The language question

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The language question is a very emotive one in this country but also throughout the world. Democracy in some countries remains fragile because of the language question. In 1976 South Africa went up in flames because of an attempt by Vorster's government to enforce Afrikaans as a language of instruction in black schools.

We who live to implement the compromise on language rendered during 1993 would be short-sighted and dishonest if we failed to recognise that it has its own shortcomings.

Thus, in the legal profession, Afrikaans ceased to be a compulsory subject for lawyers some time ago. Many legal practitioners join the profession without knowing or even understanding it. When they meet opponents who go to court with papers in Afrikaans, they cannot do justice to the matters before them. Similarly, if a Sipedi speaking practitioner were to draw papers in that language, she would be within her constitutional right to do so but there will not be many judges who would be able to read the papers.

At a practical level, there are now many judges whose knowledge of Afrikaans (if any) is so scanty that they cannot adequately contend with matters in that language. They however have to handle appeals from magistrates' courts where, very often, the record is in Afrikaans. Very soon this problem will manifest itself in the Supreme Court of Appeal.

Against this background many people are beginning to question the wisdom of the compromise to recognise all languages. In particular, people are beginning to call for recognition of English as a language of record.

At a colloquium held in October 2000 the Minister of Justice announced moves to make English the language of record in all court proceedings in the country.

Currently section 6 of the Constitution provides that:

"6(3)(a) The national government and provincial governments may use any particular language for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; ***but the national government and each provincial government must use at least two official languages.***

6(4) The national government and provincial governments, by legislative and other measures, must regulate their use of official languages. Without detracting from the provisions of subsection (2) [which deals with taking positive steps to elevate the status and advance the use of previously disadvantaged languages], ***all official languages must enjoy parity of esteem and must be treated equitably.***"[my emphasis]

A few conclusions are apparent from the above provisions:

National government is constitutionally entitled to choose to make use of any particular language for purpose of government.

However, national government is obliged to use at least two official languages, if and when it does make such a choice.

The test whether or not a decision of national government in making a choice is constitutional will be determined by examining whether it took into account usage, practicality, expense, regional circumstances and the balance and the needs and preferences of the population as a whole or of a particular region.

It thus goes without saying that if the Minister of Justice, for purposes of curtailing expense, chooses to use less than eleven languages for the purpose of recording in his department or recording in the courts, he will be making a choice he is entitled to make in terms of section 6(3)(a). He is however obliged in terms of that section to choose at least two official languages and to make them languages of record. Furthermore, it would seem that when such a decision is made account would have to be taken of differing circumstances in different regions. Failure to do so may be fatal to the decision.

On these grounds it does not seem that a decision to make use of English, as the only language of record would stand firm constitutional ground.

In fairness to the minister, it must be said that he was at pains to explain that he was not changing the Constitution and making English the only official language. All that he said was being contemplated was to make English the only language of record.

What the differences are would only be clear if draft legislation in those terms is published. Would it mean that where the accused, the prosecutor, Bench and the witnesses all speak Afrikaans, there would be no obligation on them to speak or communicate in English, but that the recorder of the proceedings would be obliged to record the proceedings in English?

In the absence of explicit draft legislation it is very difficult to say what is meant by the term "language of record" and what it would mean in the proposed legislation.

The other question is whether a choice by a department is the choice of national government. Can one department of national government decide a language policy affecting it alone and not other departments? Does the Constitution not envisage that a province may choose the languages it would use and that once that choice is made no other department within the province would then have its own further choice. It may well be that the Department of Justice has no right at all to make this type of choice on a proper interpretation of the Constitution.

Also of importance is the role of the Pan South African Language Board (PANSALB). The Board is established in terms of the Pan South African Language Board Act 59 of 1995. Section 8 empowers the board to make recommendations with regard to any proposed or existing legislation dealing directly or indirectly with language matters at any level of government and with regard to any amendments to legislation or repeal or replacement of legislation, practice and policy. The board may also request the Ministry of Justice – as an organ of State – to supply it with any information relating to policies, legislative measures or practices adopted by it and relating to language. The board is also entitled to advise the department on the constitutionality of the proposed legislation.

Patric Mtshaulana was recently elected as honorary secretary of the General Council of the Bar. He is also a member of the Johannesburg Bar Council.

It is clear that if English is introduced as a language of record, this would constitute a change of the existing practice. For that reason alone the board has an interest and ought to make recommendations to parliament on this issue. The recommendations would have to revolve around the question whether the choice of one language as a language of record does not affect the parity of esteem of other official languages. Would this measure promote the creation of conditions for the development and for the promotion of the equal use and enjoyment of all official South African languages? Would the measure in any way serve to improve the position and use of languages in South Africa?

These matters are of great interest in determining whether the Constitution is worth the paper on which it is written and whether the government takes the commitments of the nation contained in that document as seriously as it ought to.

It is not to be denied that black practitioners, especially black advocates and attorneys, who qualified in recent years, face difficulties in court when their opponents use Afrikaans. It also cannot be denied that using English and Afrikaans is expensive. Nor can we close our eyes to the problem created by records in Afrikaans when appeal judges are non-Afrikaans speakers, or the fact that some Afrikaans practitioners sometimes humiliate recently appointed judicial officers by insisting on speaking in Afrikaans when they know these judicial officers cannot speak the language.

All this cannot be an excuse for the government to tamper with our Constitution. The Constitution is a product of struggle, a testimony to the sacrifices of the heroes who laid down their lives for the achievement of democracy in this land.

The difficulties mentioned above are challenges to those that govern but they do not in themselves justify interfering with the underlying values of our democracy. Vision and planning cannot be substituted by impulsive reaction. 🕮