informed citizen is more likely to participate intelligently, and therefore effectively, in national affairs than an ill-informed citizen. As Pattanayak (1982:30) has argued:

If knowledge is power, then knowledge shared among many is power shared among many. In the same token knowledge shared among a few is power controlled by a few. As the vehicle of knowledge and information is language, language use, dissemination of knowledge and information, and the structure of the state are intimately connected. Where language controls the access to rank, status and wealth and bestows privileges on a few, democracy atrophies.

Given that acquisition of knowledge, access to and dissemination of (official) information and participation in national affairs by all the citizens are intertwined and interdependent, the role of non-official languages as (additional) vehicles of national communication in these (democratic) processes is unquestionable. Much vital information and a great deal of scientific and other forms of knowledge can be disseminated through non-official languages as auxiliary transmitters. For instance, if a literary

tradition were to be established, nurtured and sustained, creating possibilities and opportunities for books, journals (dealing with in-depth analysis of issues) and newspapers (as conveyors of information) to be published in non-official languages, democracy would receive a tonic in that the results would lead to the emergence of a more knowledgeable and better informed citizenry, an essential condition for the presence of a vibrant participatory democracy. The electronic media – radio and television – can additionally be used to reinforce the written word as diffusing agents of knowledge and information utilising non-official languages.

Literacy and democracy

That a literate community is better placed than an illiterate community to participate effectively in the political, social, cultural and economic domains of national life has today become almost self-evident. It is at any rate commonly acknowledged that literate populations, for example those of Europe and North America, to give two notable instances, demonstrate in relative terms a greater capacity to participate reasonably effectively in the management of their sociocultural, political and economic affairs than less literate societies. This suggests that there is considerable direct correlation between literacy and participation in a democracy.

It is consequently reasonable to assume that if greater numbers of people in multilingual modern nation-states are to become active, informed participants in the governing of their countries, it is imperative that they should first attain a reasonable level of literacy. How this is to be brought about, however, is the fundamental question.

The question is answered by the axiom, as a widely accepted educational principle, that on psychological and pedagogical grounds the mother tongue (or the individual's first language) is the most appropriate medium for imparting the skills of reading and writing particularly in the early stages. In the words of the oft-quoted resolution of the International Institute of African Languages and Cultures (1930): 'A child should receive instruction both in and through his mother tongue and this privilege should not be withheld from the African child.' Fortified subsequently by Unesco's report *The use of vernacular languages in education* (1953), which, among other things, reiterated the principle that education is best and more effectively imparted through the medium of the mother tongue, the primacy of the first language as the most appropriate medium for acquiring the skills of reading and writing has remained essentially unchallenged to this day.

In this context, non-official languages, as the mother tongues of the vast majority of the people in multilingual settings, especially when linked to the other related principles of human rights, equality, equity and participation, readily recommend themselves as highly desirable media for acquiring literacy. Thus, both from the point of view of democracy on one hand and psychology and pedagogy on the other, non-official languages, as mother tongues and as resources, invite being recognised as valuable – indeed essential – ingredients in the process of national progress.

Death (or extinction) of languages

Fishman (1989:30) has observed that:

A dose of cultural relativism might do us some good. We are not gods. We do not have the right, as students of literacy, to judge cultures, to find them wanting, to restructure them, or to destroy them. That is exactly what we do when we foist our own literacy goals upon others.

Implicit in Fishman's counsel are questions of domination, exclusion, neglect and (potential) destruction. Here it is germane to remember that language policies that place a special emphasis on official languages – on selection and prescription – are in essence policies of exclusion (or discrimination), domination and (unwittingly) neglect. Such policies in consequence discriminate against non-official languages either by excluding or marginalising them or by neglecting them altogether. It is at any rate a well-manifested phenomenon that in multilingual countries where only one or few languages play a dominant official role in the management of national affairs, non-official languages play largely marginalised, minor, informal roles.

As against this situation, there is a great need for renewed attention to be paid to the imperative to appreciate non-official languages as an essential part of the nation's cultural heritage, and therefore the attendant need to preserve and promote that heritage. This need is, of course, akin to the need and urgency to save the natural environment which has so much caught the imagination of our modern world in recent years. As in the case of the natural environment, unless appropriate and timely steps are taken, non-official languages as part of the cultural heritage face the danger of dying. As Mathias Brenzinger, Bernd Heine and Gabrielle Sommer (1991:19) point out, although 'African vernaculars are generally not in danger of being replaced by European languages ... we observe a diminishing use of African vernaculars, not only in an increasing number of domains, but also with regard to the absolute number of indigenous

languages; that means, in short, that linguistic vitality and variety on the African continent is decreasing.'

Factors responsible for the death or extinction of languages are many and varied. They include natural disasters such as famine, drought, epidemics, floods and volcanic eruptions, especially when these result in the decimation of whole populations. But closer to the African situation, languages may also become extinct, or fall largely into disuse, as a result of culture contact and clash, conquest, economic influence and political domination.

In the majority of African countries, during both the colonial and the post-colonial era, there has been evidence of speakers of indigenous languages increasingly gravitating towards the European languages prescribed as official languages because of the educational, economic and political advantages with which they come to be imbued in the estimation of the public. One consequence of this gravitation is that, as Wurm (1991:5) has pointed out:

Monetary benefits, access to coveted goods and services, employment and other economic advantages ... [make] it very clear to the speakers of the economically weaker group that their own language is becoming useless in the changing economic situation in which they find themselves. This realisation makes them have less and less regard for it, and this tends to lead to a gradual increase by them in the use of the language of the economically stronger population, even in situations not directly connected with the economic advantages inherent in the mastery and use of that language. This is at the expense of the language of the speech community which comes under such an influence, and can lead to a severe decline in its use, with old people eventually becoming the only ones to use it regularly, and the language disappears with their death.

Or as Brenzinger *et al.* (*op. cit.*, p. 38) have put it: 'Minority groups in shift situations regard the languages they are acquiring as being more prestigious than their own; thus prestige of a language is one of the important variables in studying language death.'

In more concrete terms, we know from recent historical experiences that as a result of culture contact and clash, particularly when characterised by political, economic and cultural domination, hundreds of languages have become extinct, Amerindian languages in North America and Aboriginal languages in Australia being a case in point.

In the light of these experiences as apocalypses of what is in the realm of possibility, there is good reason to caution against relegating non-official languages to the limbo of marginalisation and benign neglect. The danger is particularly real in situations in which, as is the case in most post-colonial African countries, in addition to the natural inclination to gravitate towards a language that offers material advantages and prospects of prosperity, increasing numbers of the younger generations are compelled by prevailing language policies to learn to read and write and to acquire knowledge through a medium other than their mother tongue. The resultant lack of literacy in the mother tongue can only act further to distance future generations from their mother tongue. What is more, this means that fewer and fewer people will be able to write in their own language, thereby depriving that language of any future literature whatsoever. Protracted distancing from the mother tongue by many future generations in turn can only have the effect of condemning the mother tongue to eventual extinction. This can be avoided but only if exclusion, marginalisation and neglect do not form a central feature of the language policies that are devised and implemented by multilingual, democratic countries.

CONCLUSION

The plea for non-official languages, as mother tongues and as the principal media of communication for the majority of people in multilingual countries, to be accorded a place and role in national affairs is predicated on the need, as an underlying principle, to expand the horizons of the citizens to their fullest potential as well as to safeguard the rights of the individual with regard to the principles of equality, equal opportunity and cultural identity. The principle of equality implies that all languages in a nation-state should have the right, and should be given the opportunity, to develop as a resource and as part of the nation's cultural heritage.

The question, however, is how these principles can be translated into practical reality. The first fundamental step that has to be taken is legislation. If all languages in the country are to be recognised, appreciated and respected as fundamental human rights and valuable national resources, it is crucially important that appropriate constitutional or legal provisions should be made that would ensure that these principles are protected by law. As Hans Dua (1985:266) has observed: 'There is no doubt that legal and constitutional protection can certainly alter the position of linguistic minorities and contribute to better relationships between the majority and minority communities.'

But legislation in itself is not a sufficient safeguard against non-official languages remaining at the periphery of national life as at present. Consequently the next critical question that needs to be addressed is: If in multilingual countries all languages without exception are to be regarded as national resources and, as such, all are to be harnessed as instruments of national development, how is this to be achieved particularly if the point is borne in mind that governments in multilingual countries do not possess an infinite array of resources to be able to promote all the languages spoken in the country in a practical manner?

The solution in part lies in the Indian experience. As we have seen, the Indian constitution as regards minority languages (or, for our purposes, non-official languages) leaves the responsibility of selecting and prescribing languages for use at the local level largely to the local communities themselves. Thus, if non-official languages as elements of a nation's cultural heritage are to be nurtured and promoted in the context of language policies that are based on selection and exclusion, coupled with the inability of national governments to promote all the languages spoken in the country owing to severe limitation of resources, then this responsibility has to be shifted by appropriate legal provision to the communities themselves in a spirit of self-reliance and self-assertion.

The precise manner in which this self-reliance and self-assertion can be expressed in practical terms would depend on whether the government is able to extend some form of assistance to the communities. Where the government has the means to do so, grants-in-aid, as in Australia, may be made available to the communities to assist them with their cultural promotional programmes, but where the government may not be able to do so, communities may have to rely almost entirely on independence of initiative and action. Important and crucial here is the proposition that for non-official languages to be preserved and promoted, there will be a need for sociocultural movements to arise that will seize the opportunity and the initiative of promoting their languages in the spirit of self-assertion and cultural identity.

References

Australia (Commonwealth of) 1984. *A national language policy*. Report by the Senate Standing Committee on Education and the Arts. Canberra: Australian Government Publishing Service.

Brann, Conrad Max Benedict 1979. *Mother tongue, other tongue and further tongue*. Maiduguri: Maiduguri University Press.

Brensinger, Mathias, Bernd, Heinz & Gabrielle, Sommer 1991. Language death in Africa. *Diogenes*, 153:19-44.

Clyne, Michael & Ross, Steele. 1984. Language policy and language planning: an Australian perspective. In Jos Nivette, Didier Goyvaerts and Pete van de Craen (eds), *AILA Brussels 1984 Proceedings*, vol. 5: Plenary Papers, pp. 1797-1815.

Dua, Hans R. 1985. *Language planning in India*. New Delhi: Harnam Publications.

Fishman, Joshua A. 1989. Non-English-language ethnic community schools in the USA: instruments of more than literacy and less than literacy. In Elisabetta Zuanelli Sonino (ed.), *Literacy in school and society*. New York and London: Plenum Press.

Harlech-Jones, Brian. 1989. The national language question: English and multilingualism in independent Namibia. *Logos*, 9(2):23-31.

Hong-Kai, Sun. 1988. Minorities and language planning in China: an outline. *New Language Planning Newsletter*, 3(1 & 2).

Kashoki, Mubanga E. 1982. Language policies and practices in independent black Africa: trends and prospects. In Afolabi Olabimtan (ed.), *African universities and the development and wider use of African languages*. Lagos: Unesco, pp. 9-25.

Kashoki, Mubanga E. 1984. The African language as a tool of development. Kampala: OAU BIL Paper No. 1.

Kashoki, Mubanga E. 1984. Language, education and the African university: towards the linguistic liberation of Africa. In Jos Nivette, Didier Goyvaerts & Pete Can de Craen (eds), *AILA, Brussels 84 Proceedings*, Vol 5, Plenary Papers, pp. 1845-1876.

Kashoki, Mubanga E. 1989. On the notion and implications of the concept of the mother tongue in literacy education in a multilingual context: the case of Zambia. In: Elisabeth Zuanelli Sonino (ed.), *Literacy in school and society*. New York and London: Plenum Press.

Kashoki, Mubanga E. 1990. Independence and nation-building: towards a comprehensive language policy for Namibia. A paper read at the conference organised by the Languages Society of Namibia, 24-26 September 1990, University of Namibia, Windhoek, Namibia.

Kroon, Sjaak & Sturm, Jan 1989. Implications of defining literacy as a major goal of teaching the mother tongue in a multicultural society: the Dutch situation. In *Literacy in school and society*.

Namibia (Republic of). 1990. *The constitution of the Republic of Namibia*.

Organisation of African Unity (OAU) 1976. *The cultural charter for Africa*. Addis Ababa: OAU General Secretariat.

- Organisation of African Unity (OAU) 1980. *Reconsideration of African linguistic problems*. Kampala: OAU BIL 1973–90. Publication 3.
- Organisation of African Unity (OAU) 1985. *Linguistic liberation and the unity of Africa*. Kampala: OAU Inter-African Bureau of Languages, Publication 6.
- Pattanayak, D. P. 1982. Third world experience in language use. In Afolabi Olabimtan (ed.), *African universities and the development and wider use of African languages*. Lagos: Unesco.
- Pattanayak, D. P. 1984. Mother tongue education and destiny. In Jos Nivette, Didier Goyvaerts & Pete van de Craen (eds), *AILA, Brussels 1984 proceedings*, vol 5: *Plenary papers*, pp. 1831–1844.
- Report of the Royal Commission on Bilingualism and Biculturalism 1969. *Book IV: The cultural contribution of other ethnic groups*. Ottawa: Queen's Printers.
- Skutnabb-Kangas, Tove 1984. Why aren't all children in the Nordic countries bilingual? *Journal of Multilingual and Multicultural Development*, 5(3 & 8):301–315.
- Smock, David R. & Kwamena, Bentsi-Enchill (eds) 1975, 1976. The problem: sub-national loyalties in Africa and their threat to national unity (as introduction). In *The search for national integration in Africa*. New York: The Free Press.
- Szépe, Gyögy 1984. Mother tongue, language policy and education. *Prospects*, XIV(1) pp. 63–73.
- Wurm, Stephen A. 1991. Language death and disappearance: causes and circumstances. *Diogenes*, 153:1–18.

Language and law: theory and practice in the courts of Lesotho

Itumeleng Kimane

INTRODUCTION

The basic legal structure operating in Lesotho today originates from the general Law Proclamation of 29 May 1884. This proclamation provided for the operation of the laws of the Cape Colony and the customary law in the then British Protectorate of Basutoland. The basic notion of two official legal systems introduced by the 1884 Proclamation was carried through into independence.

It is through the 1884 Proclamation that Lesotho can be said to have 'received' some measure of foreign law, while at the same time retaining the indigenous or customary law. The legal provisions that followed later, however, ensured that customary law was no longer administered by the chiefs, but by the courts introduced by colonial rule. In another sense, the legal provisions necessitated changes in the judicial structures as well. As the 'received' law operated parallel to the customary law, two parallel systems of courts were introduced as of necessity. The fundamental changes affecting the judicial system occurred in 1938.

METHODS AND DATA SOURCES

The primary information used in this presentation comes from the data collected for my doctoral thesis entitled 'Forums and methods of dispute settlement in Lesotho: a fresh look at the depictions of the judicial system'.¹

The data collection methods involved an extensive literature search on the legal and judicial systems of Lesotho, rules of evidence and procedure. In this, effort was also made to look into issues pertaining to language use in the courts (theory). In addition to examining the substance of the law, empirical data was obtained to investigate how the law of criminal and civil procedure and evidence are used at the practical level (practice). This became possible through observational data and interviews with judges, magistrates, court presidents, lawyers, parties, witnesses and others. At least 173 courtroom observations and 200 interviews were carried out, and these yielded immense but rich qualitative data.

A BRIEF HISTORICAL BACKGROUND OF JUDICIAL STRUCTURES

Since colonial times, Lesotho has been operating two parallel systems of law at the official level, namely Roman-Dutch law, which is the received law, and customary law. Roman-Dutch law is predominantly enforced through the Court of Appeal, the High Court and the Magistrates' Courts; while the customary law is administered through the Customary Court Structure, namely the Judicial Commissioners' Court, the Central Courts and the Local Courts.

THE ROMAN-DUTCH LAW COURTS

The Court of Appeal was reconstituted in accordance with the Court of Appeal Order No. 17 of 1970, following the suspension of the 1966 Independence Constitution. At present, the court is governed in accordance with the Court of Appeal Act of 1987. Before Independence, Lesotho shared a common Court of Appeal with Botswana and Swaziland, since it had been difficult for each of them to support their own courts (Crawford 1969). Though Lesotho established a separate court for itself at independence, it continued to share the judges of this court to a large extent with the other countries.²

The High Court first became provided for in terms of Proclamation No 57 of 1938, and was later replaced by proclamation No. 19 of 1952. During most of the colonial period there was a shared High Court with Botswana and Swaziland; the personnel was also common to both. Separate appointments for the office of Chief Justice were made in 1965. Under the Independence Constitution the High Court of Lesotho was reconstituted, and it has become consolidated and amended through various enactments.

The magisterial system emerged with the division of the country into districts during colonial times. The magistrates were part of the plan to abolish customary law and practices; they had immense powers set out in terms of Proclamation No. 51 of 1871 (Lagden 1909; Crawford 1969). Their position was later reinforced and strengthened in 1872. The present phase of Magistrates' Courts has its origins in the Subordinate Courts Proclamation No. 58 of 1938. This Proclamation was amended several times. For example, the constitution of these courts was altered in 1964, but this arrangement was subsequently left unchanged by the Independence Order, 1966.

THE CUSTOMARY LAW COURTS

The Customary Courts' structure is organised on three levels, and it was intended to replace the indigenous Chiefs' Courts. At the lowest level of the hierarchy are the Local Courts, followed by the Central Courts, and the Judicial Commissioners' Court at the apex. There is a long history explaining the establishment of these courts, but the most fundamental changes came in 1938 under Proclamation No. 62 – the Native Courts Proclamation. That Proclamation has been amended on several occasions, but is still substantially in force under the title Central and Local Courts Proclamation.

The Judicial Commissioners' Court was first established in terms of Proclamation No. 16 of 1944, and it later came to be governed by proclamation No. 25 of 1950. This court replaced the District Commissioners' Courts, which were also preceded by the Paramount Chief's Appeal Court, serving as an appeal court for cases arising from the lower customary law courts.

CHANGES IN THE JURISDICTION, PROCEDURE, EVIDENCE AND PERSONNEL

The preceding sections, describing the court structures in Lesotho, show the magnitude of changes introduced by the colonial government. These changes promoted other alterations in terms of the judicial personnel, procedures and rules of evidence, thus undermining the indigenous system of justice and courts to a large extent.

In terms of the jurisdiction, the 'received' law courts administer primarily Roman-Dutch common law, and they have jurisdiction to determine both civil and criminal matters involving common law. The High Court, however, possesses unlimited jurisdiction and can attend to any

proceedings and apply any of the two systems of law. The Customary Courts, on the other hand, are limited to applying indigenous law. Certain matters are specifically excluded from the jurisdiction of the Customary Courts, for example, cases in connection with civil marriages except where 'bohali', bridewealth, is concerned. Also criminal cases do not fall under the jurisdiction of these courts, so that virtually they attend to civil cases involving Sesotho law.

The emergence of the colonial judicial structure also influenced transformations in the rules of procedures and evidence. There was in theory³ a major shift from the inquisitorial procedure of the indigenous Chiefs' Courts to an adversarial approach. This approach becomes more prominent when observing the proceedings in the Magistrates' Courts and the High Court. In the customary courts the adversarial procedure is less pronounced, except in cases in the Judicial Commissioners' Court in which legal representatives are appearing.

Previously the personnel in the 'received' law courts were invariably expatriate, but over the years, particularly after independence, a number of nationals have been recruited. In the High Court three of the judges are local, and all the magistrates are nationals and Sesotho speakers. The judicial commissioners were expatriate until just after independence. However, for a number of years now everyone in the Customary Courts, including the Judicial Commissioners' Court, has been national.

THEORETICAL AND PRACTICAL CONSIDERATIONS OF LANGUAGE USE IN THE COURTS

Since under the colonial government the 'received' law courts and the level of the Judicial Commissioners' Court were staffed by expatriate personnel mainly of English origin, it must be expected that the language used was English. This legacy has continued in the 'received' law courts even in circumstances when court proceedings are presided over by national judges.⁴ This position may be explained in two ways, namely that the laws governing and administered by the courts are written in English and the training for legal personnel is undertaken in English. Proceedings in the Customary Courts are invariably in Sesotho, but in instances where parties are legally represented in the Judicial Commissioners' Court one may find a shift back-and-forth from Sesotho to English.

This already gives some indication of how Sesotho and English became used in the practice of the courts. Variations also exist in the Magistrates' Courts, as some magistrates sometimes choose to conduct the

proceedings in Sesotho, except in civil proceedings. This happens especially where an accused in a criminal matter appears unrepresented. The point must be made, however, that even in such cases, the records of proceedings must always be in English. The record of proceedings also has to be translated into English where a case from the Judicial Commissioners' Court is brought to the High Court for review.

The relevant section under Order No. 3 of 1973 provides that proceedings in civil and criminal cases will be in English. In criminal cases, however, the order makes provision for proceedings to be conducted in Sesotho. The assumption is that in civil cases all parties will be assisted by a legal practitioner, since all relevant documents ought to be filed in English using standard formats.

OPINIONS OF THE LEGAL PROFESSIONALS ON THE USE OF ENGLISH IN THE COURTS

Commenting on the use of English in proceedings and in recording them, the Attorney General could only say 'I don't know, that is simply a scandal.'⁵ This statement seems to carry an implication that dilemmas caused by this dictate are quite obvious to many people.

Similar comments have been expressed by other legal personnel. One of the long-serving professionals, Judge Molai, stated: 'It is an awkward thing. I have been [I was] a magistrate for many years, I used to write my record in English; while everybody was speaking in Sesotho. The people have to speak in English; [in the High Court] and I've got to provide an interpreter. What for, I don't know' (Molai 1987:6.3).

As he also noted, there was a time in the past when the High Court had only one Mosotho judge,⁶ hence it was perhaps plausible to conduct proceedings in English for the benefit of the non-Basotho judges. He added, however: 'But I personally do not like it. It looks awkward ... If you go to England you won't find a Court conducting proceedings in Sesotho or Setswana, etc. We are disadvantaged. I do not know English [well] myself, so I have to stammer all the time' (Molai 1987:6.3).

Among criminal proceedings observed in the Magistrates' Courts⁷ all but two were conducted in Sesotho, except of course where arguments on points of law arose, in which event the presiding magistrate and the legal counsel(s) would often converse in English. However, magistrates and the counsels also have a tendency to throw in one, two or so English words, even when proceedings are in Sesotho. Speaking about this, the Chief Magistrate explained: 'On humanitarian grounds we let the parties speak

in their own language [Sesotho] but the records are always in English' (Matete 1987:8.5).

Usually, as the Chief Magistrate further indicated, this is in the interest of time. He noted: 'What I find to be most annoying here at the Magistrates' [Courts], an issue which we have brought up many times, is the provision that the record of the proceedings shall be in English' (Matete 1987:8.5).

Thus when people require the records, for example for purposes of civil litigation following a criminal trial, they are given these in English. This causes a predicament, for many Basotho do not have an extensive knowledge of English, let alone legal language. Issues become further complicated because civil litigation in the customary courts is conducted in Sesotho. Personnel at that level are not highly educated themselves, therefore cannot handle and understand records written in English.

PRACTICAL PROBLEMS INHERENT IN THE TRANSLATION OF PROCEEDINGS FROM ENGLISH TO SESOTHO AND VICE VERSA

Some of the problems resulting from the use of the English language have already been alluded to in the previous section. One cannot overlook the amount of time taken up by the process of translating the proceedings during a court hearing, or the costs involved in employing interpreters. But an even more serious concern is raised by the quality of the translations. A few examples are given below to illustrate this point.

In CO/79/HC/JK/3.3.87⁸ the interpreter translated the word 'mant-siboea' as 'afternoon', when it should actually be 'evening'. The judge in the case fortunately happened to be a Mosotho and was able to request a correct translation. In the same case the interpreter provided the translation for a statement which read: 'Since she saw me in the area, she believed ...' When the judge finally gave the translation himself it was expressed differently as: 'Because she had merely seen me in the area ...' Quite clearly the two statements do not mean the same thing. Also the word 'molamu' was translated simply as a 'stick' instead of a 'thick stick' (often used for fighting). In this way, the statements are taken out of context, which may distort the evidence being related.

In another case a witness stated: 'I was asked whether I could identify them' ('Ke ile ka botsoa hore na nka ba supa'). That was translated into English by the interpreter as: 'I was asked to identify them.' The judge ordered the interpreter several times to give the correct translation 'e behe

hantle ntate, ka Sesotho', and finally had to give the translation himself (CO/104/HC/JK/17.3.87).

Some Sesotho expressions used by witnesses cause problems because they have no direct English equivalents, yet without the right translations the testimony would lose strength and/or meaning. For example, in the case cited above, a witness was asked how many people were in the identification parade, to which she responded 'Ka ntate, ha nka ba ka ba bala'. The nearest translation of this could be: '[I swear] By my father, I did not count them.' However, the interpreter put it as: 'I did not count them.' The crucial point is that a wrongly translated statement could sometimes change the content or version of testimony, if not distort it, or cause certain elements of it to conflict.

These problems are a common feature of proceedings in the 'received' law courts, particularly in the High Court where English is the main language used. This raises a number of questions regarding the 'due process' principle which forms the cornerstone of the adversarial procedure. Before addressing this issue it may be worthwhile to look at the nature of legal language.

THE NATURE OF LEGAL DISCOURSE AND ITS IMPLICATIONS FOR THE PRACTICE OF THE LAW

The language used in the received law courts has words, phrases and a style only peculiar within the legal setting. Legal professionals, in other words, have a technical language understood only by them. What is worth noting is that the technical vocabulary of law is beyond the reach and understanding of a layman.

Personnel trained in law – judges, magistrates and lawyers – are more expert in legal language than the prosecutors and interpreters. This is because the latter have no formal legal training. In the customary courts litigants do their own pleading in court, and the barrier between everyday language and the language used in the court proceedings is thin.

Perhaps it is understandable that, like all occupational groups, legal professionals possess their own discourse. Occupational groups with shared experiences tend to have their own terms common to their profession. Legal professionals share a common training, and this gives them a common culture with its own language.

The language of law has its own ritualistic style. Phrases such as 'the truth; the whole truth, and nothing else but the truth', 'proof beyond

reasonable doubt' and 'you shall hang by the neck till you die' are a feature of legal discourse.

Few people admire the way lawyers handle language. Good professional writing is not common among legal professionals. Their writing is marked by a high degree of vagueness which at times is deliberate. Verbosity too is common in legal writing, so that where one word would suffice, one may find a heap of a dozen synonyms used. This seems part of the style.

These language features dominate courtroom proceedings. The use of such language has been criticised in that it excludes the parties and their witnesses from what is going on. Newman (1966) and Casper (1972) point out that the courts' discourse is not the discourse of the defendant, that its powerful effect in making him dependent is clearly understood. According to them it is the power of this alien discourse that keeps the accused silent in court.

Ericson and Baranek (1982) and Mueller (1970) describe how repressive communication of total institutions suspended an individual's interpretation of reality. In their view legal discourse is similarly repressive in that it contains concepts that are not included in the everyday language of the accused, thus weakening his ability to define the situation in his own terms. Ronald Barthes (1972) stated: 'To rob a man of his language in the very name of language: this is the first step in all legal murders.'⁹

In court the accused is denied his own language and therefore the opportunity of stating his own account and interpretation of reality. The universe and definitions of the accused persons are designated and re-defined in a number of ways. One way in which the situation is redefined is through the control of information in the form of questioning used in courtroom examination and cross-examination. The turn-taking sequence and the type of discourse are predetermined by the rules of evidence and are therefore locally managed (Atkinson & Drew 1979). The discourse is patterned into a sequence of pairs of questions and answers. The lawyers themselves are instructed in ways of designing questions in order to restrict answers and thus control the production of information. The accused on the other hand lacks such knowledge and skill. Ericson and Baranek (1982) noted in their study that a number of accused commented on the constraints imposed by the form of courtroom questioning, feeling that it does not give them an opportunity to explain themselves.

CONCLUSION

The discussions to this point have raised two issues that give rise to some concern regarding the use of language in the courts of Lesotho. The first is the use of English in the courts. As already pointed out, many people are not totally conversant with the English language. The second is the use of legal language which is too technical and complicated for the layman not trained in law.

The thrust of the arguments in this paper was that the use of the English and legal language in proceedings of the courts contributes to a number of dilemmas for the man who brings his case before the law. It has already been noted that through the use of these language forms, the parties and witnesses are denied the opportunity of participating in the proceedings which concern them. Such lack of participation consequently makes one look critically at the principles of the 'due process of the law'.

One fundamental point in the due process model is to protect the interests of the parties in their varying capacities. However, under the circumstances already stated whereby the accused person, for instance, cannot follow what is being said in court, it would seem correct to believe that a number of his rights and interests are in jeopardy. His silence in court may be misinterpreted to mean admission of guilt. That in itself means the accused person's right not to incriminate himself is insecure. What of the right to a fair trial, the right to be heard? Would it be correct to believe that these too cannot be guaranteed under the circumstances that the accused is not able to participate.

The last but equally important point questions the basis of the conclusions reached from the proceedings. When all is said and done, on whose version of the story is the conviction based? As a matter of fact, can we continue to argue that it is on the basis of evidence from the accused persons, litigants in civil proceedings, and their witnesses that court decisions are reached? When it is so clear that these people are hardly ever able to speak in court, such a position would be difficult to maintain. These questions are far more fundamental, perhaps, than the facts that the use of English and legal language prolong court proceedings unnecessarily, and also that the costs involved cannot be sufficiently justified.

Notes

- 1 The thesis was submitted to the University of Edinburgh in 1989.
- 2 Referring to Botswana and Swaziland.

- 3 In the thesis (note 1) I argue that at the practical level, the customary courts proceedings are still influenced by inquisitorial procedure.
- 4 All of whom are Basotho and speak Sesotho as a first language.
- 5 From interview with Mr K. Maope, Attorney General.
- 6 Reference was being made to the late Judge Mofokeng.
- 7 During the data collection for the PhD thesis.
- 8 These are the codes used in the thesis to refer to the observed cases.
- 9 Quoted in Carlen (1976:112).

References

- Atkinson, J. & Drew, P. 1979. *Order in court: the organisation of verbal interaction in judicial settings*. London: Macmillan.
- Carlen, P. 1976. *Magistrates' justice*. London: Martin Robertson.
- Casper, J. 1978. *Criminal courts: the defendant's perspective*. Washington, DC. National Institute of Law Enforcement and Criminal Justice.
- Crawford, J. R. 1969. History and nature of the judicial. *African Law Journal*, 8:476-485.
- Ericson, R. V. & Baranek, P. M. 1982. *The ordering of justice; a study of accused persons as dependants in the criminal process*. Toronto: University of Toronto Press.
- Friedman, L. M. 1977. *Law and society: an introduction*. Englewood Cliffs, NJ: Prentice-Hall.
- Kimane, I. 1989. Forums and methods of dispute settlement in Lesotho: a fresh look at the depictions of the judicial system, Unpublished PhD thesis, University of Edinburgh.
- Lagden, G. 1909. *The Basutos, vols 1 and 2*. London: Hutchison.
- McBarnet, D. 1981. *Conviction: law, the state and the construction of justice*. London: Macmillan.
- Mueller, C. 1970. Notes on the repression of communicative behaviour. In H. P. Drietzl (ed), *Recent sociology*, No. 2. New York: Macmillan.
- Newman, D. 1966. *Conviction: the determination of guilt or innocence without trial*. Boston.

Double, double, toil and trouble: the problems encountered when compiling a legal dictionary in African languages

M. Jansen

INTRODUCTION

Because the main theme of this conference is 'Language and equality', it is perhaps a suitable time to consider the work done by the Committee for Legal Terminology in African Languages in South Africa. I am at present the secretary of this committee, and although I am not an authority on language law I have perhaps some knowledge of legal language, a topic which also forms part of this paper.

Recent years in South Africa have seen considerable changes. There has been a complete restructuring of the labour force and a greater involvement of the different population groups in matters of own and general interest. The fields of technology and science have become more accessible and various careers which were traditionally dominated by certain population groups are now infiltrated by people from other groups. All these factors have made increasing demands on the various indigenous languages spoken by members of the different population groups in South Africa.

BACKGROUND

During a general meeting of the South African Institute for Translators and Interpreters, translators and other officials of the various self-governing states in southern Africa indicated that they encountered numerous problems when dealing with legal terminology in court proceedings, when translating legal documents or when compiling legislation for their various states. It was suddenly realised that, although English and Afrikaans are the official languages in this country, the different indigenous languages could not be ignored but had an important role to play in legal procedure. The problem, however, is that these languages cannot meet the demands placed on them, as legal terminology in these languages is either altogether lacking or, where present, not sufficiently complex to deal with modern developments.

Under the auspices of the South African Institute for Translators and Interpreters, the Committee for Legal Terminology in African Languages was formed in 1987. The object of this committee is to make legal terminology more accessible to the local black population – not only to make it more available but also to make it more comprehensible. The aims of the committee are revealed in its coat of arms. The bridge symbolises an attempt to reach out to other fellow citizens by means of translation, the stars bring the light of knowledge to the existing darkness and the balance refers both to the law and to the function of an interpreter to ensure that the original and the translation contain the same idea. The translation must be a mirror image of the language from which the translation is done.

The committee tries to fulfil the role it has undertaken by working in different phases:

- The first phase comprises the compilation of lists of legal terms in English and the provision of definitions and examples of how the term should or could be used. The English term, with its definition and examples, is then translated into Afrikaans.
- During the second phase of the work the English/Afrikaans terminology list is adapted and revised to fulfil the lexicographical standards set by modern dictionary compilers.
- The information is then fed into a computer and adapted even further in accordance with the requirements of the computer program used.
- In the last and final stage of the process the various terms, definitions and examples are translated into one of the African languages.

At the outset the undertaking seemed boundless, so the committee decided to demarcate it by limiting the scope of the work to those legal terms relating to criminal law and criminal procedural law, as these legal fields are traditionally best known to the African population groups as a result of their own tribal penal organisation. Northern Sotho was chosen as the first indigenous language into which terms would be translated because the government of Lebowa was the first to draw attention to the deficiencies already mentioned. We are presumptuous enough to plan terminology lists in other African languages covering other legal fields when this first project is completed.

The Committee for Legal Terminology in African Languages is made up of representatives from different disciplines. At present there are several lawyers, court translators, linguists and lexicographers as well as representatives from different universities, the South African Broadcasting Corporation, the Northern Sotho Language Board, the Northern Sotho Departments of Justice and Education and the South African Department of Justice.

Although the committee may seem overburdened with academics, the idea is nevertheless to compile terminology lists that can be used in everyday dealings with the law. Our target group therefore includes legal practitioners, interpreters, compilers of legislation, students of law and even the man in the street. We further hope that our creation will be used not only by speakers of the African language, but also by English- and Afrikaans-speaking South Africans, either to clarify the meaning of a term in their own language, or to communicate more successfully with someone speaking an African language.

THE PROJECT ITSELF AND THE PROBLEMS ENCOUNTERED

The project undertaken by the committee is unique in more than one respect. We are not dealing here with a dictionary in the normal sense of the word. Although the terminology lists envisaged by the committee will be a dictionary in the sense that there will be terms in a specific language with the equivalents of these terms in two other languages, the idea is to create something more meaningful than a dictionary. Each term that has a specific legal meaning which deviates from the meaning used in everyday speech will be provided with a definition, and this definition will also be translated into the other two languages. The end product will therefore combine a trilingual dictionary and a dictionary of definitions. To date, nothing similar has been attempted in South Africa, or, as far as we could

determine, in the Western world. Because of the uniqueness of the project, various problems have been encountered in every sphere of the work.

COMPUTER PROGRAM

In the first place the committee decided to keep pace with modern technology by making use of a computer in the compilation of our dictionary. This was easier said than done. We could not find an existing computer program which could accommodate everything we had in mind and thus a program had to be written especially for this work. One of the greatest stumbling blocks was the traditional predetermined idea of programmers as to the requirements that should be met by such a program.

The program with which we started displayed little windows on the screen where certain information regarding each term had to be inserted. And it was precisely here where our problems started. The window provided for the definition was far too small. Many legal terms have lengthy definitions and this window had to be enlarged considerably.

Apart from this aspect, our computer program further required that a distinction should be drawn between examples of usage, fixed expressions, wider and narrower terms. Separate windows were provided for each. The terminology lists in English and Afrikaans are compiled by lawyers without any technical knowledge of language and lexicology. I do not know how many of you have ever tried to teach a lawyer the mysteries of lexicology, but I can assure you that it borders on the impossible. On the other hand the work could not be done by linguists either, as they lacked knowledge of the inherent meaning of each term. The ideal would be to bring lawyer and linguist together for working sessions, but this is not possible as all of us are employed full time elsewhere and the time spent on this project is merely our good deed for the day. Another solution had to be found, and once again the program had to be adapted.

We are now following a completely different layout. Instead of giving a term followed by examples of usage, fixed expressions, narrower and wider terms, every combination is regarded as a term in its own right. Some of the work done at the very beginning of our project had to be redone and this consumed much of our precious time. But the good news is that it seems as if our teething problems with the computer program have now been overcome.

ENGLISH/AFRIKAANS DEFINITIONS

Another stumbling block that presented itself soon after the work started was the lack of explanatory dictionaries of legal terms in South Africa. Use had to be made of European, Canadian, American and Australian dictionaries. Because South African law has been largely influenced by English law, ample use is made of English dictionaries. On the other hand, the English legal system is based on common law while the South African system originates from Roman-Dutch law. Therefore one finds that the meanings of terms do not always coincide.

Some examples of the problems encountered so far can be mentioned briefly. Take for example the well-known word 'crime'. How should one define it? How does a crime differ from an 'offence'? Is it merely in terms of degree so that the one is more serious than the other? Is the one created by statute while the other develops from customary common law? To go further: what about the words 'misdemeanour', 'contravention' or 'transgression'? The slight differences which exist according to English dictionaries are not known in South Africa. The words are used in an haphazard way: sometimes indiscriminately, while the user at other times intuitively reaches out to the one considered to be correct.

A similar situation arises with words such as 'litigation', 'action', 'case' and 'dispute'. The compiler of the English/Afrikaans lists has to be on the alert. A term which is not characteristic of the South African legal system can easily slip through. In South Africa, for example, we do not distinguish between libel and slander, so these terms are not found here. South Africans know only defamation.

The committee tries to overcome problems such as these by making use of existing English and American dictionaries and by supplementing them with South African legal textbooks. Where terms are especially difficult to define, help is obtained from academics involved in the teaching of law. However, simplifying a definition without omitting some of its salient features remains extremely difficult. This is especially so when the aim is to make the dictionary suitable for court usage, but also for use by legal students and the man in the street. Definitions have to be simple, straightforward and easily understandable without deviating from the standards required by legal practitioners.

TRANSLATION INTO AFRICAN LANGUAGES

The third phase of the Committee's work is perhaps the most difficult one, namely the translation of terms into a specific African language. This is not

merely a case of translation from one language into another, as we often also encounter cultural differences between the different population groups. Sometimes a term similar to the one that has to be translated already exists in the indigenous language, but because of cultural differences, it is not a precise equivalent of the English or Afrikaans term. The Western legal system is accustomed to punish crimes by imposing a fine which then accrues to the state. The black system knows only compensatory fines – part of the fine must be handed over to the complainant as a form of damages to compensate him for damage suffered. In the black tribal legal system, criminal law and private law are to a large degree intertwined. This means that the criminal and criminal procedural law cannot be separated altogether from the civil and civil procedural law. The word 'punishment' has an emotive value which alters its meaning, so that it differs altogether from the punishment envisaged by an English- or Afrikaans-speaking South African.

Where the African language already contains an equivalent for an English term this equivalent is used, although it often has to be redefined or modified to make provision for the different subjective values attached to the word. Only time will tell whether such a reshaped term will be accepted by the speakers of the mother tongue.

Where no term exists in the indigenous language, a completely new term has to be created. In these cases the committee tries to reach back to the Latin root of a term or else a derivation is compiled from existing roots or a combination is made from several words. The word 'advocate' was incorporated into the Northern Sotho language in this way as a derivation from the Latin root.

Quite often one finds that common English and Afrikaans concepts are the most difficult ones to translate. Take for example the well-known term 'assault'. In English, assault refers to any form of bodily injury to a complainant. Northern Sotho does not have an equivalent to this term. Where an accused was once asked in court whether he pleaded guilty or not guilty to the charge of assault, the interpreter translated the word with the Sotho word 'betha'. The accused pleaded not guilty. Only after several witnesses had testified did the judge realise that the accused had misunderstood the charge. The Sotho word 'betha' merely relates to hitting. In this case the accused had kicked the victim which was indeed assault according to English standards but not 'betha' as was translated into his language.

Apart from mere differences in the meaning of words, many problems are also encountered when translating because African languages are

much more idiomatic than Western languages. Figurative speech is the rule rather than the exception. It is therefore important to convey the meaning of a phrase rather than to translate it literally. The following example is quoted merely to illustrate the difference between the sober and straightforward English language and the figurative speech of the traditional African. In a rape case a black woman may for example give evidence and say: 'When he ate me I was in the month.' For the uninformed this may seem utter nonsense, but correctly interpreted the phrase merely means: 'When he was having intercourse with me, I was menstruating.'

Humorous highlights do not fail to turn up. The following incident occurred during the translation of certain legislation for Transkei: an agricultural Act required that all farmers should have first-aid kits available in case injuries occurred. The Act specifically stated that in case of injuries the necessary treatment had to be given by the responsible person and that a dressing had to be applied to the wound. For some time inspectors in Transkei were puzzled by the number of dresses stored by farmers next to their first-aid kits, until somebody realised that the word 'dressing' had been translated into Xhosa as 'dress'.

Translation is not always a mere conversion of one term into another language. More is frequently required and this is especially true when dealing with transcultural translation. In the case of the judiciary, a person's respect for the legal system quite often depends on the way in which concepts or words are translated into his mother tongue. To illustrate: the South African law of evidence generally does not accept hearsay evidence as it is regarded as being unreliable. If a black witness is told that he may not repeat the words uttered by his dead father because this is hearsay evidence and therefore unreliable, it could have dire consequences. The black family relationship require the utmost respect for parents. To tell a son that the words of his father may not be repeated because they are untrustworthy would cause him to lose all respect for the court or its proceedings.

In English the word 'government' is used to indicate the existing ruling party as well as the state itself. Afrikaans on the other hand distinguishes between the two concepts. In Afrikaans this distinction is further revealed by the fact that a Government Gazette and a Government Notice are called 'Staatskoerant' and 'Goewermentskennisgewing'. Why the separate terms for a concept which is seemingly the same? No existing dictionary could help us here and we had to consult the Dutch language from which Afrikaans originated. It appears that the difference comes

from the fact that the word 'staat' is considered a neutral term without emotional value while 'goewerment' is politically coloured. The Sotho translation was a similarly hard nut to crack. In Sotho, nouns are derived from verbs by making use of prefixes and/or suffixes and in this case we had more than one derivative to choose from. In the end we decided to follow the Afrikaans differentiation instead of using the English example. From the Sotho word 'busa', which means 'to govern', two nouns were therefore derived, namely 'puso' for government and 'mmuso' for state.

CONCLUSION

What has been said is merely a glimpse of the work done by the Committee for Legal Terminology in African Language. I have tried to highlight some of the problems which we have encountered so far but space prohibits further digression. The members of the Committee will, however, appreciate any help or any recommendations and we hope that when we meet again this committee will be able to show some positive proof of the success that can be obtained when different cultural groups use language as a bridge to span the gap that separates them.