COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA)
ON THE SOUTH AFRICAN LANGUAGES BILL (B 23-2011)

1. The first President of the democratic Republic of South Africa, Mr Nelson Mandela, was quoted in the Sunday Times of 25 April 2004 as follows: *"...we are extremely proud that the new Constitution asserts equality among South Africa's languages, and that, for the first time, the languages particularly of the Khoi, Nama and San communities will receive the attention they deserve, after years of being trampled upon in the most humiliating and degrading manner…"*

   The question can be asked whether the South African Languages Bill (the Bill) takes the remark of former President Mandela and the provisions of the Constitution into consideration. These comments reflect an attempt to assist the Portfolio Committee to comply with its constitutional obligations. The South African Languages Act (SALA) can serve as a foundation with the building blocks being on the tongues of the speakers. However, the political will reflected by the collective voice in Parliament, carries a heavy responsibility.

   This is not an exhaustive memorandum and refers only to certain aspects of the draft Bill.

   In these comments, it is necessary to consider the reason the Constitution, 1996 makes provisions for a Languages Act, and what role such legislation should play in a multilingual South Africa.

2. **Background**

   Section 6 of the Constitution is part of its founding sections and is not subject to the limitations clause, being Section 36, with regard to civil and human rights. Any limitation must thus be found in Section 6 itself, for instance, Section 6(3)(a) and Section 6(3)(b) (which is not relevant in the light of the fact that the Bill is written only for National Government's use of the official languages). A further qualification is found in the second sentence of Section 6(4) of the Constitution.

3. In evaluating the said Bill, it is also necessary to take cognizance of the Pan South African Language Board (PANSALB) as a "creature" of the Constitution in regard to the language dispensation in South Africa. The creation clause is found in Section 6(5) of the Constitution, which was given flesh in the PANSALB Act 59 of 1995, as amended by Act 10 of 1999. For

purposes of these comments, the role of the PANSALB – with regard to its function as set out in Section 6(5) – is of paramount importance. The PANSALB not only has the obligation to promote and create conditions for the development and use of all official languages, but also to promote and ensure respect for all languages commonly used by communities in South Africa. It is thus the watchdog of Section 6 in the constitutional sphere. That is also the reason why Section 8(1)(a) of the PANSALB Act requires the PANSALB to be consulted with regard to any language-related legislation. In this regard, it is noted that the Department of Arts and Culture states in the accompanying memorandum that the PANSALB was consulted. It is, however, uncertain as to whether proper consultation has taken place. If not, the Bill may be legally and constitutionally attacked on that basis alone. The Department of Arts and Culture is advised to consult properly with the PANSALB in this regard. We submit that a lack of co-ordination between the proposed National Language Unit and the PANSALB could render the Bill defective.

4. The question arises as to whether this Bill creates and sets a judicial framework to transform the South African language dispensation pre-1994 into an inclusive language dispensation, with respect for all eleven official languages. In this regard, it is necessary to refer to the annexed article by a previous Co-Chairperson of the LSSA, Dr W Seriti, (now Judge Seriti) in the November 1994 edition of *De Rebus*, entitled "Can a Provincial Legislature use only One of the Official Languages?" with specific reference to the heading "The Past" on page 49. In the light of the said article and taking into consideration what is currently transpiring with regard to formerly marginalised languages, the allegation may be made that these languages are presently in a worse situation than in the apartheid era. Contrary to the constitutional dispensation, English has become the only *de facto* official language of South Africa.

In keeping with the principle of constitutionalism, it can be stated that the proposed South African Languages Act (SALA) is a welcome "last born" child of the Constitution, after the birth of the Promotion of Administrative Justice Act (PAJA), the Promotion of Equality and

Prevention of Unfair Discrimination Act (PEPUDA), the Promotion of Access to Information Act (PAIA) and the Labour Relations Act, being so-called allies of the Constitution.

With regard to the importance of subsidiary constitutional legislation, we wish to quote from Professor LM du Plessis' paper delivered at Potchefstroom on 29 October 2010, entitled "The Status and Role of Legislation in South Africa as a Constitutional Democracy": *"….There is a special relationship between the Constitution and this kind of legislation with consequences for the interpretation and application of both, irrespective of whether the subsidiary legislation was passed pursuant to an obligatory or permissive constitutional authorisation or of a legislature's own accord...*

First, a litigant taking action because of an alleged infringement of a constitutional right (or rights) to which a subsidiary statute gives more concrete effect, cannot circumvent the statute "by attempting to rely directly on the constitutional right".[1] *This is a straightforward instance of what I call adjudicative subsidiarity, commensurate with the following* dictum *of Kentridge AJ in* S v Mhlungu*:*[2] *'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'*

Second, the provisions of a subsidiary constitutional statute must, like any other statute, be construed to promote the spirit, purport and objects of both the Bill of Rights, and the specific constitutional provision(s) to which more concrete effect is given. The said provisions may

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1 *MEC for Education: KwaZulu Natal and Others v Pillay and Others* 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC). *Cf* also *South African National Defence Union v Minister of Defence and Others* 2007 (8) BCLR 863 (CC); 2007 (5) SA 400 (CC) par 51.

2 1995 (7) BCLR 793 (CC), 1995 (3) SA 867 (CC) par 59.

also not be allowed to decrease the protection that a constitutional right affords or to infringe any other constitutional right.[3]

A subsidiary constitutional statute may, in the third place, "extend protection beyond what is conferred by" the constitutional provisions to which it is subsidiary.[4]

From the discussion above, it is abundantly clear that subsidiary constitutional legislation enjoys a considerable status and has a very special role to play in the fulfilment of crucial constitutional objectives. It is therefore an indispensible ally of the Constitution."

5. The purpose of the SALA should thus be to rectify the marginalisation of some of the official languages well into the new South Africa, as well as during the colonial and apartheid eras. In regard to the latter two eras, it is necessary to remind the reader that on 5 July 1822, the Anglicisation of the Dutch-speaking Cape was imperialistically carried out through the Somerset-laws, which lead to *inter alia* the Great Trek. Furthermore, the events of 16 June 1976 were caused largely by the "imperialistic" decision to use Afrikaans as a language of tuition in the so-called Bantu education system.

6. Consideration should be given to the question whether the proposed Act should not only comply with Section 6(4) of the Constitution, but also be seen and promulgated as an Act in terms of sub-section 9(2) of the Constitution; that is, to advance and protect languages marginalised by unfair discrimination during the past 15 years.

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3 *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 10 BCLR 1027 (CC) par 53 per Moseneke DCJ; 2007 6 SA 199 (CC).

4 *MEC for Education: KwaZulu Natal and Others v Pillay and Others* 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) par 43.

7. It can be stated that the Bill is merely a framework and does not purport to specify rights and obligations properly. The core words are "the regulation and monitoring of the use of official languages" as stated in the object. To repeat the relevant sections and phrases of the language clause, with specific emphasis, constitutes only judicial deference (The practice of courts to defer or leave decision regarding technically complex or socio-politically contentious questions that arise in the review process to the other branches of government). With regard to the Bill, the technical and contentious issues that Section 6(4) of the Constitution requires to be regulated, are deferred to a "national language policy" which, we submit, is in contravention of Section 6(4). The monitoring process is left to the same author, thus the judge in its own case (*judex in rem suam*). The Bill lacks clarity in respect of the "how question":

   Where can one find the answer as to how the National Government has regulated its use of all official languages in this Act?
   Where can one find the answer as to how the National Government has monitored its use of all official languages in this Act?

   A repetition of the constitutional clauses and an umbrella framework do not comply with the compulsory "must" of sub-section 6(4).

   We are of the view that the Bill, as presently framed, does not provide clear guidelines for policy makers in the application of the multilingual dispensation contemplated in the Constitution.

8. The Bill does not provide objective criteria or guidelines against which the language policy of the National Government may be tested. We submit that this is a material omission. This was clearly not the intention of the constitutional writers when they required a compulsory legislative framework, which can be determined by the courts of law.

9. Although South Africa, with its eleven official languages, may be regarded as *sui generis,* we submit that a comparison between different countries' language dispensations, for instance Belgium, Ethiopia, Spain, India, Canada, etc. should have been undertaken. We do not intend to elaborate on this, but some of the principles used in those jurisdictions are dealt with below. It is also relevant to refer to Articles 18 and 19 of the Charter for African Cultural Renaissance, as adopted in Khartoum, Sudan on 24 January 2006, which is quoted below. Although the Government of South Africa has not yet, to our knowledge, signed or ratified the Charter, it should have forceful persuasive weight in the light of Section 39(1)(b) of the Constitution:

"Article 18:

African states recognise the need to develop African languages in order to ensure their cultural advancement, and acceleration of their economic and social development. To this end, they should endeavour to formulate and implement appropriate national language policies.

Article 19:

African states should prepare and implement reforms for the introduction of African languages into the education curriculum. To this end, each State should extend the use of African languages taking into consideration the requirements of social cohesion and technological progress, as well as regional and African integration."

It is also noteworthy that the United Nations Educational Scientific and Cultural Organisation (UNESCO) is currently attending to a project with regard to the development of the usage of African languages as official languages in Africa, instead of colonial languages. The African research of renowned Professor Kwezi Prah in regard to the usage of mother-tongue education in Africa, underlines the development and need for the usage of the own vernacular.

An extract from the book *Language, Minorities and Human Rights* by Professor Fernand de Varennes, who is currently regarded as one of the best language-rights specialists in the world, with the heading “Preference for a ‘Neutral’ Lingua Franca” (pages 108 to 112), is attached. The extract also contains an informative quote with regard to the administration of justice.

10. The principles adapted in various jurisdictions in dealing with language disputes and competing linguistic demands, are the principles of territoriality and personality. These principles should have been used in the process of making the application of the Act more practical. The Bill is silent as to how, when, which and on what basis official languages will be used. The aforesaid two principles should be used in combination, namely, for the protection on geographical basis and, where this is not possible, the personality principle.

11. The obligation on Government to comply with the constitutional requirement, notwithstanding the fact that funds may be limited, has been clearly and unequivocally stated in *Lourens v President of the RSA and others* (49807/09) 2010 ZAGPPHC 19 (16 March 2010) which echoed the Constitutional Court’s views in the matter of *Minister of Health v Treatment Action Campaign* 2002(5) SA 72 (CC): *“[E]ven simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so.”*

12. A report on the implementation cost of the South African Languages Act, 2003, the predecessor of the proposed SALA, was compiled by Emzantsi Associates: “Costing the Draft Language Policy and Plan for South Africa”. The report is available from the Department of Arts and Culture.

13. The Constitution acknowledges the various levels of development of the eleven official languages and in this regard Section 6(2) is specific. A distinction should be made between the

various levels of functions of official languages and the point must be emphasized that, if National Government does not use an official language, it undermines its officiality, as it is a well-established principle that languages that are not used as official languages, lose esteem and value. A progressive developmental strategy within a specific timeframe (target dates) to develop the formerly marginalised languages, should be enacted in order to avoid arbitrary policies, which can be changed at will.

14. We also suggest that the term "Government purposes" be defined in the Bill as "any execution of a discretion, power or function to rule/govern on a horizontal and vertical level based on a legislative framework by a governmental official".

"Government purposes" is a term which is only used in sub-section 6(3)(a) of the Constitution and does not form part of the extent of language usage which is to be regulated and monitored by National Government in terms of sub-section 6(4). This confusion probably led to the limited nature of the proposed SALA with regard to the language rights and obligations of citizens towards National Government. In this regard, we submit that the reference to the term "government purposes" in Section 4 of the Bill, limits the scope too much, as "government purposes" is a limitation factor in sub-section 6(3)(a) of the Constitution, and the second sentence of sub-section 6(4) confers a wider obligation on National Government, as all official languages must enjoy parity of esteem and be treated equitably. Thus, it does not only refer to "government purposes" but also other usage, for instance, directly with the public. The different approaches in Sections 6(3)(a) and 6(4) of the Constitution should be amplified in the Bill.

15. With regard to Section 4, it is submitted that the Department of Arts and Culture incorrectly relies on the "national language policy framework" of 2003 as the national language policy contemplated herein. The Rule of Law requires that the Minister of Arts and Culture should comply with Section 6(4) before or on 15 March 2012. This entails not only the passing of

legislative measures, being the SALA (including the Regulations - which naturally fall within the scope of the legislative measures), but also the other measures. These measures would include the national language policy. (This is a clear case where the judiciary did not prescribe to the Executive what is to be done, but merely to comply with the constitutional requirements.) To give the Minister of Arts and Culture a further eighteen months or more after the promulgation of this Act to finalize a national language policy, is in contravention of the order in the *Lourens, supra* and undermines the Rule of Law. Parliament cannot pass legislation that is in direct conflict with a court order.

16. A national language policy for national governmental purposes, requires only two official languages in terms of sub-section 6(3)(a) of the Constitution. The Bill under consideration, which should promote multilingualism, relies on this minimum requirement,, but disregards the fact stated in paragraph 14 above. The reference to Section 6(2) in the second sentence of Section 6(4) and incorporating it and the obligation in terms of Section 6(2), makes it abundantly clear that National Government should work towards a policy for more rather than fewer languages. The Bill fails to regulate specifically in this regard.

17. Furthermore, Section 4, in terms of which a generic national language policy is required for all government departments, is also of concern. Although many departments may not need a specialised language policy, some of the departments, for instance the Department of Education (for both Higher and Basic Education) and more specifically the Department of Justice and Constitutional Development, would require a language policy.

18. It is our proposal that the language demography of the country should be taken into account in respect of the National Government's official language policy. This should include guidelines in the Bill denoting that National Government departments in "geographical language areas" should use the languages in that area. It is so that the provincial governments must also enact their separate language legislation in terms of sub-section 6(4) of the Constitution. The

provincial language Acts could be used as a guideline for the National Government to use specific languages in the specific areas. Provision should also be made that the appointment of personnel and the delivery of proper services in accordance with Section 195 of the Constitution, can be best carried out in the language of the people and, in this sense, of the area. These principles should be inserted in Section 4 in order to avoid arbitrary decisions by the National Government in contravention of the letter and spirit of Section 6 of the Constitution.

19. With regard to Section 12 of the Bill, "Intergovernmental forums on official language use", it is submitted that provision should also be made for coordination between National Government and the provinces. The proposed forum is the best-suited vehicle to facilitate such coordination, to avoid unnecessary duplication and to promote the saving of scarce resources. It is suggested that it should also include the PANSALB.

20. It is also suggested that a timetable or roadmap for the implementation should be prepared by the National Language Unit in terms of Section 5, which should be included in the Act or at least in the Regulations. The political will to implement the new language dispensation within a reasonable time period should be detailed by legislative measures. It should be noted that the South African Languages Act should have been finalised in terms of Section 6(4), read with item 21 of Schedule 6 of the Constitution, before November 1998, being 18 months after it came into effect on 4 February 1997. The Constitutional Court interprets the term "reasonable time" normally to be 18 months.

21. From a legal point of view, the lack of enforcement measures in the Bill is a serious defect. In terms of Section 10 of the Bill, the Minister of Arts and Culture has to take the complaint to Cabinet after the National Language Unit has requested him to do so. This is an extraordinary way of enacting enforcement of failure to implement a policy. It may stem from the Canadian example, where the Language Commissioner reports to Parliament. However, it must be taken

into account that Canada has huge resources whereas our Department of Arts and Culture's has a limited budget. In any event, the Cabinet member responsible for language policy should, as part of his duties, do just that. If a member of the public feels that the National Government does not respect his/her language rights, he/she can approach the Court only through an application to compel (*mandamus*). This is a costly exercise and requires the services of specialised lawyers.

22. In the consumer arena, it is suggested that a Language Ombud or a Commissioner of Official Languages (as in Canada) or a Language Tribunal, such as the tribunal in terms of the Consumer Protection Act, should be considered. The field of language rights is a very specialised one and known to only a few legal experts, most of them overseas. The development of skills and jurisprudence in regard to language rights, more so in the light of the challenge to make a success of a dispensation with eleven official languages, requires an easy and accessible complaints and enforcement mechanism. The average citizen should be able to file his/her complaint and enforce his/her rights without incurring legal costs. To state that a "complaints mechanism" must be provided in a policy, as is set out in Section 4(2)(f) of the Bill, is a dereliction of the requirement to "regulate" in terms of Section 6(4) of the Constitution. Without this, this proposed Act could be the source of many High Court battles, which is not in the interests of the Department of Arts and Culture or the State. Scarce resources should be used rather to develop the languages in a coordinated way. The complaints mechanism and the resolution of complaints are much-needed aspects, which should be developed through this Act.

23. **Language in the legal sphere**

It must be emphasised that language is not part of adjudication, but that it is the vehicle through which adjudication takes place and is communicated. The judicial system is functioning on a so-called substratum. The current policy of the Constitutional Court and the

majority of courts to adjudicate only in English, is contrary to Section 6 of the Constitution. It is submitted that the judiciary has adapted a pragmatic approach, being an "unconstitutional practice" separate from the Constitution. Many arguments can be raised, but the publication and communication policy of the Department of Justice and Constitutional Development (as a driving vehicle for justice in the country) may be regarded as contravening Section 6 of the Constitution. In defence of the Department of Justice and Constitutional Development, however, it must be noted that there are some pilot projects to enhance the use of formerly marginalised languages. This initiative must be welcomed. If the Constitutional Court or any court uses only one official language, it places itself above the Constitution.

24. The difference between language as substratum and the adjudication should be inserted in the Bill. Guidelines should be included to address this contentious issue. Many arguments in regard to the development level of the various official languages and whether they have the capacity to be used, can be raised.

25. The argument that a group that speaks a specific language, chooses not to use its language, for instance in court, is at this stage unconstitutional and a constitutional amendment will be required to formally effect a waiver of these rights.

26. Transformation of the judiciary should not be seen as a barrier to the use of a specific official language. Consideration could be given to the appointment of judges with a specific language proficiency in a specific geographical area. In terms of Rules 37 and 25 of the High Court and Magistrates' Courts rules respectively, the language to be used in the courts can be determined and allocated to such judges. The allocation of judges and magistrates can then be done in order to expedite trials without the need for translators and interpreters. Access to affordable justice is supported by such a policy. Guidelines for the Judicial Service Commission and the Magistrates' Commission regarding appointments in respect of specific

geographical areas in relation to language must be a requirement for new appointments. This should be inserted in the Bill.

27. The development of a legal vocabulary in respect of languages other than English, is already progressing with regard to Criminal Law and the Law of Evidence. These languages can develop, and access to justice promoted, only through the expeditious finalisation of court matters, when the complainant, prosecutor, defendant and magistrate (preferably the attorney too, who should learn at least one African language for the region in which he/she intends to practise), use their local language. The court's rolls will be shortened. These guidelines should be inserted in the Bill in regard to the judiciary. The development of tribal courts and the recording of their decisions in their own languages, the recording of lower, and later also, higher court decisions in other languages, should be promoted.

28. At present, many judgments that repeat old principles are reported. A panel should be established to scrutinize "reportable" judgments to determine which cases should be translated into official languages, either in whole or in part, to promote parity of esteem and equitable treatment of the official languages.

29. It is noteworthy to mention that, as soon as the Legal Practice Bill comes into force, the legal fraternity will be obliged to transform its language policy to bring it in line with the Constitution and the SALA. The minimum requirement, as is stipulated in Section 6(3)(a) of the Constitution and which is also carried through in the SALA, will be applicable to legal services in the current formulation of the SALA.

30. The chapter on the Administration of Justice in the Canadian Language Act of 1988, being Sections 14 to 20, is attached and can be used as a point of departure. The Canadian language dispute developed over a long period of time. These rights can be adjusted and adapted within a South African context. The example from Switzerland may also be useful.

31. **Municipalities**

In the light of the failure of municipalities to comply with subsection 6(3)(b) of the Constitution, it would have been beneficial to have a law compelling municipalities to adopt a language policy within a specified time period. This would render the proposed SALA truly a South African Languages Bill because it would have an impact on people at grass-roots level.

32. **Parliament: Publication of Legislation**

In terms of Rule 220 of the Joint Rules of Parliament, a Bill introduced in Parliament must be in one of the official languages. That becomes the "official text". That text must be translated into at least one of the other official languages before the official text is sent to the President for assent. It is of concern that the highest legislator currently publishes legislation only in English in the *Government Gazette* and that the Bill's second language is determined by the Department that initiates the legislation. Amendments are not made in the same language and in this regard the Sectional Titles Act 95 of 1986, as amended by the Sectional Titles Amendment Act 11 of 2010, is an example. Amendments in a language other than the original signed Act, cause confusion.

33. In the light of the legal vacuum, it is necessary that Parliament should be compelled through a section in the SALA to publish legislation preferably in all eleven languages, within a specified time period. The progressive translation thereof and the choice of languages should be determined by specific guidelines, for instance by taking into account communities that may use the legislation. As an example, legislation in regard to tribal authorities should be translated immediately into all the African languages. Commercial legislation should be translated into English, Afrikaans, isiZulu and one of the SeSotho languages, as well as in

Isivenda and Tsitshonga. This rotational principal was one of the most important contributions in the SALA, 2003, which is unfortunately not carried through in the proposed SALA, 2011.

34. We submit that Parliament's view that it falls under the prescriptions of subsection 6(3)(a) as per their legal opinion dated 21 May 2001 as part of National Government, is wrong in law. The fact that all eleven languages have official status in the Constitution should be respected by Parliament in all its legislation.

35. **Conclusion**

To call the proposed Act the "South African Languages Act", without the inclusion of the regulation of, for instance, the usage of official languages in the administration of justice, a provision in regard to the municipalities, the publication of legislation and the amendment of Section 12 to bring in a method of coordination between the National Government and provinces, makes the title of this Act a misnomer.

The proposed SALA is a legislative form of judicial deference and does not comply with Section 6(4) of the Constitution's compulsory requirement to regulate and monitor the use of the official languages.

It is submitted that all eleven official languages should be appreciated, have parity of esteem and be treated equitable through all the spheres of National Government through an amended SALA.

actions because there buyers rely on their judgment based on publicly available information and further that there is no personal contract between the seller and the buyer.

What seems to have been treated with more injustice than anything else is, however, s440F of the Companies Act which deals with statutory insider trading. Instead of setting out the major provisions of this otherwise involved and complex section, the authors, for reasons not so apparent, simply preferred to refer to it in passing. This, it is submitted, does no justice to an otherwise important legislative provision.

Exhibiting the authors' deep rooted accounting background is chapter 18 dealing with financial statements and disclosure. This high quality exhibition of knowledge of financial statements is no less reflected in the discussion of a group of companies. One tends to appreciate the importance of the presentation even more when one bears in mind that generally speaking law teachers and students would rather avoid accounting aspects of companies (and close corporations for that matter which is well-covered too).

The presentation of the rest of the work i.e. close corporations, business trust, insolvency, winding-up and judicial management being close to perfection, not much can be said about it. Although the problem originates from the Companies Act 61 of 1973 itself, one often wonders whether as between winding-up and judicial management which should come first. Since judicial management may in some cases be a forerunner to winding-up, it may be suggested that perhaps it is the topic that ought to be covered first. However, in the particular circumstances of this book it makes sense to treat winding-up first so as to bring it closer to insolvency thereby making comparative analysis between the two far much easier. ☐

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Can a Provincial Legislature use only One of the Official Languages?

by *Dr WL Seriti*

Before we consider the answer to the question: Can a provincial legislature use only one of the official languages? Let us begin by looking at section 3 of our Interim Constitution which makes provision for 11 official languages.

Section 3(4) provides that regional differentiation relating to language policy and practice shall be permissible.

Section 3(5) provides that a provincial legislature may adopt a resolution if it has a majority of at least two-thirds and if all its members declare any one of the 11 official languages to be official 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.

Section 3(8) provides that 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.

Thus, when a provincial legislature wants to pass such legislation the said provincial legislature must take into account questions of usage, practicality and expense. So we find that a provincial legislature can make use of one official language without affecting the status of the other official languages. The provincial legislature may declare the most commonly used language to be the official language, should this prove the most practical and least expensive course of action.
At face value, section 3(8) appears to contradict the qualifying provisions contained in section 3(5).

In my opinion, this qualifying clause applies only in instances where the provincial legislature wants to declare that any one official language will be the official language for the whole or any part of the province and it does not apply where the legislature wants to designate one official language for the functioning of government.

Section 3(8) is the kind of provision that deals with a specific issue, namely the use of the official language for the purposes of functioning of government, and section 3(5) is a broad, more general kind of provision. Should any conflict arise between these provisions, the provision that deals with specific issue should prevail (see *S v French-Breytagh* 1971 (4) 333 TPD; *S v Coulter* 1971 (1) SA 162 AD; *Odendaal v Loggerenberg en Andere*, 1961 (i) NNO 8(1) SA 712).

It is my submission that it is permissible and practical for the provincial legislature to choose an official language which is, or official languages which are, widely used and the use of only one official language will be a better policy from an economic point of view. Some people believe that there is a conflict between subsections (5) and (8) of section 3 of our Interim Constitution. In order to properly resolve this apparent conflict, let us look at the law relating to the interpretation of statutes.

There is a principle in our law which states that a statute must be interpreted in conformity with earlier statutes that have not been expressly repealed or amended (see *White Rocks Farms (Pty) Ltd & Others v Minister of Community Development* 1984(3) SA 785 (NPD); *Heavy Transport & Plant Hire (Pty) Ltd & Others v Minister of Transport Affairs & Others* 1985(2) SA 597 (WLD).

If reconciliation of the two conflicting statutes is impossible owing to an inescapable inconsistency between them, then by implication, the later statute must be regarded as repealing or amending the earlier one to the extent necessitated by the inconsistency. Where two sections of an Act seem to clash, but can be interpreted so as to give full force and effect to each, then such an interpretation is adopted rather than one which will partly destroy the effect of either (see *Principle Immigration Officer v Bhula* 1931 AD 323-335; Cockram, G.M. 1987. Interpretation of Statutes. 3rd edition. Cape Town: Juta: 103; *S v Moroney* 1978 (4) SA 389 AD).

If reconciliation between two conflicting sections of a statute is impossible, then the latter section should be regarded as nullifying, by implication, the earlier one, or modifying it to the extent of the conflict (see *R v Gwantshu* 1931 EDL 29; *S v Mseleku* 1968(2) SA NPD; Cockram, G.M. 1987. Interpretation of Statutes. 3rd Edition. Cape Town: Juta: 104. Also see LAWSA volume 25, page 200, which states that a statutory provision, clearly inconsistent and irreconcilable with its preceding counterpart, revokes it. Fu[illegible] more, in *R v Sutherland* 196[illegible](2) SA 806 at 815 it was said that there is an implied repeal of a law by a later repugnant law of the same or superior legislature.

Conflict

If we now return to section 3 of the Interim Constitution, we are bound to conclude that if there is any conflict between sections 3(5) and 3(8) that cannot be reconciled, then section 3(8) must be regarded as nullifying section 3(5), by implication, to the extent of the conflict.

Some people hold the view that section 3(2) of the Interim Constitution obliges provincial legislatures to use at least English and Afrikaans in the performance of their duties. These people put forward the argument that English and Afrikaans were the official languages just before the general election in April 1994 and, if the provincial legislature does not use one of these official languages in performing its functions, then it will be acting unconstitutionally.

Let us examine this allegation in detail. Section 3(2) of our Interim Constitution provides inter alia that existing rights relating to language and status of languages at the commencement of this Constitution shall not be dimished. If the terms "at the commencement of this Constitution" is to be understood to mean before the coming into operation of the Interim

Constitution, then the effect of section 3(2) is th[illegible] status of official languages that were in use shortly before 27 April 1994 cannot be diminished.

The Past

Let us consider what our official languages were prior to 27 April 1994.

Section 5 of the Republic of Bophuthatswana Constitution Act 18 of 1977 provides that Tswana, English and Afrikaans shall be the official languages of Bophuthatswana.

Section 8 of the Republic of Ciskei Constitution Act 20 of 1981 provides that Xhosa and English shall be the official languages of Ciskei and shall enjoy equal recognition.

Section 16 of the Transkei Constitution Act 100 of 1976 provides that Xhosa shall be the official language and Sotho, English and Afrikaans may be used for legislative, judicial and administrative purposes.

Section 6 of the Venda Constition Act 107 of 1979 provides that Luvenda shall be the official language of that Republic and, except for the provisions of section 40 and 41, English and Afrikaans may be used for legislative, judicial and administrative purposes.

Section 108(3) of the Republic of South Africa Constition Act 32 of 1961 provides that the State President may, by proclamation, recognise any black language as an additional language of an area declared to be a self-governing territory. Acting in terms of this section the State President declared the following as additional official languages:

Northern Sotho in Lebowa (see Proclamation R224 Gazette 3666 of 29 September 1972 - Regional Gazette 1762);

Southern Sotho in Qwaqwa (see Proclamation R203 Gazette 4461 of 25 October 1974 - Regional Gazette 2060);

Zulu in KwaZulu (see Proclamation R12 Gazette 5387 of 28 January 1977 - Regional Gazette 2417).

The Ndebele language was recognised as an additional official language in Kwa Ndebele (see Proclamation 60 of 20 March 1981); and Siswati was recognised as an additional official language of Kwa Ngwane (see Proclamation 148 of 31 August 1984) and Tsonga was recognised in Gazankulu (see Proclamation R36 of 9 March 1979). It is clear that in many areas of our country had at least three official languages shortly before the general election.

If we understand section 3(2) of our Interim Consitution to mean that a provincial legislature is duty bound to use all the official languages which were in use before the election, then this means, for example, that the Northern Transvaal Province must use, at least, the following official languages: English, Afrikaans, Tshivenda, Xitshonga and Sesotho. In order not to diminish the status of these official languages, this actually means that all notices, proceedings, et cetera of the Province must be in, at least, five official languages. The practical effect of this interpretation of section 3(2) suggests that the drafters of our Interim Constitution could not have intended one province to use at least five official languages.

Other provinces will experience similar difficulties, although perhaps to a lesser extent. For example, North West Province, Eastern Cape and Natal/KwaZulu will need to have at least three official languages, the Orange Free State will need four, Eastern Transvaal at least five, and so on.

In my view, the proper interpretation of section 3 of our Interim Constitution is that a provincial legislature cannot diminish the status of an official language which was in use in that particular area just prior to the 27 April 1994 election, but the said provincial legislature can choose one of these official languages as the language it will use for the purposes of government, taking into consideration questions of usage, practicality and expense. ❑

4.7.2 *Preference for a "Neutral" Lingua Franca*

Because newly-independent states, particularly in Africa, were artificial political constructs with little relation to the actual composition or political aspirations of their inhabitants, many governments found themselves facing deep-rooted tribal conflicts and divisions which could easily lead to wholesale instability unless state borders, as imperfect as they were, were unhesitatingly defended at all costs. Instead of being perceived as throwing the advantage decisively one way or another in the rivalries of the various domestic language communities, these states generally found it easier to simply maintain the primacy of a tribally "neutral" European language, most often French or English:

> The aim of introducing English is to introduce an official language that will steer the people away from lingo-tribal affiliations and differences and create conditions conductive to national unity in the realm of language.[138]

This aim of national unity through a common language is not objectionable as such, and the highly complex linguistic and ethnic mosaics in many former colonies would appear to support the argument that in a number of states such a policy is not intrinsically unreasonable given the problems facing these nations, even though a majority of individuals would have been better served in areas such as education and job opportunities if their primary language were in official use by public authorities.[139] The state interests in such an approach are strong. As political scientist Jean Laponce has pointed out, use of a international *lingua franca* like English and French avoids the domination of one linguistic group (Tagalog in the Philippines, Hindi in India, Chinese in Singapore) on individuals belonging to long established language communities which are numerically or politically weaker.[140] Other advantages in adopting a language of wider communication (i.e. an international European language) can be briefly summarised as follows:

1. Educational material, television and radio programmes, are more readily available.

[138] Alexander, Neville (1989), *Language Policy and National Unity in South Africa/Azania*, Buchu Books, Cape Town, at p. 44.

[139] In reality, many developing countries which have adopted English or French as an official language also use indigenous languages in state-funded educational institutions, at least at the primary level, as well as in regions where speakers of indigenous languages are particularly numerous and concentrated.

[140] Laponce, Jean A. (1987), *Languages and Their Territories*, University of Toronto Press, Toronto, at p. 190.

2. Its vocabulary is already developed to fulfil the exigencies of a modern society.
3. Knowledge of such a language will give all inhabitants of a developing country the ability to access international information and interact with individuals worldwide.
4. It can easily serve as a "link language" between the linguistic communities of a state, since it is "neutral" as far as advancing the interests of a particular ethno-linguistic group.

[Un]fortunately, it is far from clear whether the above advantages can truly be found by adopting [th]e quasi-exclusive use of an international, European language. For one thing, the use of English [or] French in these countries may be "ethnically" neutral; however, it favours a very small minority of people, whilst further disadvantaging the majority of inhabitants:

> We have to understand that unless the vast majority of the South African population are organically motivated to learn and use English for the conduct of their affairs, English will become or remain, as in so many African and Asian countries, the language of the privileged neo-colonialist middle class. In India, according to the UNIN Study on Namibia: "... English, the language of colonial dominance, was allowed to continue as the link language. But this was fraught with dangerous socio-economic consequences. It perpetuated a small English-knowing elite, largely urban, who clamoured for a policy of keeping education, as one commentator put is, in a linguistic polythene bag". In sharp contrast, 80 % of the population living in rural areas continued to be a disadvantaged group further hampered by their ignorance of English..."[141]

Moreover, only a fraction of the population realistically needs to communicate with the "rest" of the world, so that the need for an international language as the main medium of public and educational authorities will only be felt by this elite.

The continued domination of a colonial language also strikes some emotional cords, although the following comments probably reflect the realisation that it is somewhat illogical for public authorities to use a little known language when people in large areas share an indigenous vernacular:

> I wonder why we should continue to make English the mode of expression in our courts... I wonder how Nigeria can claim to have shed all vestiges of colonialism when her citizens have to state their grievances in a foreign language...which has no equivalent for most of them... It is my humble and respectful submission that Nigerian courts should endeavour to encourage the conduct of proceedings in all courts in the language of the area of the court. This has to begin sometime.[142]

[141] *Supra*, note 138, at p. 60; see also *Planning Language, Planning Inequality*, *supra*, note 89, at p. 5: "The disadvantage of the SWAPO policy is that only those few Namibians who speak English will be able to serve in the government and other official positions. As a result, English-speakers will have significant advantages in education and employment."

[142] Adeyemi, O. A. (1972), "A Day in the Criminal Court", in T.O. Elias (ed.), *The Nigerian Magistrate and the Offender*, Ethiope, Benin City, Nigeria, at pp. 26-27.

By using a language not widely spoken by the inhabitants of a country, a state may also be concentrating its scarce resources in assisting a minute elite, since it is unlikely that most developing countries in such a situation are able to obtain a sufficient supply of qualified teachers to teach English or French properly in every region. As a result, well-off urban elites will continue to profit by the maintenance of English and French as official languages, ensuring privileged access to job opportunities within the state bureaucracy and legal and political machinery — a main source of employment in many developing countries — since they can keep their children in schools for a longer period of time and provide them with additional tutoring or overseas training. As observed one commentator in Nigeria:

> We would like to begin with the reservation that fewer Nigerians now master the basic language skills in English than in any one of Hausa, Igbo, and Yoruba. Now, consider that, since the economic debacle which has beset the nation since the second half of the 1970s has put an end to the universal primary education scheme, an increasing proportion of Nigeria's school age children no longer enrol for formal education, the only medium for the acquisition of English. Add to that the galloping rate of school drop-outs and the rate of reversion to illiteracy among both the drop-outs and those who complete the primary education... As argued above, the three major indigenous languages of Nigeria count over 70 % of Nigeria's population among their speakers. Ignoring for the moment multilingualism involving indigenous languages only, it is clear that the first twelve Nigerian languages from the point of view of their mother-tongue speakers would account for at least 90 % of the country's population. This means that any Government with serious considerations for participatory governance would reach a larger number of Nigeria's citizenry at any one time through any one of the three majority indigenous languages, namely Hausa, Igbo and Yoruba than it would through the English language. The same government will touch at least 70 % of all Nigerians if it chooses to operate through Hausa, Igbo and Yoruba combined; 80 % through these three and Fulani; and at least 90 % through the first twelve most widely spoken indigenous languages. First, as it stands, the Constitution guarantees fundamental rights to the individual, but takes away these same fundamental rights from the vast majority of the Nigerian by imposing incapacities on those who have no practical skills or any skill whatsoever in English. Thus, unless a Nigerian has practical skills in the English language, certified by a secondary school leaving examination as shall be approved from time to time by government, he or she must remain only a manipulable elector at best. He may not seek any elective office even at the local government level and may not be assigned executive responsibility in the public service at any level. Furthermore, he has no access to be informed about the laws which order and circumscribe his very existence except when he runs foul of them.[143]

Far from constituting an effective tool to assist the social and economic well-being of a country's population, the use of European languages, because of the lack of resources for formal education in some states, contributes to the exclusion of vast sections of the population in direct

[143] Oyelaran, Olasope O.(1991), "Language in Nigeria Towards the Year 2000", in J.-J. Symoens and J. Vanderlinden (eds.), *Symposium : Les langues en Afrique à l'horizon 2000*, Institut Africain and Académie Royale des Sciences d'Outre-Mer, Bruxelles, pp. 109-139, at pp. 135-137.

participation in the higher echelons of government, and in having access and benefiting from many if not most state services.

As for a perceived lack of sophistication and technical vocabulary of languages in developing countries, it is not a water-tight argument. Just as technical subjects can be taught in Catalan, Mandarin, and Hindi, and scientific research is done in these and many other "smaller" languages, there is no absolute barrier in this respect for non-international, non-European languages.

Whilst a policy of favouring a European language in developing countries would appear to constitute differential treatment which tends to advantage tiny urban elites,[144] or a small percentage of the population as in the case of South Africa, it remains that such differential treatment is not automatically unreasonable even though it will disadvantage large segments of the state's population. Developing countries present a particularly delicate balancing act, but the basic applicable principles in determining whether unjustified discrimination on the ground of language is in issue remain the same.

An interesting case of the use of a *lingua franca* is presented by Indonesia. The state's only official language, Bahasa Indonesia, is for all intent and purposes no one's mother tongue, since it is in reality a simplified language borrowing heavily from Malay. Unlike English in South Africa, Bahasa Indonesia is not the language of a former colonial power, nor is it the native tongue of a privileged racial or ethnic segment of the population. It is, practically speaking, the second language for most inhabitants of Indonesia, probably the closest thing to an actual "neutral" *lingua franca* in the world.

Because of the great language diversity on its territory and in order to avoid being accused of favouring the domination of one linguistic group, such as the Javanese, who represent about half of the population, the government has gone out of its way to promote as much as possible the exclusive use of Bahasa Indonesia. In fact, the language has been central in the state's efforts to unify the whole population of the country.

Since Bahasa Indonesia is not native to any major group, it could be claimed the state's policy tends to be unfavourable to everyone in about the same proportion. In this way, the legislation *in se* could be said to be non-discriminatory, although great care should be taken in

[144] Huta-Mukana, Mutombo (1991), "Les langues au Zaïre à l'horizon 2000", in J.-J. Symoens and J. Vanderlinden (eds.), *Symposium : Les langues en Afrique à l'horizon 2000*, Institut Africain and Académie Royale des Sciences d'Outre-Mer, Bruxelles, pp. 84-107, at p. 104:

> *Le français zaïrois est langue d'unité et de cohésion, et encore, de la minorité intellectuelle et/ou semi-intellectuelle qui ne représente, comme il a été dit plus haut, que plus ou moins 2,77 % de la population. C'est donc une langue de division entre ces intellectuels et le reste de la population. Le français demeurerait comme langue d'ouverture sur l'espace francophone, car l'ouverture du Zaïre sur l'extérieur tout court pourrait et devrait même se faire par le biais d'une ou de plus d'une langue autochtone, africaine. C'est à ce prix que s'acquerra la vraie forme d'indépendance totale. Ce que nous disons du français vaut aussi de toute autre langue étrangère, en l'occurence l'anglais qui est dispensé dans le système éducationnel au Zaïre. Tout en acceptant volontiers la pratique des langues étrangères, nous ne pouvons prôner leur substitution aux langues locales. C'est dire que ces dernières devront occuper la première place dans cette situation de coexistence avec les langues étrangères, et notamment le français, tant dans le système éducatif, politique, administratif, juridique que dans les médias en général.*

this respect: in reality, non-urban dwellers and individuals unable to attain higher levels of education will tend to have a less developed knowledge of Bahasa Indonesia, so that in their case, strict enforcement of Bahasa Indonesia-only rules could be claimed to be disproportionate requirements in areas with a high level of non-speakers or poor speakers of the official language.

Moreover, the government's policy may be overzealous as in some areas there appears to be interference with freedom of expression (advertisements are at times required to be exclusively in Bahasa Indonesia) and interference with the use of a minority's language (popular publications and all films, even for private viewing, are required to be in Bahasa Indonesia).

Official Language Act 1988

PART III

ADMINISTRATION OF JUSTICE

Official language of federal courts

14. English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court.

Hearing of witnesses in official language of choice

15. (1) Every federal court has, in any proceedings before it, the duty to ensure that any person giving evidence before it may be heard in the official language of his choice, and that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language.

Duty to provide simultaneous interpretation

(2) Every federal court has, in any proceedings conducted before it, the duty to ensure that, at the request of any party to the proceedings, facilities are made available for the simultaneous interpretation of the proceedings, including the evidence given and taken, from one official language into the other.

Federal court may provide simultaneous interpretation

(3) A federal court may, in any proceedings conducted before it, cause facilities to be made available for the simultaneous interpretation of the proceedings, including evidence given and taken, from one official language into the other where it considers the proceedings to be of general public interest or importance or where it otherwise considers it desirable to do so for members of the public in attendance at the proceedings.

Duty to ensure understanding without an interpreter

16. (1) Every federal court, other than the Supreme Court of Canada, has the duty to ensure that

(a) if English is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand English without the assistance of an interpreter;

(b) if French is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand French without the asssistance of an interpreter; and

(c) if both English and French are the languages chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand both languages without the assistance of an interpreter.

Adjudicative functions

(2) For greater certainty, subsection (1) applies to a federal court only in relation to its adjudicative functions.

Limitation

(3) No federal court, other than the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, is required to comply with subsection (1) until five years after that subsection comes into force.

R.S., 1985, c. 31 (4th Supp.), s. 16;
2002, c. 8, s. 155.

Previous Version

Authority to make implementing rules

17. (1) The Governor in Council may make any rules governing the procedure in proceedings before any federal court, other than the Supreme Court of Canada, including rules respecting the giving of notice, that the Governor in Council deems necessary to enable that federal court to comply with section 15 and 16 in the exercise of any of its powers or duties.

Supreme Court, Federal Court of Appeal, Federal Court and Tax Court of Canada

(2) Subject to the approval of the Governor in Council, the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and Tax Court of Canada may make any rules governing the procedure in their own proceedings, including rules respecting the giving of notice, that they deem necessary to enable themselves to comply with section 15 and 16 in the exercise of any of their powers or duties.

R.S., 1985. C. 31 (4th Supp.) , s. 17
2002, c. 8. 156

Previous Version

Language of civil proceedings where Her Majesty is a party

18. Where Her Majesty in right of Canada or a federal institution is a party to civil proceedings before a federal court,

(a) Her Majesty or the institution concerned shall use, in any oral or written pleadings in the proceedings, the official language chosen by the other parties unless it is established by

Her Majesty or the institution that reasonable notice of the language chosen has not been given; and

(b) if the other parties fail to choose or agree on the official language to be used in those pleadings, Her Majesty or the institution concerned shall use such official language as is reasonable, having regard to the circumstances.

Bilingual froms

19. (1) The pre-printed portion of any form that is used in proceedings before a federal v\court and is required to be served by any federal institution that is a party to the proceedings on any other party shall be in both official languages.

Particular details

(2) The particular details that are added to a form referred to in subsection (1) may be set out in either official language but, where the details are set out in only official language, it shall be clearly indicated on the form that a translation is made, a translation shall be made available forthwith by the party that served the form.

Decisions, orders and judgments that must be available simultaneously

20.(1) Any final decision, order or judgment, including any reason given therefor, issued by any federal court shall be made available simultaneously in both official languages where

(a) the decision, order or judgment determines a question of law of general public interest or importance; or

(b) the proceedings leading to its issuance were conducted in whole or in part in both official languages.

Other decisions, orders and judgments

(2) Where

(a) any final decision, order or judgment issued by a federal court is not required by subsection (1) to be made available simultaneously in both official languages, or

(b) the decision, order or judgment is required by paragraph (1)(a) to be made available simultaneously in both official languages but the court is of the opinion that to make the decision, order or judgment, including any reason given therefor, available simultaneously in both official languages would occasion a delay prejudicial to the public interest or resulting in injustice or hardship to any party to the proceedings leading to its issuance,

the decision, order or judgment, including any reason given therefor, shall be issued in the first instance in one of the official languages and thereafter, at the earliest possible time, in the other official language, each version to be efffective from the time the firdt version is effective.

Oral rendition of decisions not affected

(3) Nothing in subsection (1) or (2) shall be construed as prohibiting the oral rendition or delivery, in only one of the official languages, of any decision, order or judgment or any reason given therefor.

Decisions not invalidated

(4) No decision, order or judgment issued by a federal court is invalid by reason only that it was not made or issued in both official languages.