

Observations and suggestions on the use of the official languages in national legislation

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Introduction

In this note Parliament's use of the official languages for passing and publication of national legislation is investigated. This is done against the background of the relevant provisions of the Constitution on the official languages. Parliament's interpretation and application of these provisions in relation to national legislation are critiqued. Some suggestions are also made on how the use of the official languages for national legislation might be improved.

In terms of established practice the choice in which languages to publish national legislation is made by the minister responsible for initiating a Bill in Parliament and whose department will eventually take responsibility for the implementing such legislation once it is on the statute book. Since the adoption (and the eventual publication) of national legislation is a primary legislative responsibility, the choice in which languages to adopt and publish national legislation is a responsibility which in the final analysis vests in the national legislature (Parliament.) Parliament therefore shares the responsibility of the choice of the languages of legislation with the National Executive - more particularly with the minister in question. Whenever the interpretation of the language clause in the Constitution is dealt with in relation to national legislation, it is dealt with as something that the national legislature mainly takes responsibility for.

Section 6 of the Constitution of the Republic of South Africa, 1996, (the '1996 Constitution' or the 'final' Constitution), which deals with

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the official languages provides for an impressively progressive language dispensation. It provides for eleven official languages - the mother tongues of more than ninety percent of the South African population. The inclusive official language dispensation is one of the reasons why the South African Constitution has been hailed by many as a shining example of a progressive Constitution and even as the best Constitution in the world.

An assessment of the current use of the official languages in terms of the 1996 Constitution requires a concise reference to the language provisions of the 1983 Constitution (Republic of South Africa, Constitution Act, 110 of 1983) and the 1993 Constitution (Constitution of the Republic of South Africa, 200 of 1993 - the interim Constitution)

Relevant constitutional provisions on language

Section 89 of the 1993 Constitution, like its predecessors provided for two official languages namely English and Afrikaans. According to section 89(2) these two languages had to be treated equally. Section 89(2) provided:

All records, journals and proceedings of Parliament shall be kept in both the official languages and all bills, laws and notices of general public importance or interest issued by the Government of the Republic shall be kept in both the official languages.

The equal treatment of the two official languages in terms this provision of the 1983 Constitution reflected a longstanding practice that had been followed almost since the establishment of the Union of South Africa as a unitary state in 1910. All national legislation was passed in English and Afrikaans (before 1925 in Dutch). The equal treatment of the two official languages was also reflected in the practice that was followed in relation to the signing of the texts of legislation by the head of state (the Governor-general till 1961 and the State president since 1961). In the event of an irreconcilable contradiction between the two texts, effect was to be given to the signed text. The signing of the texts has consistently alternated between the English and the Afrikaans text. The equal treatment of the two languages was also strictly adhered to in the public service particularly in relation to communication with the public. Forms used for the public's communication with the state administration were consistently made available in the two official languages and all public servants were required to be conversant in English and Afrikaans.

Various African languages enjoyed official status in the self-governing territories, created as political entities under the apartheid policy for each black ethnic group. Legislation of the various homelands was also adopted in the African language concerned (alongside English) and the debates in the homeland legislatures were also mostly in the African language of the ethnic group concerned. The African languages were also used and promoted in various capacities under the white minority government until 1994. The state created radio broadcasting services in the languages of all the African languages of the country and the African languages were widely used for non-official purposes. The Department of Justice had all along made available free interpreting services for all accused and witnesses who were speakers of the African languages (and other languages) in criminal trials. Outside the homelands none of the African languages were however afforded the status of official languages and they were also not used in national legislation. The entering into force of the interim Constitution in 1994 introduced fundamental changes in the official language dispensation.

Section 3 of the 1993-Constitution retained English and Afrikaans as official languages but went on to afford official language status to nine African languages - the mother tongues of the vast majority of South Africa's black citizenry. Section 3(2) of the 1993 Constitution, by way of a non-diminution clause, however sought to guarantee that the new dispensation would not weaken the position of English and Afrikaans by providing that the rights relating to language and the status of languages existing at the commencement of this Constitution should not be diminished. Section 3(2) of the 1993 Constitution read:

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).

In practical terms this meant, that even though the newly introduced official languages could be used for official purposes, all records, journals and proceedings of Parliament still (also) had to be kept in English and Afrikaans and that all Bills, laws and notices of general public importance issued by government also had to be in these two languages. Subordinate legislation (regulations and proclamations) issued in terms of (original) legislation of the national and provincial legislators also had to be published in English and

Afrikaans in order to comply with the non-diminution clause. (Currie 'Official languages and language rights' in Woolman *et al* (eds) *Constitutional law of South Africa* (2006) 65-7).

In line with section 3 of the 1993 Constitution, section 6 of the 1996 Constitution (the 'final' Constitution) provides that the official languages are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. However, unlike its predecessor three years before, section 6 does not have a non-diminution clause. This means that the erstwhile formal Constitutional guarantee that the rights relating to language and status of English and Afrikaans that existed at the commencement of the 1993 Constitution should not be diminished, had not been renewed.

The meaning and consequence of the phrase *official language* are not defined and the detailed consequences of official language status must therefore, as in similar jurisdictions, be spelt out in legislation that specifically deals with the practical implementation of official language status. Section 6(4) of the Constitution in fact enjoins the national government and provincial governments, to regulate and monitor their use of official languages by legislative and other measures. More than eleven years after the 1996 Constitution took effect no such legislative measures has however been adopted by Parliament. (The Provincial government of the Western Cape however passed the Western Cape Provincial Languages Act, 13 of 1998 to regulate the use of the official languages in that province. So far this is the only provincial government to have adopted such legislation.)

In spite of this failure which constitutes a rather flagrant violation of a clear Constitutional obligation and in spite of the lack of clarity on what precisely the expression 'official language' entails, it speaks for itself that an official language is to be understood as one of the language(s) used for conducting the business of government by the legislature, executive and the judiciary. Moreover, these provisions are at the same time bold and precise enough to prevent official language status to degenerate into a practically insignificant symbolism. This is so particularly since these provisions place obligations of both a general and specific nature on the national government (and on other spheres of government as well as the *state* in general.) For present purposes the following three obligations are particularly relevant:

- Section 6(2) introduced an affirmative action clause in relation to the indigenous African languages by enjoining the state to take measures to elevate the status and advance the use of these

languages, which now enjoy official status but which had previously suffered from diminished use and status. Afrikaans is one of the indigenous languages, but arguably did not suffer from a degenerated status or limited use, at least not in the decades immediately preceding the Constitutional transition in 1994. In practical terms this means that the African languages, ie all the official languages except for English and Afrikaans have to benefit from action that the state is to take in terms of this subsection. The obligation of section 6(2) is imposed on the state which is very broad and obviously includes the legislatures in all three spheres of government. It is therefore quite obviously applicable to legislation in national, provincial and municipal spheres.

- Section 6(3)(a) makes provision for an obligation of a specific kind. It provides that the national government and provincial governments may use any particular official language for 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 the province concerned but states that the national and provincial governments must use at least two official languages. By listing a number of factors to be considered in exercising a choice of which languages to use the Constitution enjoins Parliament to take rationally accountable decisions and to avoid arbitrary and capricious selection of which languages it uses. Arbitrary selection would be Constitutionally assailable in terms of section 6(3)(a). This provision applies for the use of language for purposes of government. Legislation is quite obviously the most crucial means of government and the use of the official languages for governmental purposes is therefore squarely applicable to legislation. (Rautenbach and Malherbe *Staatsreg* (2004) 106)
- Notwithstanding the affirmative action clause (s 6(2)), applicable to the official African languages, section 6(4) still provides that all the languages have to enjoy *parity of esteem* and *must be treated equitably*. For various reasons this somewhat awkwardly worded phrase is important. It confirms that the official languages need not be treated equally as was the position until the 1993 Constitution. What the provision also does, is to prevent arbitrary treatment and particularly arbitrary diminution of the use and status any of the official languages. More in particular, following the argument by Rautenbach and Malherbe (106) the requirement of parity of esteem disallows the use one of the official languages as a so-called anchor language, ie the consistent use of only one

language for legislation (or other official purposes) whilst the others are rotationally or sporadically used. This would clearly create a negative disparity of esteem of the randomly used languages in favour of the anchor language. Official policy and practices in relation to the languages - also in relation to the use of the official languages in legislation - is therefore required to be rational, which implies that it must account for all considerations relevant to the choices relating to the use of the official languages.

Official languages in national legislation

Under the interim Constitution from April 1994 to February 1997 all national legislation was passed and officially published in both English and Afrikaans. This was in accordance with the non-diminution provision contained in section 3(2) of the interim Constitution. Notwithstanding the fact that the nine indigenous languages have been afforded official status, no national legislation was passed in any of these languages. It is not clear why this was not done as the necessary translation facilities that were used in the defunct homelands must still have been available.

The effects of the removal of the non-diminishment clause in the present Constitution could soon be felt. In 1998 - the first full year under the present Constitution - two Acts of the national legislature were for the first time published in one of the official African languages. Successive years have witnessed an increase of the number of national statutes in the official African languages. Since parliamentary legislation is published in two languages only, every decision to publish in one of the African languages has the effect that either English or Afrikaans is not used. However, in practical terms it is Afrikaans that, without exception, stands aside in order to make room for publication of legislation in an African language. The chart below shows the number of instances in which one of the African languages was used for legislation in each year. The middle column indicates the numbers of the Acts that were adopted in an official African language. The right-hand column shows the number of statutes in which an official African language was used (ie in which Afrikaans was not used) in legislation that was adopted during the year indicated.

| | | |
|------|--|---------|
| 1998 | 55, 97 | 2 Acts |
| 1999 | 9 | 1 Act |
| 2000 | 3, 4, 22, 27, 37, 38, 51, 63, 67 | 9 Acts |
| 2001 | 3, 24, 31, 44, 48, 63, 67, 68 | 8 Acts |
| 2002 | 2, 4, 13, 14, 16, 17, 26, 28, 32, 42, 52, 53, 72, 75 | 14 Acts |
| 2003 | 4, 5, 7, 31, 32, 36, 41, 53, 57, 59, 60, 61 | 12 Acts |
| 2004 | 3, 5, 6, 7, 10, 11, 19, 28, 31, 36, 37, 39, 40 | 13 Acts |
| 2005 | 1, 8, 12, 13, 14, 26, 33, 34, 37 | 9 Acts |
| 2006 | 1, 2, 4, 13, 16, 17, 18, 19, 25, 26 | 10 Acts |
| 2007 | 1, 3, 5, 7, 10, 12, 14, 15, 18, 21, 27, 28, 33, 34, 40, 41 | 16 Acts |

The statistics reveal a very telling pattern regarding the national legislature's interpretation and application of the language provisions, more particularly section 6(3)(a) of the Constitution. It reveals the fate within the contexts of national legislation of the requirement that the official languages must be treated with parity of esteem and be treated equitably and also shows what Parliament has done in order to promote the use and elevate the status of the official African languages as far as national legislation is concerned. It therefore brings to light what the Constitution's official language dispensation means in practical terms at least as far as national legislation goes. For Parliament in practical terms it means the following:

Two, instead of at least two

Firstly, all national legislation has thus far officially been published in two official languages only. This is so notwithstanding the fact that 6(3)(a) of the Constitution provides that the national government (and provincial governments) must use *at least* two official languages. On no occasion was more than two official languages used. This was the case even with legislation such as the Promotion of Administrative Justice Act 3 of 2000, which is of the utmost importance to all members of the public and where translation into all the languages would be fairly easy due to the fact this is a short and non-technical statute. (The Act has only 11 sections and the electronic version comprises twelve and a half pages.) In practical terms the national government is therefore applying section 6(3)(a) as if it reads that it must use *only* two official languages in stead of using *at least* two official languages. The *at least* portion of the provision therefore seems to be ignored and has quietly fallen by the wayside. This is borne out by the consistency of the national government publishing

legislation in two languages only, without any exception in which legislation was published in three or more official languages.

Even though all national legislation is published in two languages, this does not mean that two official languages are used in the legislative process that precedes publication of an Act in the *Government Gazette*. On the contrary: It is normal practice, save for singular exceptions for national Bills to be considered and adopted in only one language, namely English. It is only once the entire parliamentary consideration process in respect of a Bill has been completed and the Bill has been passed by Parliament that the translation into another language is finalised, and, after the signing of the President published in the *Government Gazette* alongside with the English text. In the course of Parliament's actual processing of Bills it therefore usually works on the basis of only the English text and the translated version is very seldom available before the Bill has been passed by Parliament.

Although this practice is arguably unconstitutional, being incompatible with section 6(3)(a) (the question is not discussed here), it appears that Parliament is hardly left with any choice but to follow this unilingual English practice. The reason for this is that whereas it may be accepted that all members of Parliament has a workable knowledge of English, there is in all likelihood no, or but a handful, of MP's who knows all the other official languages. It is therefore quite simply not possible for Parliament to consider Bills (and pass legislation) in two languages since there would always be at least some members who do not understand the *second* official language (aside from English) that might be used. Even if the Constitution is convincingly interpreted to require that two official languages be used for this purpose, this would simply be impossible to comply with.

English plus one

Secondly, as already implied above, all national legislation since the present Constitution entered into force has been published in English and one other official language. In most cases (particularly amendment legislation) the other official language was Afrikaans but in some instances - those cited in the chart above - one of the other languages, mostly isiZulu, - was used. The disappearance of the non-diminution clause is therefore not impacting negatively on English. It does however impact negatively on Afrikaans since an increasing

number of pieces of legislation are not available in Afrikaans anymore. In fact, most of the Acts that are currently published in Afrikaans are only amending old pieces of legislation that had originally been published in Afrikaans. Virtually all 'new' Bills introduced in Parliament (ie those not amending existing legislation) are not published in Afrikaans. The number of national statutes not available in Afrikaans for the period 1998 to 2007 totals ninety five, and the percentage of Acts not published in Afrikaans is growing every year. This state of affairs impacts negatively on Afrikaans particularly in two ways: Firstly, it should be taken into account that Afrikaans as a fully-developed legal language is used as a language of instruction at six law faculties in the country (at the following universities: Pretoria, Johannesburg, North-West, Free State, Unisa and Stellenbosch). The non-availability of the legislation and thus of officially published legal sources in Afrikaans hampers legal education in Afrikaans. Secondly, it also has a particularly negative impact on the publication of legal textbooks in Afrikaans. Such textbooks are often principally based on a single or a small number of statutes. Proper legal education and reliable legal textbooks are to a considerable extent dependent on the availability of officially published terminology (in legislation) instead of the author's own unofficial and possibly inaccurate translation. The non-availability of for example the following statutes in Afrikaans, is particularly detrimental in this regard: The Promotion of Administrative Justice Act, 3 of 2000, the Children's Act, 38 of 2005 and the National Credit Act, 34 of 2005. These statutes are particularly important not only in legal practice but also for under-graduate education of law students and is the typical subject matter of basic student textbooks.

This practice is not only damaging to Afrikaans; it is, moreover unconstitutional in two respects. In the first place the fact that legal education and legal textbooks in Afrikaans require legislation in Afrikaans cannot be ignored when languages for legislation are decided on. On the contrary, this clearly relate to the factors of usage and the balance of the needs which count among the factors that must be considered in terms of section 6(3)(a). Selection without accounting for these factors - and reflecting them in the actual choice which is made - is thus obviously unconstitutional. Secondly, not selecting Afrikaans as one of the languages for legislation notwithstanding the fact that there is a clear need for that, is damaging and therefore patently inequitable and hence a violation of section 6(4). What is stated here is equally applicable to the effect of the arbitrary selection practices and the practice of using

different languages for principal and amendment legislation, discussed in the next to sections respectively.

It is to be doubted whether the few instances in which statutes were haphazardly published in the African official languages have added any substantive value to these languages. It might have a minimally positive effect on the status of these languages but the number of Acts published in these languages is plainly too small to contribute meaningfully to a bigger practical use of these languages by the public and by members of the legal profession. In this way Parliament and the National Executive have therefore up to now failed to comply with its obligations in terms of section 6(2).

Parliament's use of (a maximum) of two official languages of which English is always one, instead of using a minimum of two official languages has therefore borne bad fruits for Afrikaans without producing any notable benefits for the official African languages. The one thing the national legislature's practice has achieved was to further promote the dominant position of English as some kind of an anchor-language, thus elevating English to either the only real official language or the primary official language under the 1996 Constitution to the detriment of all the other official languages. The arbitrary manner in which the selection of languages (other than English), is done, dealt with below, has further weakened the position of the official languages and entrenched the position of English.

Arbitrary selection

In selecting the at least two languages - or as it has panned out in practical terms, of an official language besides English - for the purposes of legislation, section 6(3)(a) of the Constitution provides that the following factors must be taken into account: usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned. The selection must account for these factors and must therefore not be arbitrary. However, when the language selection for the publication of legislation is considered it is difficult to escape from the impression that the selection has indeed been arbitrary and thus not as rationally considerate as the Constitution requires. What for example could have been the reason for the decision to publish the Measurement Units and Measurement Standards Act, 18 of 2006 in isiZulu or the Accreditation for Conformity Assessment, Calibration and Good Laboratory Act, 19 of 2006 in isiXhosa and not in any other

African language or in Afrikaans which has the developed technical terminology used in these statutes? What could have caused the decision to publish the 2010 FIFA World Cup South Africa Special Measures Act 11 of 2006 in Afrikaans and not in isiZulu or in any other official African language? There are without a doubt many more supporters of soccer among speakers of isiZulu and the other African languages than among the ardent rugby-supporting Afrikaans-speaking public. What could have led to the decision that it was appropriate to publish the Municipal Fiscal Power and Functions Act 12 of 2007 in siSwati and not in any of the other official languages which might have been as, if not more suitable, for this purpose and what could have been the reason for deciding to publish the Co-operative Banks Act 40 of 2007 in isiXhosa and not in isiZulu, Sepedi, Afrikaans or any of the other official languages? Certainly the reason for publishing the Auditing Professions Act, 26 of 2005 in Sesotho could not have been that there are more Sesotho mother tongue auditors than there are Afrikaans or isiZulu speaking auditors. These few examples (and many others) certainly do not testify to the factors of usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population - the factors listed in section 6(3)(2)(a) - having been taken into account. On the contrary, the selection appears to be made rather arbitrarily and randomly.

Irrationality in relation to amendment Acts, practically only English

The arbitrariness of the selection of languages assumes even more glaring, if not absurd proportions in view of the fact that on several occasions Parliament published amendment legislation in a language other than the principal Act. The National Sports and Recreation Act 118 of 1998 was published in Afrikaans but amended in isiZulu by the National Sports and Recreation Amendment Act 18 of 2007. As indicated above the National Credit Act 34 of 2005 was published in isiZulu. Schedule 2 to the Act amends fourteen Acts that were initially passed and published in Afrikaans, including legislation of general public importance very regularly used in legal practice such as the Insolvency Act 24 of 1936, the Magistrates' Courts Act 32 of 1944, the Prescribed Rate of Interest Act 55 of 1975, the Matrimonial Property Act 88 of 1984 and the Small Claims Court Act 61 of 1984. As explained in the next paragraph the usage of two languages for the same Act renders such Acts practically useless and is in practice tantamount to using no

language at all. Hence, if English is the one language in which an Act (and the amendments to it) is passed and that Act and its amendments are published in different languages, the effect is that that legislation in question is for all practical purposes only in one language, namely English. This practice creates the impression that the requirement of section 6(3) to use at least two official languages is complied with, but produces unilingual consequences as it renders only one text - the English text - practically useful, while rendering the other texts of no use at all or at least clearly of much lesser use to the interpreter - including the legal practitioners - of these texts, than the English text. In this way Parliament and the National Executive are violating the Constitution every time when embarking on this practice. Since this practice renders the non-English texts of legislation useless or of lesser use than English, it obviously also goes counter to the injunction that the languages must enjoy parity of esteem and must be treated equitably. Neither is it capable of complying with the Constitutional injunction that the state must elevate the status and promote the use of the indigenous languages. This practice is therefore unconstitutional in various ways and produces consequences harmful to all the official languages apart from English.

As to the assertion that this practice renders the languages which are used in the same legislation (the principal and the amendment Act) useless, the following should be pointed out: It stands to reason that the most basic prerequisite for using and interpreting a statute is that one must have access to it. You must understand the whole of the text of the Act concerned. If the principal Act is considered without its amendments, the interpretation of the Act would obviously be incomplete, outdated and hence incorrect. On the other hand, amendments presuppose an already existing statute, which it adds on to and which it partially modifies. If an amendment is interpreted without access to and without understanding the non-amended portions of the principal Act, the amendment would simply make no sense at all. The amendment Act can hardly linguistically fit into the amended Act and if the interpreter - mostly a legal practitioner - moreover does not understand the languages of both the amended and the amendment Acts; no client can be advised on the basis of such linguistic confusion and no case can be prepared on the basis thereof. Precisely for this reason the practice of having the principal and amendment Acts in different languages is entirely irrational and absurd and renders such legislation useless. The only way out for an interpreter finding himself in this muddle is to resort to the one and only coherent text - the English one. In this way Parliament and the national

Executive not only promote the use of English but in fact makes it the only official language that is really available and useful for interpreting national legislation, thus creating a practice which is not only out of step with the Constitution, but diametrically opposed to it.

Signing of the English text

The signing of Parliamentary Bills by the President is the final step in the passing of legislation (s 79 regulates the signing of Bills by the President). Section 82 of the Constitution provides that the signed copy of an Act of Parliament is conclusive evidence of the provisions of the Act in question. In this way the signed copy of a parliamentary Act is given an enhanced status above the non-signed versions of legislation. In a constitutional order where legislation is passed in more than one official language, such rule is indispensable particularly with a view to resolve inconsistencies that might occur between the versions in the various languages. Until the entering into force of the present Constitution, the equality principle was strictly followed in relation to the signing of the Afrikaans and English texts. The texts were consequently signed in turns. Consecutive constitutional provisions, for example section 35 of the 1983-Constitution and section 65(2) of the 1993-Constitution provided for that. The rule has, however, fallen away in the present Constitution. What has come in the place of the defunct equality principle is a practice followed since the present Constitution took effect that the president without exception signs the English text. There is no constitutional or legislative basis for this practice. The fact is however, as indicated in *Two, instead of at least two* above, that although legislation is published in two official languages in the *Government Gazette* (English and another), Parliament considers only the English text. It follows rather logically that the text that has been considered, and not the other one, should be signed by the President.

There are also other considerations that suggest that the English text be signed. It may be accepted that at least all members of the legal profession are conversant in English but obviously not in all the other official languages. Previously, when the vast majority of members of the legal profession were white, the assumption could more readily be made that all South African lawyers had a basic command of Afrikaans alongside English. With a steeply increased number of black legal professionals who studied in English and whose mother tongue is one of the official African languages, this assump-

tion is no longer tenable. Neither is it fair to expect of mother tongue speakers of the African languages to know Afrikaans in addition to English, ie to be at least trilingual, while the same is not required of the other members of the legal profession. By the same token, it may be argued that it is also not fair to expect Afrikaans mother tongue legal professionals to be proficient in one or more of the African languages. Everyone, regardless of his or her mother tongue, is however conversant in English. Since the signed copy of legislative texts is understandable in English by all (legal practitioners), it seems obvious that only English and none of the other official languages qualify for signing and thus to be the conclusive text in the event of irreconcilable discrepancies between the texts. It would therefore be insensible to sign the text of any of the other official languages.

Conclusion and suggestions

If the practices of Parliament and the Executive in relation to the official languages in national legislation are to go by, the Constitution does not really seem to provide for eleven official languages - that enjoy parity of esteem. It rather suggests that the Constitution provides for English as the primary official language while the others are something like occasional or sporadic official languages, which occupy a poor secondary position. The selection of two instead of a minimum of two languages for legislation - more correctly, the *English plus one* practice, the arbitrary selection practices followed in respect of national legislation in Parliament - and the irrational practice to use different languages for principal and amendment Acts are further reinforcing the position of English as practically South Africa's only real official language. Even though Afrikaans is still used for most national legislation amending existing legislation on the statute book, it has lost considerable ground, having suffered from the unconstitutional and damaging practices that have been analysed above. Notwithstanding the Constitutional injunction to promote the use and elevate the status of the official African languages, these languages have also not made any meaningful gains and as far as the actual use of these languages is concerned, they are as far as legislation goes practically in the same position as when the Constitution took effect in 1997. Parliament's consistent adherence to the *English plus one* approach, instead of selecting more official languages on the basis of the considerations listed in section 6(3) has subjected the official languages, except for English, to glaringly

unfair treatment which again suggests that the Constitution is in fact providing for something different from that for which it is in fact providing for.

What should be done in order to correct what is currently wrong with the use of the official languages for legislation in Parliament? It is suggested that three guidelines should determine the policy that Parliament (as well as all other state organs and the courts) should follow in dealing with the official languages.

Firstly, all the official languages aside from English are exclusively autochthonous to South Africa. As local cultural assets to the South African citizenry, government in the broadest sense of the word, including Parliament, must accept responsibility for their protection and promotion. There is no other government that will or should accept responsibility for that. An aloof *laissez-faire* approach as if these languages will be able to take care for themselves is therefore not acceptable. This guideline also corresponds with the Constitution.

Secondly, the exceptional importance of English in South Africa as well as internationally and in many other national jurisdictions with which South Africa maintain close economic and political ties is not to be doubted. It is the primary language of commerce and industry and a large number of South African citizens have a workable knowledge of English as their second or third language. Any language policy, including policy regarding national legislation must account for and reflect the practical importance of English. A policy that fails to do that would be unrealistic, reactionary and unsuccessful. Precisely this importance of English does, however also underline another point. This is that if the other official languages do not receive special care and attention from the state, they will not be able to stand their ground against the dominance of English.

Thirdly, the use of languages in legislation is also a human rights question. There are many aspects to this truism. Language is a means by which the speakers of the language in question are afforded recognition as individuals (within the context of their linguistic communities). For the present purpose however, the most important point is that people can only know what their legal position is if it is communicated to them in the language they understand best, which will obviously be their mother tongue. Not all legislation bears on the rights of the citizenry in general or is of meaningful significance to all segments of the population. A strong case cannot be made that such legislation need not be made available to everyone in his own language. Legislation that (potentially) does bear on the interests of

everyone and that potentially affects the legal position of everyone must however be directly accessible and therefore understandable to everyone in her/his mother tongue so as to allow everyone to understand precisely what her/his legal position is. Not to make such legislation available in the mother tongue of each citizen, alienates such persons from the country they call their home and from the state that they are citizens of and causes unnecessary dependence from others in relation to the matters of the persons concerned.

The constitutional imperative that national and provincial government must use at least two languages taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population already to a certain extent account for the three above-mentioned factors. So does the injunction that the languages must enjoy parity of esteem and that they must be treated equitably. The injunction that the indigenous languages must be promoted also disavows a *laissez-faire* position and affirms the need to protect and promote the country's linguistic assets.

Against this backdrop the following more specific suggestions should be considered:

- 1 The importance of English in South Africa is acknowledged and therefore all legislation must quite obviously be passed and published in English as it is being done at the moment. If that is not done, legislation will simply not be understandable to a notable portion of the population. Of particular importance is the fact that it will also not be understandable to a substantive percentage of the legal profession. There are also statutes which are of particular interest to foreigners such as potential foreign investors and other people with business interests in South Africa, with a clear need to know what South African law provides in their field of business. That constitutes another clear reason for legislation to be available in English. Not to acknowledge the wide ranging importance of English in all these respects, would be a denial of the national linguistic landscape and thus purely reactionary and impractical.
- 2 As already argued in *Signing of the English text* above, the current practice in terms of which the English text of all legislation is signed can from a practical point of view not be wronged and should continue.
- 3 Considering the factors discussed in *Irrationality in relation to amendment Acts, practically only English* above, amendment Acts must in all instances be in the same language as the relevant

principal Act. This also applies to instances where existing pieces of legislation are being amended in the schedule to a new Act or where various principal Acts are being amended in a schedule to an Act. Each principal Act referred to in such a schedule must be amended in the language of the relevant principal Act.

- 4 Selected older pieces of legislation which are of considerable importance to members of the public at large and which are only available in English and Afrikaans but not in the official African languages must be identified and translated into these languages.
- 5 The current arbitrary selection of a language in addition to English should be replaced with an improved system of rational and informed selection. Languages in addition to English for legislation should be selected in accordance with the following guidelines:
 - Legislation of a specialised technical nature, which is not due to have consequences for the public at large, which will not be used widely in the legal profession and which does not ordinarily form part of the under-graduate curriculum for LLB students at South African universities may be passed in only two additional languages. More languages may however be used where the legislation in question is short and/or with a view to promote the languages concerned. The reason for publication in at least two official languages is to give definite effect to section 6(2), and in the cases where Afrikaans is one of the two, to safeguard the position of Afrikaans, which has through tremendous effort already achieved the position as a fully-fledged legal language;
 - Legislation that ordinarily forms part of the undergraduate curriculum for LLB and/or which is widely used in legal practice must be in Afrikaans and in at least two, preferably more official African languages. The reason why it must be in Afrikaans is to guard against the damage Afrikaans is currently suffering as a result of such legislation not being available in Afrikaans, which problem is highlighted in *English plus one* above. The African languages must benefit from this in order to promote the use of these languages within the legal administration and legal profession so that these languages can occupy their rightful place as fully-fledged legal languages. This will enable legal education to be conducted in these languages. It will also enable law firms (and individual legal practitioners) with a clientele with a high percentage of speakers from among the African languages to assist clients using legislation that was officially published in the African languages.

- All legislation with a definite bearing on the legal position of the public at large (legislation such as The Promotion of Administrative Justice Act, the Children's Act and the National Credit Act (referred to in *English plus one* above, must be published in all the official languages so as to afford each South African an equal right to determine his/her legal position in his/her own language. This will go a long way in the actual promotion of these languages and will moreover give real meaning to a culture of human rights.

The way in which the official languages have been used for the passing and publication of national legislation has inflicted a serious blow to the integrity of the language provisions of the Constitution and has detracted from the supremacy claim of the Constitution. Moreover, it is also damaging all ten of our official indigenous languages and thus the crucial cultural assets of the South African citizenry. The neglect of the indigenous languages and the violation of the Constitution's language provision need not continue. Parliament is clearly well-placed to initiate the correction of what has gone wrong so far.