

Chapter 65

Official Languages and Language Rights

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Languages

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

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

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

(b) Municipalities must take into account the language usage and preferences of their residents.

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

(5) A Pan South African Language Board established by national legislation must

- (a) promote, and create conditions for, the development and use of
 - (i) all official languages;
 - (ii) the Khoi, Nama and San languages; and
 - (iii) sign language; and
- (b) promote and ensure respect for
 - (i) all official languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telugu, and Urdu; and
 - (ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.¹

65.1 Historical context of the official language provisions

Constitutional protection of language rights in South Africa can be traced back to the National Convention of 1909. Representatives of the former Transvaal and Free State Republics, fearing continued discrimination against Dutch speakers by a government under British supervision and dominated by English speakers, insisted on provisions in the Union Constitution that guaranteed the equality of the Dutch language.² Both English and Dutch were recognized as official languages of the Union: speakers possessed the same rights and privileges; public documents were printed in both languages. More importantly, the entrenchment of these provisions meant that any legislation that might affect or alter the equal

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status of the two languages required special procedures and majorities.³ The 1961 and 1983 Constitutions preserved this protection.⁴

1 Constitution of the Republic of South Africa, 1996 ('FC' or 'Final Constitution').

2 Despite the provisions of the Treaty of Vereeniging (1902) permitting the teaching of Dutch in schools in the former Transvaal and Free State colonies, an official policy of Anglicisation saw Dutch treated merely as a medium for teaching English between 1902 and 1910. See David Brown 'Language and Social History in South Africa' in Robert K Herbert (ed) *Language and Society in Africa: The Theory and Practice of Sociolinguistics* (1992) 71, 74. Some of the history behind the recognition of Dutch as an official language is recounted in *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*. 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) at para 46 (Sachs J).

3 Section 137 of the South Africa Act (1909). See HR Hahlo & Ellison Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 125. See also *Harris v Minister of the Interior* 1952 (2) SA 428 (A) (Legislation passed by ordinary procedures removing entrenched rights declared invalid); *Swart NO & Nicol NO v De Kock & Garner* 1951 (3) SA 589 (A), 601-602 (The constitutional entrenchment of the equality of the official languages entitles an individual to call on the courts to resist any legislative or executive action offending against the entrenchment.)

The constitutional protection of language rights was accompanied by discrimination against speakers of non-official languages. African languages were undervalued and neglected. While mother-tongue education in primary school served the apartheid aim of promoting ethnic identity, proficiency in the official languages became a principal determinant of subsequent progress in secondary and tertiary education and of access to employment.⁵ Official bilingualism in a multilingual country came to symbolise white political domination.⁶ During apartheid, Afrikaans, imposed on an unwilling population of learners as a language of instruction, was, in turn, vilified as the 'language of the oppressor'.⁷

The language provisions of the Interim Constitution were a bold attempt to end the linguistic discrimination practiced by the apartheid state.⁸ Three fundamental rights vouchsafed linguistic freedom and equality. IC s 8(2) prohibited unfair

4 Afrikaans was included in the definition of Dutch by the Official Languages of the Union Act. Act 8 of 1925. Section 119 of the Republic of South Africa Constitution Act defined Afrikaans as including Dutch. Act 32 of 1961. Section 99(2) of the Republic of South Africa Constitution Act required special procedures and majorities for legislation infringing the equal status of English and Afrikaans. Act 110 of 1983. No mention was made of Dutch. Commentators have suggested that Dutch remained an official language of South Africa, since the special procedures first detailed in the South Africa Act were not followed to demote it. See Julien Hofman 'Official Languages for a New South Africa: Article 5 of the ANC's Bill of Rights' (1991) 3 *Stellenbosch LR* 328. This mild controversy over the status of Dutch was resolved by the passage of the Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution'). The exclusion of Dutch from the list of official languages was validated by the use of the procedures required by s 99(2) of the 1983 Constitution to enact the Interim Constitution.

5 See Brown (supra) at 86 (The emphasis on vernacular instruction 'led to an enforced trilingualism in African education, with equal time being given to the official languages regardless of region'. This was 'an unusually onerous prescription, even in harsh colonial contexts'.) See also Neville Alexander *Language Policy and National Unity in South Africa/Azania* (1989) 38-9 ('Black students, generally, were placed at a disadvantage educationally because they came from economically and culturally deprived family and community backgrounds and because the imperialist and racist language policies followed by the NP government placed one more hurdle in their collective path.')

6 The 1991 census figures show 21 sizeable home languages in South Africa. Fourteen of these languages are spoken as a home language by groups of more than 100 000 people. See South African Institute of Race Relations *Race Relations Survey 1993/94* (1994) 86-7.

7 Robert K Herbert 'Language in a Divided Society' in Herbert (supra) at 1, 8. See also Alexander (supra) at 39.

8 IC s 3 read:

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

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

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

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

discrimination on the grounds of language. IC s 31 guaranteed a right to use a language of choice. IC s 32(b) contained a right to education in

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a language of choice where reasonably practicable. In addition, eleven of the principal languages spoken in South Africa were granted the status of official languages. The users of these eleven languages possessed additional rights and the state incurred a duty to promote their development, equal use and enjoyment.

Constitutional Principle CP XI shaped the language rights and the official language provisions of the Final Constitution: 'The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.' As a result of CP XI, the Final Constitution prohibits both public and private discrimination on the basis of language (FC ss 9(3) and (4)), accords an

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

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

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

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

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

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

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

(b) The Pan South African Language Board shall be consulted, and be given the opportunity to make recommendations, in relation to any proposed legislation contemplated in this section.

(c) The Pan South African Language Board shall be responsible for promoting respect for and the development of German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu, Urdu and other languages used by communities in South Africa, as well as Arabic, Hebrew and Sanskrit and other languages used for religious purposes.

individual right to use a language of choice (FC s 30), protects the rights of linguistic minorities (FC s 31) and ensures that all learners have a right to receive, where reasonably practicable, an education in the official language of their

choice (FC s 29).⁹ FC s 6 identifies eleven official languages and makes provision for legislative and administrative measures to regulate their use.

65.2 The Official languages

(a) The eleven languages

FC s 6(1) names eleven languages as 'the official languages of the Republic'. The languages are: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. There is one change to the Interim Constitution's list. Sesotho sa Leboa (sometimes called Northern Sotho) is now described by its more correct name: Sepedi.

Though the list aims to be as inclusive as possible, during the first certification hearings the Constitutional Court heard argument that some of the Indian languages spoken in South Africa deserved official status.¹⁰ The Court rejected this argument on the grounds that the object of CP XI was to provide protection for the diversity of languages, not the official recognition of any particular language. Decisions about the actual content of South Africa's official language policy fell entirely within the purview of the Constitutional Assembly. The protection of non-official languages, and thus diversity in its fullness, was accommodated by the specific measures provided for in FC ss 6(2) to (5).¹¹ These measures include the requirement that the Pan South African Language Board 'promote and ensure respect for' the principal Indian languages spoken in South Africa.¹²

(b) The meaning of 'official language'

The right of an individual to 'speak the language of his or her choice' (FC s 30) and the rights of linguistic communities to use their language (FC s 31) protect individual

9 Language rights are engaged in a number of other chapters in this text. See Cathi Albertyn & Beth Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 35; Stu Woolman 'Community Rights: Language, Culture and Religion' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 58; Stuart Woolman & Michael Bishop 'Education' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 57; Stuart Woolman & Julie Soweto-Aullo 'Commission for the Promotion and the Protection of the Rights of Religious, Linguistic and Cultural Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F.

10 These Indian languages include Urdu, Tamil and Hindi. Some 900 000 people are speakers of Indian languages in South Africa. Raymond G Gordon (ed) *Ethnologue: Languages of the World* (15th Edition 2005), available at <http://www.ethnologue.com> (accessed on 15 September 2005). By comparison, Tshivenda, an official language, has about 1 million speakers. See Statistics South Africa *Census in Brief* (2001).

11 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 210.

12 FC s 6(5)(b)(i).

use of a language (any language — official or not) in private communication and in public fora such as the media, schools, public meetings and organisations.¹³ By

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contrast, the term 'official language' is usually understood to mean a 'language used in the business of government — legislative, executive and judicial'.¹⁴ Such a gloss appears to have been placed on the phrase by South African courts prior to the new dispensation.¹⁵

No immediate or practical consequences follow from the mere declaration of a language as an official language.¹⁶ Legal content is given to official language policy through regulation of the following forms of state action:¹⁷

1. the use of a language in a court of law;
2. the use of a language when communicating with government (filling in forms, dealing with officials and the like);
3. the use of a language in public notices (such as street signs, public information and the like);
4. the use of a language in government reports, documents, hearings, transcripts and other official publications intended for public distribution;
5. the use of a language in legislation, and in the proceedings and records of the legislature.¹⁸

13 See Stu Woolman 'Community Rights: Language, Culture and Religion' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 58.

14 UNESCO *The Use of Vernacular Languages in Education* (1953) 46. But see Francesco Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (1991) 75.

15 See *Swart NO & Nicol NO v De Kock & Garner* 1951 (3) SA 589 (A), 600 (1909 Constitution conveys an instruction to all three branches of government to treat both languages equally); *Madikizela v State President, Republic of Transkei* 1986 (2) SA 180 (Tk), 185H-J (Any of the three official languages of Transkei may be used 'for official purposes'.)

16 See *Société des Acadiens du Nouveau-Brunswick v Association of Parents for Fairness in Education* (1986) 27 DLR (4th) 406 (SC)(Canadian Supreme Court holds that constitutional recognition of official languages does not in itself guarantee a right to any type of service in either official language.) But see Fernand de Varennes *Language, Minorities and Human Rights* (1996) 174 (Argues that an official language declaration does at least 'signal that the use of such language in a state is provided by law; however the exact scope of a right to use an official language can always be subjected to various limitations and considerations'.)

17 According to the Québec Superior Court, the declaration of French as the official language of Québec 'has little concrete meaning'. To give substance to the declaration, 'laws must be enacted which attach specific legal effects to the ... proclamation ... recognizing the use of the language, or allowing for the legal effects of its use in a variety of areas.' *Bureau Métropolitain des Ecoles Protestantes de Montréal v Ministre de l'Éducation du Québec* [1976] 1 CS 430, 452 (as translated in Gilbert A Beaudoin & Edward Ratushny *The Canadian Charter of Rights and Freedoms* (2nd Edition, 1989) 661.)

18 See Manfred W Wenner 'The Politics of Equality Among European Linguistic Minorities' in Richard P Claude (ed) *Comparative Human Rights* (1976) 184, 193.

65.3 Relationship between the official languages

(a) Equitable treatment and parity of esteem

The 1909 Constitution and its successors demanded that the two official languages 'be treated on a footing of equality', and declared that they were to 'possess and enjoy equal freedom, rights and privileges'. The courts interpreted these two requirements to mean that official use of one language would be as effective as the use of the other. It did not mean that official action (other than that specifically regulated by the 1909 Constitution: ie, Parliamentary legislation,

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proceedings and records and central government publications) had to take place in both languages to be effective.¹⁹

By contrast, the Interim Constitution did not require all eleven official languages to be treated equally. The opening statement of IC s 3(1) identifying the official languages at national level was declaratory. The balance of the section identified the consequences of this declaration: the state was required to create conditions for the development of the languages, and for 'the promotion of their equal use and enjoyment'. Rather than create an immediate obligation to treat all official languages equally, equality of the official languages became an aspiration. IC s 3(9) confirmed this interpretation: it enjoined the state to create the necessary 'conditions for the development and for the promotion of the equal use and enjoyment of all official South African languages.'²⁰

The Final Constitution similarly avoids any language that might give rise to a claim that the official languages must be treated equally. Moreover, it does not even repeat the Interim Constitution's promise of prospective equality. Instead FC s 6(4) simply requires that 'all official languages must enjoy parity of esteem, and must be treated equitably'. 'Equitable' treatment is clearly not the same as 'equal' treatment. Equitable treatment is treatment that is just and fair in the circumstances. Those circumstances include a history of official denigration and neglect of indigenous languages. Equity may therefore require that the languages that FC s 6(2) terms 'historically diminished' in use and status receive particular attention from and support from the state. It might mean that historically undiminished languages (ie, English and Afrikaans) are treated with relative inattention.

In any event, there is no hard and fast requirement that the national or provincial governments use more than two of the official languages 'for the purposes of government'. The national government may decide that only its communications in two of the official languages have legal validity, while those in any other language do not. Such legislation must reflect a good faith assessment that usage, practicality, expense and the other factors mentioned in FC s 6(3)(a) require such a measure.

19 See *Ex parte Suid Afrikaanse Nasionale Trust en Assuransie Maatschappij Bpk* 1918 CPD 207, 209 (De Villiers AJ) ('When the Act of Union provides that the two languages shall have equal rights and privileges, it means that these two modes of expressing thoughts may be used equally; a person may use the one or the other.') See also *R v Schaper* 1945 AD 716 (Promulgation of a by-law in English only would not offend against the equality requirement.)

20 IC s 3(9)(a).

As for 'parity of esteem', this awkward phrase probably has little legal significance. 'Parity' is possible only where there is a legal prescription that the official languages are treated equally and that they all have the same rights and status. But as we have seen, the Final Constitution does not insist on actual substantive equality. Instead, some languages may, for reasons of expense and practicality, end up enjoying greater rights and status than others. What then is the purpose of requiring the eleven languages to be treated with 'parity of esteem'? In a multilingual state, an official language policy can have the practical aim of designating a single language in which the business of government will be conducted. This has

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been the approach of a number of post-colonial African states that have given official status solely to the former colonial language.²¹ On the other hand, an official language policy may have political and cultural objectives, rather than practical aims. Like the 1909 Union Constitution, the adoption of eleven official languages in the Final Constitution blunts the force of criticism that one language, rather than another, has become the language of government. At the same time, according a language official status encourages its speakers to participate in political life and to press for the use of their language, where practicable, in the business of government. It enriches the cultural wealth of the nation through the invigoration of languages heretofore ignored. In short, while parity of esteem does not ensure the equal treatment of all eleven official languages, it does oblige the state to take all eleven languages seriously.

(b) Non-diminishment of existing status and rights

The official language policy of the Interim Constitution increased the number of official languages and the rights relating to those languages. At the same time, it sought to preserve the existing rights and status of the pre-1994 official languages: English and Afrikaans. To that end, the Interim Constitution contained a provision stipulating that 'the rights relating to language and the status of languages as they existed at the time of the commencement of this Constitution shall not be diminished.'²² Similar provisions relating to the non-diminishment of the existing status and rights of languages were contained in IC s 3(5)(non-diminishment at regional level) and IC s 3(9)(f)(the use of languages at any level of government).

What was the practical effect of the non-diminishment provisions at national level? Parliament could not amend the Interim Constitution to remove English or Afrikaans from the list of official languages. To do so would have diminished the pre-constitutional status of those languages. Parliamentary bills and legislation, the record of proceedings of Parliament, and government notices of general public interest and importance had to continue to be published in English and Afrikaans. Section 89(2) of the 1983 Constitution had required that 'all ... laws ... issued by the government of the Republic' be in both official languages. This meant that delegated legislation issued by the post-1994 national administration had to be published in English and Afrikaans in order to comply with the non-diminishment requirements.

21 See, eg, Article 3(1) of the Namibian Constitution and Article 5 of the Constitution of Mozambique, respectively, designating English and Portuguese as the official languages in those countries.

22 IC s 3(2).

Additional rights relating to the 1983 Constitution's provisions regarding official languages were grounded in statute. IC s 232(1)(d) provided that:

[u]nless it is inconsistent with the context or clearly inappropriate, a reference in a law [in force] ... to an official language or to both official languages, shall be construed, with due regard to section 3, as a reference to any of the official South African languages under this Constitution.

The effect of the section, read with IC s 3(2), was that where legislation in force granted rights to English and Afrikaans, it could be read to grant the other

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nine official languages the same rights, but could not be read to withdraw rights from English and Afrikaans and grant those rights to any other language.²³

At provincial level, the non-diminishment provisions had the potential to require the executive authorities of the new provinces to issue delegated legislation and public notices in English and Afrikaans. Where the new provinces contained the re-incorporated TBVC states, the rights and status of the former official languages of these territories could not be diminished by re-incorporation into a unitary South Africa. Instead those languages retained whatever rights and status they once enjoyed, but now only at a 'regional level'. This probably meant that in those 'regions' or parts of a province formerly occupied by self-governing territories or by one of the TBVC states, the provincial government could not demote a former official language, or remove any rights that a language enjoyed in that region.

IC s 3 and the non-diminution requirements, though binding on Parliament during the operation of the Interim Constitution, were not binding on the Constitutional Assembly. The Constitutional Assembly could have, consistent with Constitutional Principle XI, substantially revised the state's official language policies in the Final Constitution. In the end, however, the most substantial change was the dropping of the non-diminution requirement. During the certification hearings, the Constitutional Court heard argument that the status of Afrikaans had been 'diluted' in the Final Constitution. The argument was rejected. According to the Constitutional Court, no Constitutional Principle required that Afrikaans be given a special status in the Final Constitution. The Court also observed that the Final Constitution

does not reduce the status of Afrikaans relative to the [Interim Constitution]. Afrikaans is accorded official status in terms of s 6(1). Affording other languages the same status does not diminish that of Afrikaans.²⁴

The absence of a non-diminution requirement does, however, mean a loss of the constitutional rights enjoyed by these two languages since 1910. FC s 6(3)(a) provides that 'national government and provincial governments may use any particular official languages for the purposes of government.' The languages chosen need not include English and Afrikaans. This makes it constitutionally (if not

23 IC s 232(1)(d)'s mention of 'an official language or ... *both* official languages' appeared to exclude legislation of the former TBVC and self-governing territories that granted rights to official languages other than or in addition to the two official languages of the 1983 Constitution. (My emphasis).

24 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 212; *Ex parte Gauteng Provincial Legislature re: In Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) at para 74 (Discussion of non-diminution).

practically or politically) possible for the business of national and provincial government to be transacted in languages other than English or Afrikaans for the first time since Union.

65.4 Use of official languages for the functioning of government

(a) The National Language Policy Framework

The National Language Policy Framework, government's policy on the achievement of the goals of the Final Constitution's official language provisions, was adopted by the cabinet in 2002.²⁵ The policy is the result of a lengthy drafting process conducted by the Language Plan Task Group ('LANGTAG') established by the national Department of Arts and Culture in 1995.²⁶ The aims of the policy are to promote the equitable use of the official languages at all levels of government; to facilitate equitable access to government services, knowledge and information; to ensure redress for the previously marginalised official indigenous languages; to initiate and to sustain a vibrant discourse on multilingualism with all language communities; to encourage the learning of indigenous languages in order to promote national unity, as well as linguistic and cultural diversity; and to promote good language management for efficient public service administration.²⁷

As part of the implementation of the policy, a draft South African Languages Bill has been prepared by the Department.²⁸ In the description of the current law on the use of the official languages that follows, reference will be made to the reforms proposed by the Framework and the draft Bill.

(b) National and provincial government

(i) The 'purposes of government'

The South Africa Act and its successors required that records, journals and proceedings of Parliament were kept in both the official languages. All bills, laws and notices of general public importance or interest issued by the government were required to be in both official languages. Provinces were obliged to legislate and to conduct administration in English and in Afrikaans. Section 90 of the 1983 Constitution required that all 'records, journals and proceedings of a provincial

25 National Language Policy Framework (2002), available at www.info.gov.za/otherdocs/2001/langframe.pdf (accessed on 10 March 2009) ('National Framework').

26 See 'Towards a National Language Plan for South Africa: Final Report of the Language Plan Task Group (8 August 1996) ('LANGTAG Final Report'), available at http://www.dac.gov.za/reports/langtag_report/langtag_report.htm (accessed on 15 September 2005). For a useful review of the Report, see LT du Plessis & JL Pretorius 'The Structure of the Official Language Clause. A Framework for its Implementation' (2000) 15 *SA Public Law* 504.

27 LANGTAG Final Report (supra) at para 2.1.

28 The South African Languages Bill (24 April 2003), available at http://www.dac.gov.za/bills/sa_language_bill.pdf (accessed on 10 March 2009).

council shall be kept in both official languages.' The same requirements applied to all 'draft ordinances, ordinances and notices of public importance or interest issued by a provincial administration.'

The Final Constitution contains no similar set of obligations. Instead, FC s 6(3)(a) is permissive:

The national government and provincial governments may use any particular official languages for the purposes of government taking into account usage, practicality, expense,

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regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned.

However, both national and provincial government must use at least two of the official languages 'for the purposes of government'. Both the national and provincial governments are obliged by FC s 6(4) to regulate and to monitor their use of the official languages by means of legislative and other measures.

The phrase 'purposes of government' encompasses the various activities of government. The effect of language on two such activities — legislation and administration — warrants closer inspection.

(ii) Legislation

Legislation creates rights and duties throughout the jurisdiction of the legislature, and ought to be intelligible to the people to whom it applies.²⁹ Legislation at national level should, in principle, be published in all of the principal languages of the state. Similarly, legislation at provincial level should be published in the principal languages spoken in the province.³⁰

Similar obligations apply to the languages employed during the legislative process. Parliamentary debate should take place in all the principal languages of the state. Members of a provincial legislature should be able to use the languages of the province in their deliberations.³¹ Failure to observe this principle will leave speakers of unaccommodated languages feeling that they are not represented in the legislative process. Members of Parliament will face the burdensome obstacle of

29 Julien Hofman 'Official Languages for a New South Africa: Article 5 of the ANC's Bill of Rights' (1991) 3 *Stellenbosch LR* 328, 333.

30 See Universal Declaration of Linguistic Rights (10th draft, International PEN Committee for Translation and Linguistic Rights and Centre International Escarré per les Minorities Etniques i les Nacions, Barcelona 1995), available at <http://www.linguistic-declaration.org> (accessed on 15 September 2005) ('Universal Declaration of Linguistic Rights'). Article 19 of the draft declaration proposes that:

1. All language communities have the right for laws and other legal provisions which concern them to be published in a language specific to the territory.
2. Public authorities who have more than one territorially historic language within their jurisdiction must publish all laws and other legal provisions of a general nature in each of these languages, whether or not their speakers understand other languages.

31 According to Article 20 of the Universal Declaration of Linguistic Rights:

1. Representative assemblies must have as their official language(s) the language(s) historically spoken in the territory they represent.

communicating in languages that are not their mother tongue. This may make them less effective debaters, or may inhibit them from entering Parliament in the first place. IC s 3(7) provided an unqualified right to members of Parliament to address Parliament in the official South African language of their choice.³² There is no corresponding right in the Final Constitution. This means that the languages

legislation used for and by legislators is, in terms of FC ss 6(3) and (4), left largely to the discretion of the legislature.

Recognising these principles, the National Language Policy Framework proposes the use of all the official languages in 'all legislative activities' as a matter of right, though in provincial legislatures the incidence of use of the languages in the region can be taken into account.³³ The phrase 'all legislative activities' clearly encompasses both the publication of legislation and the conduct of legislative proceedings.

The South Africa Act and its successors required the two official languages to be placed on an equal footing. For this reason both English and Afrikaans were considered to be the languages of enactment of legislation. This meant that either version of a statute was as authentic as the other and that the meaning of the statute was to be found by consulting the two versions and reconciling the contents of both.³⁴ Only in the event of an irreconcilable interpretative conflict between the two versions would the signed version of the legislation be treated as authoritative.³⁵

As we have already seen, there is no longer a constitutional requirement that the official languages be treated equally. This makes it difficult to decide which version of an Act is to be considered authoritative in the event of an interpretative conflict. The task of consulting and reconciling as many as eleven versions of a statute would be overwhelming, if not impossible. FC s 82 may provide a solution to this problem.

2. Supraterritorial representative assemblies, which cover a larger territory with more than one territorially historic language, must have all such languages as official languages.

32 See Gilbert A Beaudoin & Edward Ratushny *The Canadian Charter of Rights and Freedoms* (2nd Edition, 1989) 678 (Discussion of provisions of the Canadian Charter of Rights and Freedoms and the Constitution Act 1867 that are, or were, comparable to IC s 3(7)). In practice, Parliamentary proceedings were simultaneously translated, but only into English and Afrikaans. *Debates of the National Assembly* (31 August 1994) 2197.

33 National Framework (supra) at para 2.4.4. Some provinces have already legislated in this regard. See, eg, Northern Province Language Act 7 of 2000 (Provincial official languages are Sepedi, Afrikaans, English, Tshivenda, Xitsonga and Isindebele; any official language can be used in legislative proceedings and legislation must be published in two languages); The Constitution of the Western Cape, 1997, s 5 (Designates Afrikaans, English and isiXhosa as official languages for the province.) The Western Cape Provincial Languages Act provides for the use of these languages by the legislature and requires all legislation to be published (but not necessarily simultaneously) in Afrikaans, English and isiXhosa. Act 13 of 1998.

34 *New Union Goldfields v CIR* 1950 (3) SA 392 (A), 405–406. See Hofman (supra) at 335; George Devenish 'Statutory Bilingualism as an Aid to Construction in South Africa' (1990) 107 *SALJ* 441, 442–446.

35 Section 35 of the Constitution of the Republic of South Africa Act 110 of 1983. The practice was for the State President to sign an Act in one language and the following Act in the other language. This practice was continued for a time after 1994. More recently, the practice is to sign Acts in English only.

It reads: 'the signed copy of an Act of Parliament is conclusive evidence of the provisions of that Act.'³⁶ The section ought to be read to mean that where multiple versions of an Act exist, the signed copy should be taken to be authoritative for purposes of interpretation. A similar provision existed in the Interim Constitution, and FC s 82 should, for purposes of convenience, be treated as its successor.³⁷

(iii) Administration

In contrast to legislation, the activities of the administration affect limited sections of the population, and do so at different times. This allows greater flexibility in the formulation of a language policy appropriate to a particular region, a section of the population or an administrative function.³⁸ The government should, in principle, be able to respond to communications from the public in the principal languages of a region and be able to offer public services in those languages.³⁹

Some guidance on the content of the government's obligations to provide multilingual administrative services was provided by the Interim Constitution. IC s 3(3) read: 'Wherever practicable, a person shall have the right to use and to be addressed in his or her dealings with any public administration at the national level of government in any official South African language of his or her choice.' IC s 3(6) contained a similar right to communicate with a provincial administration in the official languages declared for the province.⁴⁰ The section imposed a duty on government institutions to implement measures enabling them to communicate in

36 There is a similar provision for provincial legislation: FC s 124.

37 IC s 65 required Acts of Parliament to be enrolled of record at the Appellate Division 'in such official South African languages as may be required in terms of section 3'. In the event of multiple versions being enrolled, IC s 65(2) provided that in cases of conflict between versions, the version signed by the President would prevail.

38 A similar distinction is made between the official languages of the European Union for purposes of legislation and administration. There are 21 'official languages and the working languages' of the institutions of the Union. Regulations and documents of general application must be in all official languages. Documents sent directly by a member state or a citizen of the Union to the Union's institutions may be in any of the official languages. The reply must be in the language in which the communication was sent. Documents sent by an institution or official of the Union to a citizen of a member state must be in the language of the state or the language of the citizen. Failure by an institution to communicate or to transmit a document in the proper official language selected in terms of these rules constitutes an irregularity capable of affecting the validity of that document. See *Chemiefarma v Commission* [1970] ECR 661, 686-7.

39 Fernand de Varennes *Language, Minorities and Human Rights* (1996) 176. De Varennes notes that failure by the government to communicate in the language of its citizens might have discriminatory effects:

In addition to the fewer opportunities for employment in the state bureaucracy, non-native speakers with a lower proficiency in the official or majority language as compared to native speakers may experience disadvantages in the area of public services such as delays in obtaining appointments and interviews with bilingual public servants, the cost of paying another person to act as an interpreter during interviews and to assist with the completion of forms and consequent delays, the inability or varying level of difficulty to communicate information in order to be eligible for public benefits, decisions or privileges involving public authorities, the unintentional communication of incorrect information by untrained family members and friends acting as interpreters, the inability to accurately communicate medical information to public health authorities and employees, additional costs such as family members' travel expenses and absences from work in order to interpret.

all official languages. Such measures would obviously entail employment of officials conversant with the official languages and the provision of translation services. The aim of the measures should have been to provide service of equal quality to the public in any of the official languages. However, given the qualification that the right was available only 'where practicable' and that equality between the official languages was a matter of aspiration rather than obligation, the government was in effect required only to attempt to provide the best possible services in all official languages.

FC s 6 does not repeat the prescriptions of IC s 3(3). The language in which administrative services are provided is instead left as a matter for regulation by

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legislation and policy. The National Language Policy Framework requires that official correspondence must be in the official language of the recipient's choice. Oral communication must take place in the preferred official language of the target audience.⁴¹ Government documents must be in all eleven languages when 'the effective and stable operation of government at any level requires comprehensive communication of information', or in all of the official languages of a province. In cases where it is not necessary to make documents available in all eleven languages, they should be published in six languages.⁴² The policy also requires each government structure to agree to use one or more working languages and languages of record for the purposes of intra- and inter-departmental communication.⁴³ The draft National Languages Bill proposes legislation to enforce these requirements.

(iv) The margin of appreciation

Whatever the government's obligations in principle, in practice its official language policy may be qualified by a number of considerations: 'usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population'. The first of these — 'usage' — presumably refers to the objective demographic incidence of use of a language in a particular region. The incidence of use of the eleven official languages is not uniform throughout South Africa.⁴⁴ In some regions there may be too few speakers of a particular language to justify measures protecting and encouraging the use of that language.⁴⁵ This fact would clearly justify the use by a provincial government of only the principal languages used in that province for purposes of legislation and administration.⁴⁶ It would also justify the national government's formulation of a policy in which only the principal languages of a region were employed for the provision of administrative services in that region.

40 The ambit of the right was dependent on the declaration of official languages by the province. However, there was no constitutional obligation on a province to declare official languages.

41 National Framework (supra) at para 2.4.6.2.

42 The six must embrace one of the four Nguni languages, one of the three Sotho languages, Tshivenda, Xitsonga, English and Afrikaans. The Nguni and Sotho languages are to be used in rotation. Ibid at para 2.4.6.5.

43 Ibid at 2.4.6.1.

44 See, generally, E Grobler, KP Prinsloo & IJ Van der Merwe (eds) *Language Atlas of South Africa: Language and Literacy Patterns* (1990).

The other limiting considerations — 'practicality, expense, regional circumstances and the balance of the needs and preferences of the population' — confer

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a considerable margin of appreciation on the government. While 'regional circumstances' sounds like it covers the same ground as 'usage', it presumably must mean something different. The term may refer to conditions in a region which impact on administration and which influence the provision of services in multiple languages. For example, the absence of translation facilities in a particularly undeveloped region might qualify as a 'regional circumstance' justifying a restriction on the provision of multilingual services. As for 'practicality' and 'expense', these considerations recognise that, however noble the intentions behind the Final Constitution's recognition of eleven official languages, the constraints inhibiting the translation of intention into practice are considerable. It will all too often be practically and financially impossible to provide every type of government service in each of the official languages.

(c) Local government

When passing measures or taking action in relation to the languages employed by local government, municipalities 'must take into account the language usage and preferences of their residents'.⁴⁷ There are two significant differences between the constitutional language requirements for national and provincial governments and the constitutional language requirements for municipalities. First, there is no requirement that a municipality use at least two official languages. Second, rather than the long list of factors qualifying the obligation to provide multilingual services, municipalities are given a great deal less discretion: they may consider only usage and the preferences of their residents.

We have seen that 'usage' refers to objective demographic factors. International practice suggests that a 'sliding scale' is the most appropriate measure for determining the reasonableness of an official language policy for local or regional government. The greater the concentration of speakers of a language in a particular municipal area, the greater the obligation to provide municipal services in that language. Where there are fewer speakers of a language in the area, the

45 Cf Committee of Ministers of the Council of Europe *European Charter for Regional or Minority Languages* (Adopted 1992)(Reprinted in Hurst Hannum (ed) *Documents on Autonomy and Minority Rights* (1993) 86.) The Charter requires States to implement measures protecting and encouraging the use of regional and minority languages in 'the geographical area in which the said language is the mode of expression of a number of people justifying the adoption of the various protective and promotional measures provided for in this convention.' Article 1(b).

46 This has been the approach of those provinces that have developed official language policies. The Constitution of the Western Cape, 1997 s 5 (Designates Afrikaans, English and isiXhosa as official languages for the province). The ill-fated Constitution of KwaZulu-Natal designated Zulu, English and Afrikaans as official languages. See *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: in re Certification of the KwaZulu-Natal Constitution* 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC)(Denying certification, but not on grounds of official language.)

47 The Interim Constitution's official language provisions (IC s 3) bound only the national and provincial levels of government. See *Louw v Transitional Local Council of Greater Germiston* 1997 (8) BCLR 1062 (W)(No obstacle in Interim Constitution to a decision of council that English only be used in all official communications and proceedings.)

municipality might be justified in providing fewer of its services in that language or even none at all.⁴⁸

'Preference' refers to the fact that, in a multilingual state, individuals may be happy to communicate in languages other than their mother tongue. Where a municipality argues that its failure to provide services in a particular language is in accordance with the preferences of its residents, it must be able to demonstrate some evidence of these preferences.

65.5 Corrective measures in relation to indigenous languages

Notwithstanding the wide margin of appreciation conferred on the state in

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implementing its official language policy, FC s 6(2) requires the state to promote the use of indigenous languages: 'Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.' The corrective measures required by the subsection may obviously include, but are not confined to, the use of languages by government. Expense and practicality aside, the government should, in the elaboration of its official language policy, actively promote use of the 'historically diminished' languages in legislation and administration.⁴⁹

Is Afrikaans an 'indigenous language of our people'? Afrikaans is a creole language, a variant of the Dutch of the 17th century colonists, with some lexical and syntactic borrowings from Malay, Bantu languages, Khoisan languages, Portuguese, and other European languages.⁵⁰ While its origins might qualify it for the label 'indigenous', it is unlikely that Afrikaans qualifies for the corrective measures required by FC s 6(2). The language was the beneficiary of decades of active promotion by the National Party government and can hardly be considered 'historically diminished' in use and status.

65.6 Use of an official language in judicial proceedings

The 1909 official language provisions and their successors did not require use of the official languages by the judiciary. Nevertheless, a practice developed that judicial proceedings could be conducted in either official language. Provision was also made for interpretation of criminal proceedings at state expense to accused persons who could speak neither official language.⁵¹ In civil proceedings, neither the parties nor the witnesses possessed a right to the interpretation of evidence at state expense:

48 See de Varennes (*supra*) at 177-8.

49 Besides official language measures, positive measures to promote indigenous languages would include the provision of education at all levels in a language, subsidising the production of dictionaries, textbooks and literature in that language and requiring the use of the language by the public broadcasting media.

50 Raymond G Gordon (ed) *Ethnologue: Languages of the World* (15th Edition 2005), available at <http://www.ethnologue.com> (accessed on 15 September 2005).

though a court was required to call for interpretation where necessary.⁵² The language of record of the courts was English or Afrikaans, and any part of criminal or civil proceedings not in these languages would be

conducted through an interpreter and translated into and recorded in either English or Afrikaans.⁵³

The Final Constitution contains measures aimed at allowing any person, whether a speaker of one of the official languages or not, to understand the criminal proceedings in which he or she participates. In criminal matters, FC s 35(3)(k) provides that, as part of the fundamental right to a fair trial, an accused person has the right 'to be tried in a language which the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language.'⁵⁴ According to FC s 35(4), detained, arrested and accused persons have the right to be given

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- 51 Section 6 of the Magistrates Court Act codified the rule of practice followed in the Supreme Court. Act 32 of 1944. Subsection 1 provided: 'Either of the official languages may be used at any stage of the proceedings in any court and the evidence shall be recorded in the language so used'. Subsection 2 provided for interpretation of evidence to an accused person who is not sufficiently conversant in the language in which that evidence is given. If, in the opinion, of a judicial officer an accused was not sufficiently conversant with the language being used in criminal proceedings, that judicial officer had a duty to provide for interpretation into a language the accused could understand.
- 52 Rule 61 of the Uniform Rules of Court requires interpretation where evidence is given in a language with which the court or a party is not sufficiently conversant. Where the services of an interpreter are employed in any proceedings, the costs (if any) of interpretation are, unless the court otherwise orders, costs in the cause. Where the interpretation of evidence given in one of the official languages of the Republic is required by a party, such costs are at that party's expense. Section 5(2) of the Small Claims Courts Act is more generous. Act 61 of 1981. If evidence is given in a language with which one of the parties is not sufficiently conversant, an interpreter may be called by the court to interpret that evidence into a language with which that party appears to be sufficiently conversant, irrespective of whether the language in which the evidence is given is one of the official languages.
- 53 This practice continues even in the case of proceedings where all participants are conversant with an official language other than English or Afrikaans. See *S v Matomela* 1998 (3) BCLR 339 (Ck) (Nothing in the Final Constitution prevents the use of any official language for the purpose of conducting court proceedings where all participants are conversant with the language. However conduct of court proceedings in languages other than English or Afrikaans will entail inconvenience, delay and the additional expense of translation of the record in the event of a review or appeal.) See also *S v Damoyi* 2004 (2) SA 564 (C)(Conducting of court proceedings in Xhosa out of necessity when no interpreters were available and when all participants were Xhosa-speaking not a reviewable defect in the proceedings.) For criticism of these decisions on the grounds that they fail to live up to the Final Constitution's goals of multilingualism, see John Hlophe 'Official Languages and the Courts' (2000) 117 *SALJ* 690. For arguments that a single language of record (English) should not be adopted, see JJ Malan 'Die gebruik van Afrikaans vir die Notulering van Hofverrigtinge Gemeet aan Demokratiese Standaarde' (2003) 28 *J for Juridical Science* 36 (Removal of Afrikaans as a language of record would be contrary to official language provisions and, moreover, inefficient); *S v Pienaar* 2000 (2) SACR 143 (NC). But see *Damoyi* (supra) at para 18 (English ought to be treated as the language of record).
- 54 The subsection does not confer a right to be tried in a language of choice but merely a language that the accused understands. See *Mthethwa v De Bruin* NO 1998 (3) BCLR (N). See, further, PJ Schwikkard 'Arrested, Detained and Accused Persons' in I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 737, 787; Frank Snyckers & Jolandi Le Roux 'Criminal Procedure: Arrested, Detained and Accused Persons' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51.

information about the reasons for their detention, their right to remain silent and their right to legal representation in a language that they understand.

There are no similar provisions in respect of civil matters.⁵⁵ Arguably, the right to have civil proceedings conducted in a language of choice forms part of the right to have disputes decided 'in a fair public hearing before a court.'⁵⁶ Court proceedings can hardly be considered fair if they are not intelligible to the parties.

It is, however, not clear whether the cost of provision of interpretation services should be borne by the state or by the litigant who requires those services. FC s 35(3)(k) is phrased as a fundamental right of an accused to the interpretation of judicial proceedings, and should be interpreted as placing a duty on the state to

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provide interpretation.⁵⁷ Such a duty was assumed by the state prior to the Interim Constitution in terms of the common law right to a fair trial, and it seems unlikely that the Bill of Rights would seek to alter this position.⁵⁸

As for the provision of interpretation in the case of civil litigants and witnesses, the previous practice was for the parties to civil litigation to bear the cost of interpretation for any language other than English or Afrikaans. This practice is likely to continue, though certainly the state should attempt to provide court services in all official languages. As with criminal proceedings, a witness or civil litigant wishing to address a court in any of the official languages should be able to do so, and a court not sufficiently conversant with that language should be required to have such evidence interpreted at state expense.

65.7 Pan south african language board

IC s 3(10) required the Senate to establish an independent Pan South African Language Board ('PANSALB'). PANSALB was designed to 'promote respect for ... and

55 The Final Constitution contains no provision equivalent to IC s 107(1). IC s 107(1) read: '[a] party to litigation, an accused person and a witness may, during the proceedings of a court, use the South African language of his or her choice, and may require such proceedings of a court in which he or she is involved to be interpreted in a language understood by him or her.'

56 FC s 34. See Jason Brickhill & Adrian Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59.

57 Such an interpretation accords with international practice. See Bruno de Witte 'Linguistic Equality: A Study in Comparative Constitutional Law' (1985) 3 *Revista de Llengua i Dret* 43, 105:

Practically all countries provide for the assistance of an interpreter to the persons who do not have a sufficient knowledge of the language used by the [criminal] court; such aid is usually provided without cost for the accused ... this guarantee is only indirectly linked to the general principle of equality and more closely to the more specific constitutional principles of 'fair trial, 'equality of arms', or, in the United States, 'due process'.

58 The right of an accused to provision of interpretation at state expense was essential for a fair trial, and could not be lawfully waived by the accused. See *Mackessack v Assistant Magistrate, Empangeni* 1963 (1) SA 892 (N); *Geidel v Bosman NO* 1963 (4) SA 253 (T); *Ohanessian v Koen* 1964 (1) SA 663 (T). FC s 39(3) reads, in relevant part: 'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

to further the development of the official languages.' The Interim Constitution further required that PANSALB be consulted and given the opportunity to make recommendations in relation to any proposed legislation relating to the official languages.⁵⁹

PANSALB currently consists of no fewer than 11 and no more than 15 members — appointed by the Minister of Arts and Culture after consultation with the Parliamentary Portfolio Committee on Arts and Culture — who are experts in the fields of language planning, translation, interpreting, lexicography, language teaching, literacy, language legislation and language matters. Under the Final Constitution, PANSALB is, in addition, charged with promoting respect for and the development of a list of languages 'used by communities in South Africa' that have not been designated as official languages,⁶⁰ as well as 'Arabic, Hebrew and Sanskrit and other languages used for religious purposes'.

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Item 20 of Schedule 6 provides that the Pan South African Language Board created under the Interim Constitution continues to function under the Final Constitution. FC s 6(5) amplifies PANSALB's obligations and requires that PANSALB promotes the official languages, as well as Khoi, Nama, San, and sign language.

59 Pan South African Language Board Act 59 of 1995.

60 These languages are German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu. See FC s 6 and IC s 3.