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Articles

Justice Albie L. Sachs*

The Language Question in a
Rainbow Nation: The South
African Experience

In this, the twenty-second annual Horace E. Read Memorial Lecture, Mr. Justice Albie Sachs reviews the efforts to resolve problems of multilingualism in the new Constitution of South Africa. Writing from experience in the constitution-making process, he reflects on the reality of eleven different languages in South Africa. He discusses the consequent problems of legislative strategy and linguistic rights and the appropriate balance amongst language rights, policy and practice.

Dans la vingt-deuxième conférence annuelle commémorative Horace E. Reid, M. le Juge Albie Sachs passe en revue les efforts de résoudre les problèmes de multilinguisme dans la nouvelle constitution Sud Africaine. En écrivant de son expérience du processus de rédaction constitutionnelle, il réfléchit sur la réalité des onze langues officielles de l'Afrique du Sud. Il s'adresse aux problèmes des stratégies législatives et des droits linguistiques, et à la recherche d'un équilibre juste entre les droits linguistiques, la politique et la pratique.

Introduction

Eleven official languages? Yes, eleven official languages. What follows—written as the recall of an erstwhile negotiator rather than as the opinion of a current judge—is an overview of the principles that guided us in South Africa in moving from two official languages to eleven. As will be seen from the rather extensive provisions that were negotiated,¹ the approach was accommodatory rather than competitive, inclusionary

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1. Formal negotiations about transforming South Africa from a racist authoritarian state to a democratic constitutional democracy took place in two phases. The first, from 1991 to 1993, in which the then South African Government and the formerly outlawed African National Congress (ANC) were the most influential participants, culminated in an Interim Constitution, which provided the framework for the adoption of the final Constitution. Most of the discussion in this paper concerns the debates which led to adoption of the clauses on Language Rights in the Interim Constitution. (See Appendix A.) The second phase involved a final text being adopted by a democratically elected Parliament, which had to comply with thirty-four principles agreed to in the first phase. (The final provisions on Language Rights are contained in Appendix B.) I was actively involved as a member of the ANC constitutional committee in the drafting of the provisions on Language Rights in the Interim Constitution, but had no role in the drafting of the final version.

rather than narrow, and developmental rather than prescriptive. The text is attached as Appendix A.

I. *The Problem of Numbers*

Tidiness is not always a virtue. The new constitutional provisions relating to language which I helped to negotiate were messy, inelegant and contradictory—just like the language situation itself. So were the new flag and the new anthem, with a multitude of colours in the one case, and a variety of tunes and verses in the other. This is not a plea for untidiness for its own sake, simply a recognition of the inevitability of inelegance in the solutions to problems arising from the turbulence of history. Pluralism is by its nature untidy. It allows things to achieve their natural contours rather than attempts to force them into a simple pre-ordained shape.

The peopling of our country has been such that we have a multiplicity of languages used in a great number of different situations. Language utilization and status reflect cycles of conquest and re-conquest. The situation is a product of historical conflict and interaction, not of constitutional prescription. Accordingly, the whole approach of the drafters of the constitution was to construct a set of functional principles around the existing reality, rather than to attempt to subordinate the reality to a simple controlling principle. This is one of those areas where, within the framework of common citizenship and a shared endeavour to make South Africa a decent and prosperous country for all, we could declare that diversity, not unity, is strength.

It was disappointing that the greatest exponents of liberty and spontaneity in the economic sphere were frequently the most prescriptive in relation to language use. In their view, English was the language of business, therefore English had to be the language of the world. How easy it would have been to have declared English to be the working language of government and the functional medium of public discourse, reserving to other languages a protected but subordinate status. This may be called the one plus ten solution. Most of those who, like myself, are English-speaking, would see no problem with one plus ten. After all, to most English-speakers, English is considered the natural medium of communication, so convenient and ever-present as to be more like the air you breathe than a language. The language question, from this viewpoint, was what to do about all those other tongues.

To speakers of other languages, however, the problem was just the opposite. The enforced omnipresence of English could be seen as inconvenient and suffocating, and as inducing a sense of disempowerment and exclusion. In a sense, all language rights are rights against English,

which in the modern world is such a powerful language that it needs no protection at all and tends to resist being slotted into any system of rights.

It might well be that one day English will emerge as the working language of most of government and business in South Africa. Perhaps it will come to be the language that everyone wants to learn because of its utility. That, however, would be evolution through choice. Nothing could be more inimical to the widespread acceptance of English than to make it the common language by command.

However useful English in our day may have been as a language of negotiation, any attempt to establish formal English language supremacy would have been unacceptable. It would have revived deeply painful memories of past dispossession in a sizeable section of the South African community and ensured language strife at the moment when peace was most needed in our country. It would greatly have strengthened the hands of those who argued that cultural self-expression could only be achieved through territorial self-determination, not by means of democracy and a Bill of Rights.

Language questions are, indeed, never just about function and convenience. If they had so been, the world could long ago have adopted the language spoken by the largest number of people as the language of humankind, and today we would all be speaking Chinese. The language question is a question of communication, but it is also a matter of identity on the one hand, and of empowerment and disempowerment on the other.

It must be remembered that the problem of one plus ten did not end with the longstanding battle between Boer and Briton. It touched on the whole history of conquest and the destruction of the independence of the indigenous African people. If South Africa had emerged as a confederation of ethnically based states, then each of the African languages could have had official status in a particular state, and English could have served as a link language. The concept of ethnic confederalism, however, was overwhelmingly rejected, because linguistic autonomy had come to be associated with corrupt and ineffectual Bantustans, with poverty and marginalization, and not with independence and development.

The basic concept of the new South African nation was that we came into it as we were, bringing our languages, beliefs and world-views with us. Citizenship was culturally and linguistically unqualified; to be a South African, you did not need to prove to anyone's satisfaction that you were civilised, assimilated, exempted or honorary. We shared a common humanity, occupied a common territory and fell under the protection of a common constitution. We did not have to share a common language. Equality did not mean identity, but denoted equal rights to participate, as we were, in a common citizenship.

One plus two was accordingly also unacceptable. It would have drawn a distinction of status and empowerment between speakers of English and Afrikaans, on the one hand, and speakers of the African languages on the other. To regard English and Afrikaans as national languages, while restricting the status of the African languages to certain regions only, would simply have emphasised invidious distinctions linked with colonial domination and apartheid. Alarm at the problems of having eleven official languages led to attempts to adapt languages to state convenience, rather than to remodel state policy to fit language reality. The languages had to be obliged, like the feet of Cinderella's sisters, to fit into state policy; yet the shoe should be the size of the foot, not the foot the size of the shoe.

Four plus seven was based on the plausible but linguistically arrogant process of selecting four widely used and broadly representative languages—Zulu, English, Afrikaans and Sotho—and giving to the remaining seven an associated but junior status. Yet head counting, always relevant to resources, is ever dangerous in respect of rights. Nothing is more likely to promote language chauvinism than to attach benefits to numbers.

The approach embodied in the Constitution was accordingly not based on numbers as such but on historical, sociological and political fact. There were eleven languages with deep implantation in South Africa each of which already enjoyed some degree of official status in the country. This was the eleven plus nought approach. The idea was to do away with the conflictual symbolism and divisive distinctions of the past and, on the basis of equal respect for all languages, to move from a situation of standardized compulsion to one of varied and realizable choice.

The move from bilingualism to multilingualism did not mean continuing with the present language rules and multiplying performance by five and a half. The change was a qualitative and not just a quantitative one. The essence of multilingualism is not automatic replication, but meaningful communication. It is founded on acknowledging fundamental language rights for eleven language communities, and then finding sensible and practical ways of realizing these rights.

With two languages enjoying equal status, it is possible to require fluency in both languages for state employment, to make both obligatory on state documents, and to have the telephonist say: "Goeie more, good morning." But if the telephonist had to say good morning in all eleven languages, it would be afternoon before she or he finished. If every tax form had to be in all the languages, the taxes would have to be raised to cover the expense.

Having eleven languages in fact forced us to look more carefully at what language rights really meant. If they did not signify everything times eleven, what, then, was their essence? If we succeeded in answering that question and managed to develop appropriate language strategies, we could avoid trivializing the issue.

II. *The Problem of Strategy*

Redesigning South Africa's language policy, and moving from bilingualism to multilingualism, involved three major shifts of approach. The first was from language inequality to language equality. English was in a strong position, and Afrikaans had achieved a powerful status. The African languages, though spoken by the great majority of the people, occupied a status of marked inequality. In keeping with the principles of equality, reconciliation and nation-building, the new language dispensation had to promote the idea of achieving equal status between all languages.

The second change was from an emphasis on state prescription towards one on the exercise of individual and community rights. This in turn involved a movement from compulsion to choice, *i.e.* from compulsory use of official languages in prescribed situations, to the right to choose in which language to communicate or be educated. The third major shift was from a simple and totalistic approach to a more graduated and open one. This, too, pre-supposed that the perspective would be developmental rather than one based on rigidly determined positions. A principled and balanced approach to language rights would enable policy to evolve with time, so that problems could be solved on a priority basis rather than all at once. Rights could become progressively more meaningful as more and more resources were made available for their realization.

III. *The Problem of Rights*

Fundamental language rights can be divided into three main clusters: the right to use your language, the right to development of your language and the right to communicate with speakers of other languages.

The right to use your language relates not only to speech in the intimate sphere of family and friends. It applies to transactions of importance to your life: dealings with the state, communications with your employer or employee, and the receipt and imparting of information in the public sphere. People should not be made to feel like strangers in their own land. When you touch the language, you touch the speakers.

The right to develop your language goes well beyond establishing academies to introduce words like "cellular phone" into the vocabulary.

It signifies the production of schoolbooks, television dramas, work manuals, law reports and newspapers. Advancing the language means moving forward in a creative way rather than retreating backwards to some allegedly original and pure language font. The thrust of development comes from the unruly inventiveness of everyday speech rather than the formalistic dictates of experts.

The right to be understood and to understand other languages is fundamental to language survival in the contemporary world. This is achieved both through multilingualism of the individual and through the provision of translation and interpretation facilities. You retain, speak and develop your own language. At the same time, you communicate with, understand and share in the pleasures of expression of other languages. Language ceases to be either a knobkerrie (club) or a shield, and becomes just a language.

Corresponding to these affirmative rights, is the negative right not to be discriminated against because of your language. All these rights, both positive and negative, individual and collective, interact with and reinforce each other. The art of the constitution is to give appropriate, functional and integrated recognition to them all. In real life they are interdependent; so must they be in the constitution.

IV. The Problem of Balance

The first strategic balance was between the principles of non-diminution and of extension. Existing rights in relation to privileged languages should not be reduced, while at the same time there should be an expansion of rights in relation to underprivileged languages.

The second strategic balance was between rights and practicality. Rights and practicality should not be seen as principles in collision, but rather as mutually interacting concepts. The rights become meaningful to the extent that they are claimed in a reasonable fashion, and to the degree that all reasonable steps are taken to ensure their realization.

The third area of balance was between rights to be exercised at the national level and those to be enjoyed at regional levels. The constitution did not separate languages into national and regional ones, but rather differentiated between the national and regional exercise of language rights. South Africa did not end up as a confederation of linguistically based states. Each province is multilingual, only some are more multilingual than others.

V. *The Problem of Policy and Practice*

Confusion often exists between language rights, language policy and language practice. Language rights are those rights that are protected by the constitution and by legislation. To the extent that they are guaranteed by the constitution, they have to be respected. The government has no choice in the matter.

Language policy is of a different order. It can change, reverse itself, be repealed or altered. The government has freedom to develop policy as it thinks best, provided it does so within the limits of constitutionality. Thus, there is great scope for negotiation and trial and error in relation to language policy, whereas rights are rights.

Language practice is yet one step further removed. The removal of Afrikaans from soft drink cans created something of a storm. The fact was that there could be no possibility of a constitutional right to have eleven languages on a soft drink can. This was a matter for civil society, not the government. Aggrieved consumers could slake their thirst in the language of their choice!

While the courts must always be there in the background to ensure that constitutional rights in relation to language are not violated, it is not their function to develop language policy or to make decisions about the most efficacious use of public funds in this respect. The separation of powers ensures that although courts are obliged to be wise, governments, provided they are not so thick as to behave illegally or improperly or violate fundamental rights, retain the right to be stupid.²

VI. *Coda*

The constitution-making caravan moved on and I became a judicial barking dog rather than a legislative driver. Passing over the bridge created for itself by the Interim Constitution, the Constitutional Assembly adopted a new text³ that was considerably more compact in relation to the eleven official languages, and somewhat more expansive in respect of other languages, including ancient indigenous languages and sign language. The text is set out in Appendix B.

Whether or not these provisions (together with the others dealing with language in the courts and in education) achieve the multilingual accommodation we seek, is a question for the future. We have tried hard for an appropriately South African solution. No doubt the Constitutional Court

2. This is a light-hearted way of saying that, provided the government keeps within constitutional limits, it is not the role of the Court to "second guess" its decisions.

3. See Appendix B.

will one day have to consider the implications of the final text. Until then, I remain silent on how I feel it should be interpreted; judicial reminiscences are acceptable, prognostications are not!

Appendix A: Provisions Related to Language in the Interim Constitution

CHAPTER 1

3. Languages

(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.

(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, Gujerati, 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. . . .

CHAPTER 3: Fundamental Rights

8. (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race,

gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. . . .

Language and culture

31. Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

Education

32. Every person shall have the right -
(a) to basic education and to equal access to educational institutions;
(b) to instruction in the language of his or her choice where this is reasonably practicable; and
(c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race. . . .

CHAPTER 7: The Judicial Authority and the Administration of Justice 107. Languages

(1) 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.

(2) The record of the proceedings of a court shall, subject to section 3, be kept in any official language: Provided that the relevant rights relating to language and the status of languages in this regard existing at the commencement of this Constitution shall not be diminished. . . .

SCHEDULE 4: Constitutional Principles⁴

X. Formal legislative procedures shall be adhered to by legislative organs at all levels of government.

XI. The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

XXXIV. 1. This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not

4. These principles had to be complied with in the drafting of the final Constitution.

be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.

2. The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.

3. If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions.

SCHEDULE 6: Legislative Competence of the Provinces

Language policy and the regulation of the use of official languages within a province, subject to section 3. . . .⁵

Appendix B: The Principal Language Clause in the Final Constitution

CHAPTER 1: 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.

5. This was one of the concurrent powers which the provinces shared with the national government.

(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 languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and

(ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.