

ANALYSEN UND BERICHE

South Africa's System of Official Languages

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1. Introduction

This article deals with the current rules on official languages in the Republic of South Africa. The emphasis will be placed on the current situation under her fifth Constitution: the final 1996 Constitution¹, hereinafter referred to as the "Final Constitution". However, some references to the situation before the Final Constitution will be included.

The current rules are not as onerous on the South African state as they may seem at a first reading, and in spite of the clear goal of a multilingualistic society with eleven official languages, in reality certain languages are used more frequently than others. In addition to looking at the Constitutional provisions, this article gives some examples as to how the South African society has responded to having eleven languages declared as official languages in the Final Constitution.

In most countries, the official language is the language determined by the dominant community within the physical boundaries of that country. The African states do not – as European countries – reflect with the same clarity in their official languages the language spoken by the majority. The African countries have with very few exceptions all retained the official language of the state which colonized them in the 19th Century.

Retaining these neutral European languages among a multitude of indigenous (tribal) languages has made it easier to communicate with the outside world both in and outside Africa. This is especially the case with English and French. Likewise, a "foreign" official language also enables people in power to keep the local population ignorant if they choose to conduct official contacts with the outside world in that official language while reserving the education of this language to the "élite".

¹ The Constitution of South Africa Act 108 of 1996.

To return to the notion of official language, official languages are those used in the business of government at the legislative, executive and judicial levels. Likewise, it is the language in which the citizens must address themselves to officials of the state. Further, official languages are the languages used for teaching purposes in schools and higher education.

With the use of official languages in mind two disadvantages for linguistic minorities are clear. First, it can be harder for a person whose mother tongue is not the official language to address himself to the state. This can in some cases even cut him off from exercising his rights or obtaining certain benefits he is entitled to.

Further, for linguistic minorities, public education in a majority language can be particularly burdensome. The academic performance may be prejudiced by having to be taught in a language that is not their mother tongue. As we shall see below, the vast majority of South Africans have been treated as a linguistic minority for much of the 20th Century.

II. The 1909, 1961 and 1983 Constitutions

Although the issue of official languages finds its roots in the 19th Century, the historical starting point has to be on 20 September 1909. The reason for this is that on that date the British Parliament adopted an act to constitute the Union of South Africa, hereinafter referred to as the "1909 Constitution". The state of South Africa did not exist before then. However, it would seem inappropriate not to recall that the Union of South Africa was the result of two bitter wars between the Dutch (Afrikaans) speaking white community in South Africa and the British². The Union of South Africa "united" the former British colonies in the Cape and Natal with the two independent Dutch/Afrikaans speaking republics, the Republics of Transvaal and The Orange Free State.

1. The language clause

Section 137 of the 1909 Constitution stated:

"Both the English and Dutch languages shall be official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights, and privileges; all records, journals, and proceedings of Parliament shall be kept in both

² Normally referred to as the Boer Wars; the Afrikaners however refer to them as the "Vryheidsoorlogen" which translates as "Freedom Wars". For a very comprehensive account of the second and last of these wars, see for instance, *Thomas Pakenham*, *The Boer War*, Abacus ed. 1993.

languages, and all Bills, Acts, and notices of general public importance or interest issued by the Government of the Union shall be in both languages."

Right from the outset, South Africa had two official languages: English and Dutch. The choice of the two languages was a necessary compromise in order to appease the fear of English dominance felt by the Afrikaans speaking community. In 1925 Dutch was by law³ defined as comprising the Afrikaans language⁴. Section 119 of the 1961 Constitution defined Afrikaans as including Dutch. The 1983 Constitution speaks only of Afrikaans.

The language clause of the 1909 Constitution was to survive in the 1961 Constitution (under which South Africa became a republic) and as Section 89 (1) & (2) in the 1983 Constitution. The obvious shortcoming of these language clauses was that from 1909 until 1993 – the year when the Interim Constitution⁵ came into force – no Black languages were recognized as official languages in South Africa despite the Black population being in the majority⁶.

2. *Entrenched clauses*

A very important aspect of the language clause was that it was a so-called "entrenched clause"⁷: the language clause could only be repealed or altered by an act passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. There was only one other entrenched clause in the 1909 Constitution, namely Section 35 maintaining very limited voting rights for non-Whites in the Cape Province. The implication was that the entrenched sections in the Constitution could not be repealed by a normal act of Parliament. Any other sections of the Constitution could be changed by an act of Parliament passed by a simple majority as it normally can according to English law. The principle of a sovereign Parlia-

³ Union Act 8 of 1925.

⁴ The Afrikaans language is very interesting in that it is the only Germanic language to have developed on the African Continent. It finds its origins in the 17th Century Dutch spoken by the Dutch settlers in the Cape. It follows simpler grammatical rules than Dutch. Further, it has adopted numerous words from indigenous languages especially for plants and animals unknown in Europe, and from the language of their Malay slaves, and from the English and Portuguese languages.

⁵ Constitution of South Africa Act 200 of 1993.

⁶ It should be noted that Section 89 (3) of the 1983 Constitution made it possible to recognize a Black language as an additional official language in such areas "declared to be a selfgoverning territory in the Republic". Some of these territories were pushed to become "independent" states, the so-called "Homelands". The Homelands were one of the measures of segregation put in place by the Apartheid regime which ruled South Africa for much of the 20th Century.

⁷ Sec. 152 of the 1909 Constitution.

ment in the English legal tradition, according to which constitutional provisions can be changed by an act of Parliament passed by a simple majority, differs fundamentally from most other countries. In most countries the constitution can only be changed in accordance with rules making it more difficult to carry out such a change. Unlike the entrenched clause on voting rights⁸, the language clause never led to any controversy and was never amended, with the exception of broadening the definition of Dutch to comprise Afrikaans; this took place by a normal act of Parliament without anyone invoking the correct procedure under the entrenched clause.

Until the Interim Constitution in 1993, English and Afrikaans were treated equally in South Africa by all levels of government and the constitutional protection for them stayed in place⁹. Regardless of the language spoken at home, English and Afrikaans are the languages which millions of South Africans have been educated in school. It is worth noting that, in today's South Africa, English and Afrikaans are spoken respectively by 9 and 15 percent of the population as home languages¹⁰.

III. The 1993 Interim Constitution

1. *The Apartheid years prior to the Interim Constitution*

It is impossible to write about aspects of South Africa's history without the dark shadow of Apartheid lingering somewhere in the text.

To recall, Apartheid (which translates by "apartness") was based on four ideas. First, the population of South Africa comprised four so-called racial groups – White, Coloured, Indian and Black African – each with its own inherent culture. Second, Whites as "the civilized race" were entitled to have absolute control over the state. Third, white interests should prevail over black interests; the state was not obliged to provide equal facilities to the subordinate races. Fourth, the white group formed a single nation, while blacks belonged to several (eventually ten) distinct nations or potential nations, subsequent homelands¹¹.

⁸ See for instance: *Klavs Skovsholm*, The right to vote in South Africa – a hundred years of experience, VRÜ 32 (1999), p. 236.

⁹ Sec. 99 (2) and 90 of the 1983 Constitution. For further details see also Constitutional Law of South Africa, 3rd revision, 1999, Juta, Cape Town, p. 37-1 to 37-2, hereinafter referred to as "COLSA".

¹⁰ See further appendix 1 below.

¹¹ See *Leonard Thompson*, A History of South Africa, Massachusetts 1990, p. 190.

The office of government was in the hands of the National Party from 1948 until 1994. From the ranks of the members of the National Party came the architects of Apartheid also known as 'The Grand Scheme of Separate Development'. Most active members of the National Party were Afrikaans speaking, thereby giving Afrikaans the legacy of language of the oppressor.

2. *School riots because of the Afrikaans language*

In the sixties and seventies, Apartheid was at its highest point of oppression through various measures of racial segregation. During these two decades the International Community's awareness of the plight of non-white South Africans grew because of the organised internal opposition to Apartheid. Indeed, the Afrikaans language was to play a significant role in this opposition. In 1975, all black secondary schools were instructed to teach arithmetic and social studies in Afrikaans only. Parents, pupils and teachers united in protest. All teachers spoke English, whereas many did not speak Afrikaans. They argued that English was the main language of industry and commerce, and therefore of jobs, and was the *lingua franca* of the Africans in the towns. Afrikaans they considered the language of police, pass office and prison. This protest was to no avail. In June a year later, in the township of Soweto outside Johannesburg, black secondary school students protested over the education in Afrikaans. This led to a confrontation with the police during which two were killed and many wounded. These school riots were to last for the next twelve months all over the country and the official figures put the number of killed in the course of the uprising that began in Soweto, at 575 and the wounded at 2389¹².

3. *The 1983 Constitution*

Eventually, South Africa's government had to give in to pressures from national and international levels and undertake some reform. After a referendum, the South African government decided to give South Africa a more equitable and broader political platform, racially speaking. This led to the adoption of the 1983 Constitution. Under section 52 of this constitution, "every white person, Coloured person and Indian" had the right to vote subject to certain legal conditions¹³.

However, the 1983 Constitution did not appease the situation in South Africa, and the Coloured and Indian population groups only gave the reform a very limited support

¹² Brian Lapping, Apartheid – a history, Paladin Grafton Books, 1987, p. 210 to 213.

¹³ See in particular sections 14 and 16 of the 1983 Constitution, and, for instance, Thompson, *op.cit.*, p. 225.

because, after all, the 1983 Constitution was little more than window-dressing since the Whites still held the reins of power. The obvious and major short coming of this constitution was that about 75 percent of the population, including the homelands, had no say in the governing of South Africa¹⁴.

For our immediate purposes, it is not necessary to give a detailed description of the decade between the 1983 Constitution and the 1993 Interim Constitution, other than to recall that the last years of Apartheid led to enormous human sacrificing due to politically motivated violence. In fact, the unrest in South Africa grew so alarming that a general state of emergency was declared from 1986 to 1989. Furthermore, during the same period South Africa's economy suffered greatly under the economic sanctions which had finally been imposed on South Africa by the Commonwealth Countries, the United States of America, and the European Community.

4. Change of political leadership in the governing party

The pressures on the government for change never ceased, even if the government did try to abandon various pieces of legislation which were not strictly necessary to keep the Whites in power. Finally, in 1989 a change of political leadership in the National party, which had then been in office since 1948, paved the road towards negotiations on a new constitution introducing a multiracial democracy and the subsequent adoption of the 1993 Interim Constitution¹⁵.

5. Negotiations and adoption of the Interim Constitution

The reason for first adopting an Interim Constitution instead of proceeding to a new Final Constitution was that, at the time of the negotiations, there were no bodies of people who were truly democratically elected. Further, to curb the fears of the various minorities, the negotiating parties decided as a compromise to first draw up an Interim Constitution with temporary power-sharing arrangements, then have multi-racial elections. The National Assembly and Senate emerging from these first elections in April 1994 were then to run the country under the Interim Constitution while negotiating the Final Constitution. The new National Assembly and Senate could not, however, draw up the Final Constitution in any way they would want, because the Interim Constitution contained certain so-called Consti-

¹⁴ See *Thompson, op.cit.*, p. 225.

¹⁵ Several books deal with these negotiations and the last years of Apartheid; among the best known are probably former president Mandela's "Long Walk To Freedom" and former president De Klerk's "The Last Trek – A New Beginning".

tutional Principles which had to be respected in the Final Constitution¹⁶. Finally, the Constitutional Court had to certify that these principles were indeed adhered to. A very fundamental change in the South African Constitutional system is that the principle of a sovereign Parliament was replaced with the principle of supremacy of the constitution¹⁷. This means that the South African Parliament is now subject to the limitations imposed on it by the Constitution.

6. *The language clause in the Interim Constitution*

Unlike, for instance, Namibia and Moçambique¹⁸ which at independence chose the former colonial language as official language, the negotiating parties could not agree on retaining English and Afrikaans as sole official languages. Instead, South Africa took a leap forward when Section 3 (1) of the Interim Constitution¹⁹ declared: "Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwanti, Xisonga, Setswana, Tshivenda, isiXhosa and isiZulu shall be official South African languages at national level, and conditions shall be created for their development and for the promotion of their equal use and enjoyment"²⁰.

Section 3 of the Interim Constitution was ambitious when it came to equal linguistic treatment of all South African peoples, in that it recognized not less than eleven languages as official languages of South Africa.

7. *Interaction between the official languages*

Before the Interim Constitution, English and Afrikaans were "treated on an a footing of equality, and possessed and enjoyed equal freedom, rights, and privileges"²¹. This measure of equality between eleven official languages could not be present under the Interim Constitution from the outset, as only Afrikaans and English had been official languages so far. However, it would seem that Section 3 (1) of the Interim Constitution set this goal on the national level by stipulating that "conditions shall be created for their development and for the promotion of their equal use and enjoyment". Section 3 (2) stipulated that the rights of

¹⁶ Interim Constitution Sec. 73. To safeguard these Constitutional principles, Sec. 74 provided that these principles could neither be amended nor repealed.

¹⁷ Interim Constitution Sec. 4.

¹⁸ Article 3 (1) of the Namibian Constitution and Article 5 of the Constitution of Mozambique designate respectively English and Portuguese as the official language of the country.

¹⁹ As regards languages before the Courts, see Section 107 of the Interim Constitution.

²⁰ For full text of Section 3 of the Interim Constitution , see Annex I.

²¹ See Section 137 of the 1909 Constitution.

English and Afrikaans on the national level are not to be diminished, and additional languages in the homelands be extended to the national level. The homelands were one of the radical segregation measures put in place by the Apartheid regime and consisted of designating large, but arid parts of South African territory to be "independent states" for the various Black African tribes with their own state administration – and thus enjoying the right of declaring a language an official language of their own. Many members of the various tribes were expelled by force to these areas where they became "foreign" citizens enjoying no civil rights in South Africa where most of them had to seek work ²².

Whereas Section 3 (1) & (2) of the Interim Constitution dealt with obligations for the authorities, Section 3 (3) granted the right to the individual to communicate with the national authorities in the official language of his or her choice; this, however, with the important limitation that it has to be "wherever practicable". The "wherever practicable" condition ensures that these provisions would not be too onerous on the authorities.

Section 3 (4) allowed for regional differentiation. Section 3 (5) & (6) dealt with the regional adoption of an official language from the list in Section 3 (1), but this was not allowed to influence the existing status of the official languages at the time of the entry into force of the Interim Constitution. In reality, this must have meant that the provinces could adopt an official language of their choice, but could not do away with English and Afrikaans (and a possible other official language). Section 3 (6) was parallel on the regional level to Section 3 (3) covering the national level.

Section 3 (7) stated the right of a Member of Parliament to speak in any official language of his or her choice. Section 3 (8) provided that Parliament and regional authorities could adopt (probably limiting) rules regarding official languages "for the purposes of the functioning of government, taking into account questions of usage, practicality and expense".

Finally, Section 3 (9) contained various principles for linguistic legislation, and provided for the setting up of a advising body, namely an independent Pan South African Language Board.

8. *Education*

As well as granting every person the right to basic education and to equal access to educational institutions, Section 32 of the Interim Constitution also granted every person the right to instruction in the language of his or her choice where this was reasonably practical,

²² See footnote 7.

and to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.

9. *Negotiations for and adoption of the Final Constitution*

As the name implies, the Interim Constitution was only valid for a limited period. The Constitutional Assembly (the National Assembly and the Senate) had up to five years to agree on a new, final Constitution²³.

As regards languages, the Constitutional Assembly had to respect the following Constitutional Principle XI: "The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged."

On 8 May 1996, the Constitutional Assembly adopted the Final Constitution. Under the Interim Constitution, the Constitutional Court had to certify that the Final Constitution complied with the Constitutional Principles. On 6 September 1996, the Constitutional Court declared that the Final Constitution did not comply with the Constitutional Principles on the grounds that the Final Constitution did not give enough competence to the local governments. In terms of the Interim Constitution, the relevant parts of the Final Constitution had to be drawn up once more. Eventually the Constitutional Court gave its permission to President Mandela to sign the Final Constitution in Sharpeville on 10 December 1996. The Final Constitution came into force on 4 February 1997²⁴.

IV. The 1996 Final Constitution

1. *The language clause in the Final Constitution*

Section 6 (1)²⁵ of the Final Constitution states: "The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwanti, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa, and isiZulu."

In line with the Interim Constitution, the Final Constitution lists eleven official languages. There is one change in the list. The former "Sesotho sa Leboa" is now referred to by its more correct name "Sepedi"²⁶.

²³ See Section 71 of the Interim Constitution.

²⁴ The Interim Constitution was likewise repealed. Court cases pending at the moment of the entry into force of the Final Constitution will still be heard according to the Interim Constitution.

²⁵ For full text of Section 6 of the Final Constitution, see Annex II.

The structure and coverage of Section 6 is as follows:

- Section 6 (1) lists the official languages.
- Section 6 (2) imposes an obligation on the state to "take positive measures to elevate the status and advance the use" of the official languages.
- Section 6 (3) contains an obligation for the state to put linguistic legislation in place, but allows "for purposes of government" to restrict the use of official languages to a minimum of two languages under certain conditions based on a broad appreciation of the actual conditions in the area.
- Section 6 (4) deals with the interaction between the official languages: "all official languages must enjoy parity of esteem and must be treated equitably".
- Finally, Section 6 (5) deals with the Pan South African Language Board and its tasks.

2. *Interaction between the official languages*

With eleven official languages it would be practically impossible, and in all events extremely costly and burdensome, to maintain the "interchangability" which existed between English and Afrikaans until the Interim Constitution. Section 6 (1) of the Final Constitution lists the eleven official languages. However, a mere declaration as official language is of little consequence without the statute backing envisaged in Section 6 (4), and the positive measures the national and provincial governments must take according to Section 6 (2) & (3). Section 6 (4) contains the key phrase to the interaction between the official languages: "all official languages must enjoy parity of esteem and must be treated equitably."

The Interim Constitution did seem²⁷ to set as a goal, if distant, to reach a state of complete equality between the eleven official languages. However, the Final Constitution does not set this as a goal and it does not state that all official languages have to be treated equally. Section 6 (4) only requires that all official languages must enjoy parity of esteem and be treated equitably. Equal treatment and equitable treatment are not the same thing. Equitable treatment is treatment that is just and fair in the circumstances. There is therefore no requirement of equality as in the past. However, equity may require that languages diminished in the past now receive more attention than the favoured English and Afrikaans.²⁸ As regards parity of esteem, it has been submitted that the parity of esteem require-

²⁶ COLSA, p. 37-3.

²⁷ Interim Constitution Section 3 (1) & (9).

²⁸ COLSA, p. 37-5.

ment insists that, considerations of practicality aside, a sincere attempt must be made to ensure that particular languages do not dominate while others are neglected.²⁹

In the Interim Constitution, a recurrent phrase was that rights relating to language and the status of languages existing at the commencement of the Interim Constitution shall not be diminished³⁰. This meant that the former National Assembly and Senate had to respect the use of Afrikaans and English as in the past. However, this rule was not imposed on the Constitutional Assembly and this favouring of existing language rights disappeared in the Final Constitution. It follows from Section 6 (3) of the Final Constitution that "national government and provincial government may use any particular language for the purposes of government (...) provided that no national or provincial government may use only one official language". This means that for purposes of government the national government could decide to conduct its business in only two languages which – for the first time since the creation of the Union in 1910 – do not have to be English and Afrikaans. It seems for practical reasons more than unlikely that any government would stop working in English and Afrikaans altogether³¹.

Section 6 (3) does seem to mean that national legislation does not have to be published in all eleven official languages which is a bit surprising since legislation creates rights and obligations for the individual citizens³². On the provincial level this seems more acceptable because of the different indigenous languages spoken in the various nine provinces. Whatever the government's obligations in principle, in practice its official language policy may be qualified by a number of considerations: usage, practicality, expense, regional circumstances, and the balance of the needs and preferences of the population³³.

In addition to these central provisions on official languages in Section 6, the Final Constitution contains several other provisions dealing with language.

3. *Equality under the Bill of Rights*

Chapter 2 of the Final Constitution contains the South African Bill of Rights. Section 9 therein deals with equality. Section 9 (3) imposes an obligation on the state not to discriminate unfairly on various grounds such as race or religion. Among these grounds is

²⁹ COLSA, p. 37-6.

³⁰ Interim Constitution Section 3 (2) & (5).

³¹ See further COLSA, p. 37-7.

³² COLSA, p. 37-8 to 37-9.

³³ Final Constitution, Section 6 (3). As regards language before the courts in criminal matters, see Final Constitution's Section 35 (3) (k). See further COLSA, . 37-13 to 37-14.

'language'. In Section 9 (4), this prohibition is extended to apply to individuals. However, this prohibition must be seen in the light of the State's broad margin within which to lawfully decide its language policy³⁴.

Further, the extension of the prohibition against discrimination because of language to comprise individuals does not mean that a private person or firm is legally obliged to conduct business in more than one language – of his or their own choice.

4. *Linguistic communities*

In addition to Section 9, the Bill of Rights provides in Section 30 that "everyone has the right to use the language ... of their choice" and Section 31(1) gives "persons belonging to a ... linguistic community ... the right .. to use their language; and form, join and maintain linguistic associations and other organs of civil society". In both cases the exercise of these rights "may not be inconsistent with any provision in the Bill of Rights".

5. *Education*

Section 29 of the Final Constitution which deals with education, is likely to be more relevant. Because this is a Section of the Final Constitution linguistic minorities are likely to invoke. Apart from granting an unqualified right to basic education, including adult basic education, Section 29 (2) provides that "everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account (a) equity; (b) practicability; and (c) he need to redress the results of past racially discriminatory law and practice".

As we have seen above, before 1993 the majority of South Africans were not taught in any one of their own languages in school, so the right to be taught in the official language(s) of

³⁴ As regards limitation of rights listed in the Bill of Rights, Section 36 (1) provides for a formula to be applied by the courts in case they have to decide whether or not a limitation of one of these rights is lawful. However, section 36 (2) seems to exclude the application of Section 36 (1) as regards limitations on the use of languages because it is provided that "except as provided in subsection (1) or *in any other provision* of the Constitution, no law may limit any right entrenched in the Bill of Rights:" Thus limitations on the use of languages must be appreciated in the light of the discretionary powers that the language provisions vest themselves in the state.

choice can have major repercussions on the South African educational system. Indeed, the question of language of educational instruction has already proven controversial³⁵.

Section 29 (2) grants everyone the right to receive education in the official language or languages of their choice. The number of languages is therefore limited to the official languages listed in Section 6 (1). By speaking of "the official language or languages" it further grants the person to be instructed a choice between multilingualism and unilinguism. It is not clear if the number of official languages to choose from are all the official languages of the Republic or only the official languages of the province in question.

This far-reaching right is "counter-balanced" by the right for the state to limit the numbers of languages of instruction on practical grounds. The choice is granted in public educational institutions³⁶ "where that education is reasonably practicable". The state, including a provincial government, therefore has a margin of discretion whereby it can lawfully limit this constitutional right. Still, in limiting this right it has to keep in mind that the state in all events is under an obligation to treat all official languages equitable and with parity of esteem³⁷.

Section 29 (2) itself gives guidelines for the exercise of this discretion by laying down what the state must do. In order to decide if the language of instruction in a particular subject is reasonably practicable, the state must consider all reasonable educational alternatives, including single medium institutions, *i.e.* institutions in which the subjects are taught in one language only. On the basis of the wording of this section, it is hard to see that an individual pupil has an absolute right to receive education in a school which only teaches in one language, as it has been suggested in the legal literature³⁸.

In the exercise of its discretion, the state must consider all alternatives, taking into account the following three criteria:

- equity;
- practicality;
- the need to redress the results of past racially discriminatory law and practice.

³⁵ See, for example, *Matukane v. Laerskool Potgieterus* 1996 (3) SA 233 (T), which attracted a great deal of attention in South Africa. This case dealt with a predominantly Afrikaans school apparently making disguised efforts to keep the school white.

³⁶ Private schools are therefore not covered. This links nicely with Section 29 (3) which grants the right to establish and maintain, at own expense, independent educational institutions on certain conditions, especially that these institutions may not discriminate on the basis of race.

³⁷ Final Constitution, Section 6 (4).

³⁸ See COLSA, p. 38-15.

The equity criteria seems clearly to indicate that, considering all aspects of the actual situation in an educational institution, the state may restrict the equality between the official languages.

The practicability criteria seems somewhat redundant as this Section has already stated that the choice of language of instruction can only be given "where that education is reasonably practicable".

The "need for redress" criteria makes it possible for the state to opt for alternatives which have a stronger element of redress than equity may dictate.

These criteria can hardly be the only ones which can be taken into account. Circumstance may point to other criteria. In all events, these criteria obliges the state to look for reasonable solutions when it comes to offering a choice of languages of instruction, but also that the state has a wide margin of discretion in these matters. It should be recalled, however, that we are dealing with the exercise of discretion which means that inflexible rule-based decision making may disregard administrative law³⁹.

V. South African society today

Gradually, the Constitution will allow South African society to develop into a multilingualistic society also on the official level.

In the South African Parliament⁴⁰, the situation is still somewhat unclear in that rules are applied which seem to uphold the situation under the Interim Constitution in some areas and limiting the use of languages in others. At present, a Member of Parliament may use any of the official languages during the debates. Interpretation services are provided for any language that is spoken on the floor of both Chambers of Parliament. It should be noted, however, that the interpretation of African languages takes place into English and Afrikaans only.

English and Afrikaans speakers do not have to give prior notice of the language they intend to use because interpreters into these languages are always there. African language speakers, however, have to give at least an hour's notice. The reason for this is that Parliament does not yet have an official language policy. Therefore, interpreters have to be taken away from the duties they otherwise fulfil in the service of the state. As regards written

³⁹ See COLSA, p. 38-16.

⁴⁰ Information received in August 1999 directly from the Language Services Section attached to the Parliament of South Africa.

materials, including the minutes of the debates, these are normally only provided in English.

The South African Parliament has established a Joint Rules Committee. The task of this Committee is to announce the Parliament's language policy which may also serve as a guideline for South African Society at large. This announcement is expected before long.

On the Provincial level a number of provincial governments have not shied away from adopting policies limiting the number of official languages used for the purpose of provincial government⁴¹.

The Interim Constitution as well as the Final Constitution foresaw the establishment of a Pan South African Language Board. This Board was set up by Act 59 of 1995, and the special government Gazette in which this act was published was the first Gazette to be published in all eleven official languages.

In spite of the fact that the Constitution imposes an obligation on the public services to develop towards multilingualism, there is a marked move towards unilinguism in the public sector in favour of English. In most government departments the medium of communication is English. This trend is also visible in official publications and nationally important documents⁴². However, for instance, street signs are now mostly written with an additional third African language.

The Pan South African Language Board brought this to national attention by addressing an open letter to former President Nelson Mandela. In this letter the Board expressed concern "about the move towards monolingualism manifested at all levels of our government, especially with the latest Germiston town council's decision to conduct all business in English, and the High Court judgement to uphold that decision"⁴³.

The letter created quite a stir in South Africa and it highlights an important trend which will be interesting to follow over the coming years. Monolingualism or almost monolingualism in an administration could amount to an unconstitutional practise. On the other hand, such a trend also shows that there seems to prevail a sense of practicality in the public services. It is obviously easier and cheaper to use as few languages as possible.

⁴¹ See Appendix 2.

⁴² See, for instance, South Africa Yearbook 1998, fifth edition, p. 406, and table in appendix to this article.

⁴³ See Website of Pan South African Language Board.

Since the constitutional requirements do not apply to the private sector, most South African firms still cater for their customers both in Afrikaans and English.

VI. Conclusion

The provisions on language of the Final Constitution may not be as onerous on the state as they may seem at a first reading. It is a clearly defined objective that South African society must develop towards a multilingual society. However, with the discretionary powers vested in the national government and the provincial governments, this objective needs only to be met slowly and progressively. For especially economic reasons this seems justified. It should perhaps be stressed that the objective is a multilingual society, but that the objective does not comprise a total parity between the official languages. Indeed, in reality, the result is likely to be that certain languages will appear "more as official languages" than others simply because of their more frequent use. This is a result which may amount to being unconstitutional, but may feel more natural by the people involved. If, indeed, this trend continues to grow stronger, Section 6 of the Final Constitution may one day have to be amended in order to reflect the actual usage of official languages in the Republic of South Africa.

ANNEX

Full text of Section 3 of the Interim Constitution:

"3. 1) Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwanti, Xisonga, Setswana, Tshivenda, isiXhosa and isiZulu shall be the official South African languages at national level, and conditions shall be created for their development and for the promotion of their equal use and enjoyment.

2) Rights relating to language and the status of languages existing at the commencement of this Constitution shall not be diminished, and provision shall be made by an Act of Parliament for rights relating to language and the status of languages existing only at regional level, to be extended nationally in accordance with the principles set out in subsection (9).

3) Wherever practicable, a person shall have the right to use and to be addressed in his or her dealings with any public administration at the national level of government in any official South African language of his or her choice.

4) Regional differentiation in relation to language policy and practice shall be permissible.

5) A provincial legislature may, by a resolution adopted by a majority of at least two-thirds of all its members, declare any language referred to in subsection (1) to be an official language for the whole or any part of the province and for any or all powers and functions within the competence of that legislature, save that neither the rights relating to language nor the status of an official language as existing in any area or in relation to any function at the time of the commencement of this Constitution, shall be diminished.

6) Wherever practicable, a person shall have the right to use and to be addressed in his or her dealing with any public administration at the provincial level of government in any one of the official languages of his or her choice as contemplated in subsection (5).

7) A member of Parliament may address Parliament in the official South African language of his or her choice.

8) Parliament and any provincial legislature may, subject to this section, make provision by legislation for the use of official languages for the purposes of the functioning of government, taking into account questions of usage, practicality and expense.

9) Legislation, as well as official policy and practice, in relation to the use of languages at any level of government shall be subject to and based on the provisions of this section and the following principles:

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

10) a) Provision shall be made by an Act of Parliament for the establishment by the Senate of an independent Pan South African Language Board to promote respect for the principles in subsection (9) and to further the development of the official South African languages.

- b) The Pan South African language Board shall be consulted, and be given the opportunity to make recommendations, in relation to any proposed legislation contemplated in this section.
- c) The Pan South African Language Board shall be responsible for promoting respect for and the development of German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telugu, Urdu and other languages used by communities in South Africa, as well as Arabic, Hebrew and Sanskrit and other languages used for religious purposes."

ANNEX II

Full text of Section 6 of the Final Constitution:

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

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

(3) National and provincial governments may use particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances, and the balance of the needs and preferences of the population as a whole or in respective provinces; provided that no national or provincial government may use only one official language. Municipalities must take into consideration the language usage and preferences of their residents.

(4) National and provincial governments, by legislative and other measures, must regulate and monitor the use by those governments of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

(5) The Pan South African Language Board must -

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

APPENDIX 1

Statistics on South Africa's Linguistic Diversity⁴⁴

Percentage of population speaking at home one of the following languages

African languages:	74,64 %
English & Afrikaans:	24,05 %
Other languages:	1,31 %

Home languages (specified)

isiZulu:	21,96 %
isiXhosa:	17,03 %
Afrikaans:	15,03 %
Sepedi:	9,64 %
English:	9,01 %
Setswana:	8,59 %
Sesotho:	6,73 %
Xitsonga:	4,35 %
siSwati:	2,57 %
Tshivenda:	2,22 %
isiNdebele:	1,55 %

⁴⁴ Source: *South Africa New Language Policy (ISBN 0-7970-2971-0)* published by the South African Department of National Education.

APPENDIX 2

Official languages in the Provinces⁴⁵

Eastern Cape:	No official bill or language policy regarding official language(s) in the province. A draft bill proposes isiXhosa, isiZulu, Sesotho, English, Afrikaans and Sigh language be official languages.
Free State:	No official policy regarding the official languages in the province. However, the provincial legislature uses Afrikaans, English and Sesotho.
Gauteng:	No formal policy or bill. However, the province uses Sesotho, isiZulu, English and Afrikaans as official languages.
KwaZulu-Natal:	IsiZulu, English and Afrikaans (KwaZulu-Natal Parliamentary Official Languages Act 10 of 1998)
Mpumalanga:	Draft policy proposes Afrikaans, English, isiZulu, Sepedi, Sesotho, Setswana, isiNdebele and Xitsonga be official languages
Northern Cape:	Draft bill proposes Afrikaans, English, Setswana and isiXhosa be official languages
Northern Province:	No official language policy or bill
North West:	No official language policy or bill
Western Cape:	English, Afrikaans and isiXhosa (Western Cape Languages Act 117 of 1999)

⁴⁵ Source: information obtained in August 1999 directly from the South African National Language Service under the Department of Arts, Culture, Science and Technology.