Law and language: solution for multilingual societies

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1. Introduction

The legacy of the past is there. The continued dominance of Afrikaans and English is a case in point. It is indisputable that language is the repository of social, cultural and ideological values. It is for this reason and many others that the promotion of English as the language of record in court raised the discontent amongst academics, researchers and the public about lack of equal status that has been accorded to languages in South Africa by the South African Constitution. A common discontent is that African languages will soon become extinct.

The lack of tolerance to language diversity in South Africa is a national problem that needs urgent attention. This should not be perceived as a problem but as natural resources for the mutual enrichment, diversity, multilingualism, economic prosperity and national development.

It is therefore the aim of this paper to investigate the situation which exists in South Africa in which there are several official languages accorded by the Constitution but with only two, namely Afrikaans and English being given official recognition in the legislature, judicial and other official communiqué, in particular, the delivery of legal services, whether as judgments or legislation, has tended to ignore the interests and rights of other languages. This has resulted in the negation of the right to language and that of equality of every citizen as preserved by the Constitution.

The country's Constitution guarantees equal status of eleven official languages to cater for the country's diverse people and their culture. These are:

- Afrikaans
- English
- isiNdebele

- isiXhosa
- isiZulu
- Sepedi
- Sesotho
- Setswana
- siSwati
- Tshivenda
- Xitsonga

Other languages spoken in South Africa and mentioned in the Constitution are the Khoi, Nama and San languages, sing language, Arabic, German, Greek, Gujarati, Hebrew, Hindi, Portuguese, Sanskrit, Tamil, Telegu, and Urdu.

English is generally understood across the country, being the language of the law, business, politics and the media. *It is a compulsory subject in all schools, the medium of instruction in most South African schools and tertiary institutions*. It only ranks joint fifth out of eleven as a home language. As a home language, English is spoken by 10% of the South African population, every third South African is not white. According to the statistics, *8,2% of the South African population speaks English as a home language.*

A changing population requires changes in law enforcement. *With immigration in South Africa growing and increasingly dispersed,* academics, researchers and law enforcement practitioners are looking for ways to improve contact with people who cannot speak or understand English well.

This paper will attempt to find solutions for the following questions:

- What are the primary *banners* for the use of African Languages as languages of record and options thereof?
- Is the Constitution a *mere paper* with regard to *law making process*?
- Are there alternatives to the present position?

2. The primary *banners* for the use of African languages as languages of record.

In order to do their jobs effectively and safely, the enforcement personnel must be able to communicate with people they serve, including the growing number of immigrant communities that do not speak of any of South African languages including English.

Commentary on how language is used and abused in business, politics, and the law, and other areas of public life is important. You can think of this blog as a linguistic self-defense course in which we prepare ourselves to do battle with the force of linguistic evil.

There is a need to take steps to meet the language demands of the vast majority of the South African citizens. If we accept that language is a repository of culture, including legal norms and values, we may concede that the degree to which simplifying or making language complex for purposes of communication may not substantially affect the norms and values inherent in the language.

In principle, due process of law is satisfied when the accused person is given a fair hearing by an unbiased tribunal or presiding officer. In all fairness, the criminal justice system must afford the accused person the right to a fair trial which includes the right to understand and be understood in order to make full answers. Fairness and ones are fundamental values in our criminal justice system. Therefore the denial of the opportunity to acquire first hand information through language communication may well leave the accused with justifiable sense of justice.

It is the duty of the arresting officer or the presiding officer to determine whether or not the accused person understands or cannot be understood for reasons relating to language. The individual's right to use language of his or her choice is impeded by a further right to an interpreter in a case where it is practically impossible for him or her to be tried in the language he or she understands. It is submitted that interpretation is for the benefit of the accused, but practically, this right does not seem to be accorded to the accused person due to interpretation problems. Translation is viewed as a loss of meaning of words, rules and principles, both in verbal and written communication. It is accepted both nationally and internationally that translation is not one of perfection, but the right of the accused to interpretation is accorded in order to give the accused person the right to multilingual court proceedings.

The South African judicial approach to language rights has two dimensions. Firstly there is a view that the Constitution does not require that the accused should be informed in his or her native-language. It must be in the language which the accused understands. The second view is to the effect that the accused has the right to use his or her own language as long as that language is one of the official languages as entrenched in the Constitution.

Language cannot explain the whole of law, as the dimension of law exceeds any single explanation and any single cause. Language is one factor among many, and all this individual factors may well be weakened by the common nature of human beings.

In the American case of *Smith vs United States (113 S. Ct. 2050 (1993)* jurists engaged in substantially linguistic argumentation concerning a provision of drug laws according to which "whoever, during and in relation to any crime of violence or drug trafficking crime… uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentences to imprisonment for five years….."

The accused in this case was convicted and sentenced due to improper construction of the meaning of "using a firearm." The jury says that according to the "natural" or "ordinary" meaning of "use" the accused action constituted using a firearm. It was found that it was true in a literal way. But that it was not how normally "use" is interpreted in a sentence like "He used a firearm to scare off the burglars". The dictionary meaning of the word "use" was "to make use of" or "to employ". The Law dictionary meaning defines it as "to make use of, or "to employ", or "to carry out its purpose or action by means of".

It is acknowledged that misinterpretation and mistranslation can lead to wrong conclusions; they may grant mistrial, that is being vitiated by error, dismissal of confessions; a trial being unfair; thereby infringing the very purpose of interpretation and translation which is intended to afford the accused the right to multi-lingual court hearing.

In the case of *Intercity Property Referrals CC vs Computing (PTY) LTD and Another 1995 (3) SA 723 (W)* an arbitrator handed in his report on the issues in question. The report gave rise to controversy resulting in the applicant applying to the court to

declare it valid and binding while the respondent argued that the award was unenforceable and beyond arbitrator's jurisdiction. On proper construction of the award the court found that the arbitrator had not done beyond his jurisdiction and he answered the two questions submitted. The court held further that where more than one interpretation was possible, the one which resulted in an award being affective was to be preferred to one which rendered it meaningless. It further held that, in any event, if there were possible ambiguity which might arise from a simple reading of the award, it would be perfectly proper to have regard to the letter (second report clearing the first report) written by the second respondent (the arbitrator) which was entitled to be given full evidential weight and which made it clear that the award had dealt with the questions submitted. The court held further that a judge could explain those things which are nebulously stated in the judgment and thus amend words as long as the drift of the judgment remained.

The main message delivered from this judgment is that a judge or an arbitrator can elucidate ambiguities from his judgment or his award despite the misunderstanding created by such a judgment or award and problems created by language in legal drafting. The trend of our case law indicated lack of trust for the community on how courts interpret the law.

Frankel Marx Pollak Vinderine INC vs Menell Jack Hyman Rosenbrg & CO INC and Others 1966 (3) SA 355 (A) the court held that where an arbitrator has not given any reason for the orders made in his award, the interpreter is initially confined to the language of the orders. If, however, uncertainty as to the meaning of the judgments or awards, or one of them, emerges from a consideration of the language used, the recourse may be had to the extrinsic circumstances.

In *Walele vs City of cape Town and Others (unreported case)* the descending judge found that the word "recommendation" in section 6 of the Building Standards Act should not be read to require a written report from the building Control Officer. Further held that the City's proof approach, in which the various departments signed off on the compliance of the plan with applicable laws and regulations, satisfied the requirements of the Act.

It is in this context that our legal language should be reformed for the benefit of the vast population of South Africa. The purposive interpretation as a developed new trend to interpret legal language might not be the immediate solution to the ordinary South Africans.

While there are shared trends away from literalism towards contextual analysis and from the "plain meaning" approach to "purposive approach", some recent studies have suggested simpler expression of legal language. There are arguments for plain and simple legal language. One of them is that in the history of colonial and imperialist's domination in Africa, language was a major tool used in the imposition of the values of domination and subordination. As it will be indicated below, language may deprive one of his or her rights. In the analogy of one sheriff, language barrier could cost someone his or her life. Hence the problem of complicated language in the administration of justice has been identified as a major target for reform or transformation.

Once language in multi-lingual society such as South Africa is made plain and simple enough to ordinary people to comprehend and relate to and law in general i.e. written and unwritten; official and unofficial; statutes and common law private and public law; customary and indigenous laws, problems such as stated above i.e. case law, will be elevated. A large part of work of judges and lawyers is interpreting disputed written words such the case in Intercity Property Referrals where an arbitrator has to interpret an agreement between the parties. The contested statutes and contracts represent the complexity of our legal system. Sometimes the words of a statute have a plain and straightforward meaning. But in most cases, there is some ambiguity of statutes or vagueness in the words of the statute that must be resolved by the judge. To find the meanings of statutes, judges sue various tools and methods of statutory interpretation, including traditional canons of statutory interpretation, legislative history, and purpose.

The issue of mother tongue legal system like so many other social issues has in South Africa unfortunately been politicized and is consequently more problematic than elsewhere. The problem of multilingualism has different aspects: to be able to join the mainstream of modern urban life, native African speakers need to acquire at least one, often two European- based languages. Educational institutions based on common culture, language or religion may be established in order to promulgate an own, African education

that would equip the native speaker with the tools to adapt to an "Africanized" technological and media- controlled era would require the adaptation in South Africa alone of about eleven languages to this era and its specialized vocabulary.

The complexity of the legal system maybe address by making the language plain and simple.

3. The Constitutional implications on Law and language in multilingual society.

It may well be that language implications do not infringe only the right to language as provided in the constitution, but also other constitutional rights. It is the aim of this paper to investigate as to whether the constitution is just a mere paper or it serves its purpose which is to be the supreme law of the country.

The following rights are affected by language use:

3.1. The right to language and culture

The Bill of Rights provisions relating to language and culture and to education, also require that every person shall have the right to use the language and to participate in the cultural life of his or her choice.

Language use in law infringes the right of everyone to his or her own language as entrenched under section 30 of the Constitution of South Africa 108 of 1996. This section provides that "everyone has the right to use the language and participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights." The language rights of everyone and to freely enhance the cultural life of his or her own by using his or her own language are infringed. It is acknowledged that language is a repository of social, cultural and ideological values.

The Bill of Rights provisions relating to language and culture, and to education, also require that every person shall have the right to use the language and to participate in the cultural life of his or her own choice. Language rights are regarded as basic rights and for the preservation and existence of linguistic communities in which everyone is a member.

3.2. The right to life, liberty and security of a person.

In Canada section 14 of the Charter on the right to interpretation is read with section 7 relating to the right of life and liberty of a person. This is equality so in South Africa. Section 35(3) (k) of the Constitution which provides that "every accused has right to fair trial, which includes the right to be tried in a language that the accused person understands or, if that is not possible, to have the proceedings interpreted in that language," is read with section 11 relating to life and section 12 relating to freedom and security of a person. As a result, the use of any language other than the language of person affected by law enforcement mechanisms will probably have a negative effect against these fundamental rights.

A good example in already stated in an American case of Smith v United States, where the jurists came to a wrong conclusion because of the interpretation given to a certain statutory provision and convicted that person, thereby infringing her right to her freedom and security. As it is already indicated above, language barrier can cost someone's life.

3.3 The right to administrative justice

The right to administrative justice is provided under section 33 of the Constitution of South Africa. When one looks at this provision, one may give it one interpretation: the judicial scrutiny over administrative actions. But the interpretation is too broad to cover the situation where the judiciary must administer justice by granting the accused a fair trial or organs of the state acting fairly towards the public. This clause was included in the Constitution to ensure administration of justice by law enforcement agencies. Not only in the context in which it is commonly understood, which is to review administrative actions, but also that law enforcement agencies must administer justice by according the linguistic communities their rights to language. It is acknowledged that law enforcement agencies are intuitions of administration of justice.

By affording everyone his or her right to language, these agencies would have administered justice as required by international human rights instruments on language rights and therefore the legal system will be perceived as accessible and legitimate to the public. The use of any other language other that the one used or understood by the person upon whom a legal action is to be administered, certainly infringes the right of everyone to administrative justice. The Constitutional provision on administrative justice imposes a duty on law enforcement agencies to act fairly where the right or legitimate expectations are threatened or affected. The priority given to administrative justice is also evident in *S vs Zuma and Others (1995 (4) BCLR 401 at 409G-H* in which it was stated that the state of affairs must seriously prejudice the general administrative justice as well as the interest of numerous accused persons affected.

3.4. Access to Court

The right to access to court is provided under section 34 of the Constitution of South Africa. This section provides that "everyone has the right to have any dispute that can be resolved by the application of law decides in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". The section was intended to protect the fundamental rights in Chapter 2 of the Constitution.

In short then, the inclusion of section 34 was to ensure administrative justice via law enforcement agencies. This right to access to court ensures access to courts whereby persons will effectively exercise their rights as accorded by Chapter 2. Courts are important fora where realities of language rights or absence are put on display. Any law enforcement agency must be the guardian of enforcement of rights.

3.5. The right to equality

The right to equality is provided under section 9 of the Constitution of South Africa. Section 9 (1) is of significance to this paper because it also forms the basic value of the constitutional era. It provides that "everyone is equal before the law and has the right to equal protection and benefit of the law."

The denial of the right to language infringes everyone's right to equal protection of the law. All law enforcement agencies must ensure equal protection of law the citizens of South Africa.

It is worth noting that "equality" is provided as both a right and a constitutional vale. It is therefore important that our law enforcers accord everyone equal protection of the law and equal benefit of the law. Fundamental right can only be exercised through equality.

The ideal of making the language in which law is expressed plain and simple is to make it easy for ordinary people. There are in fact tensions between the apparent requirements of "mass justice and procedures that may provide a finished product of a great, beauty, but entail an immense sacrifice of time, money and talent."

The constitutional court in *Shilubana and Others vs Nwamitwa (unreported case: cct 3/07)* stated that courts must balance the need for flexibility and the imperative to facilitate development against the value of legal certainty and respect for vested rights. Relevant factors for this balancing test include the nature of the law in question, in particular the implications of the change on the constitutional and other legal rights, the process by which the alleged change occurred or is occurring, and the vulnerability of parties affected by the law.

It is important, therefore, that in interpreting or giving meaning to the constitutional provisions as mentioned above, the numeral language requirements in the Constitution are to be taken into consideration. The domination of legal and constitutional discourse in South Africa by English and Afrikaans speaking institutions and personalities has led to very narrow conceptualization and understanding of these constitutional provisions.

4. Solutions to problems created by language use in multi-lingual societies

It is common course that law enforcement agencies around the nation are dealing with unfamiliar languages as they work to ensure public safety. When language barriers prevent residents or immigrants from, say reporting a crime or describing a suspect, it becomes harder for the officers to provide protection or gather information. Officers

confirmed that language discordance is their biggest challenge when serving the communities speaking different language that they speak. That language barriers make it very frustrating to get their work done.

In complex societies of today there will always be division of labour and only a small segment of society can specialize in law and administration. However, the need to make the law easy to understand, accessible and just in its content and function is matter that the entire society has an interest in and should participate in. It is possible to ensure language access in multilingual society. For public safety and social service agencies, the challenge of communicating and building trust with immigrants in South Africa can be immense. The ultimate goals are to increase government department's ability to communicate and serve, to develop strong, trusting relationships with the linguistic communities and to ensure that officers do their jobs effectively.

The following are few innovative approaches that are currently being used by law enforcement agencies

- *Linguistic communities*

Write legal documents in the prevalent language spoken by the community you serve. If in the case of Interciti Property Referrals CC , above, the arbitration agreement between the applicant and the respondent was written in their own language, the dispute might not have arisen. Similarly if the arbitration was written in the parties own language, the meaning of the award would not have come in the picture.

Simplifying and making the law plain to the public for the purpose of communication may not substantially affect the norms and values inherent in the language.

- *Monolingual court proceedings*

In the process of transforming administration of justice in multilingual South Africa, this alternative will solve the problem of complicated language; harmonize language diversity only if African prosecutors, magistrates judges and all other court

officials speak the language prevalently used in the communities they serve. This sentiment was echoed in the case of *S vs Matomela 1998 (3) BCLR 339 (CK)* wherein the court indicated that more and more judges and magistrates whose mother-tongue is one of the official languages are finding their way on South African benches.

The court proceedings will be more accessible and participatory.

- *Interpreters in multilingual jurisdictions*

It is well known phenomenon that interpretation is likely to remain, at least for sometimes though extremely poor in South African courts. In the USA it is acknowledged that misinterpretation is detrimental to the interest of justice. It is submitted that section 35(k) of the Constitution of South Africa grants the accused the right to a fair trial in the language of his or her choice even if that language is one of the official languages. That this section means that if the court is sufficiently conversant with the language of the accused person to conduct the trial in that language, the proceedings should be conducted in that language. But that the right to a fair trial will not be violated if the proceedings are not conducted in a language of the accused choice, provided that the proceedings have been interpreted to the accused.

Interpretation has its own advantages and disadvantages. The most common disadvantages are that a. it promotes one language over another; b. it leads to wrong conclusions. See case law above; c. it leads to interpretation errors; d. messages are not correctly conveyed; e. it delays the proceedings; e. it is expensive. Advantages of interpretation include among others, a. it promotes of other languages; b. it provides easy communication in multi-lingual societies; c. it makes appeals and reviews more easily; etc.

Law enforcement agencies such as police or sheriffs may use “ad hoc” interpreters for the purpose of public safety. Studies have shown that training interpreters and employing bilingual law enforcement personnel is another alternative to overcome language barriers. Interpreter training may include information about how to conduct oneself during interpretation.

- *Know who you are serving*

It is also suggested that information on language spoken at home and education level of the people of your command area will assist you in the execution of your duties.

Studies have shown that to be effective in fighting crime and protecting residents, a law enforcement agency needs to understand the changing demographics of the communities in its jurisdiction, information about residents' characteristics and the languages they speak can help the agency make more informed decisions about allocating resources and recruiting and deploying staff. A growing number of police departments across the country are also finding it helpful to collaborate with their local city planning agency to collect map this kind of data on an ongoing basis.

- *Develop language policies*

Our present policy requires that proceedings be conducted in English or Afrikaans. The policy also confirms that legal documents be written in English and Afrikaans. It confirms that communication in politics and business be in English. It is the submission of this paper that for administrative purposes, one or more languages may be designated as languages in which court proceedings must be recorded or other communiqués. The suggestion on language widely used in a specific area could carry out the provisions of section 6 (1) of the Constitution even provinces are not obliged to do so under this section. This section provides that "the official languages of the Republic are Sepedi, Sesotho, and Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. As already indicated in the introduction there are other languages in South Africa that are mentioned in the Constitution due to the increasing immigrants in the county. It is suggested that departments should undergo a planning process to develop language access policy and protocol guidance. That law enforcement agencies operate within a culture of policies and procedures. A written language access policy can guide officers and civilian staff on how and when to use language services.

- *Monolingual educational institutions*

One of the reasons for continuing with this procedure is that law is studies in English at tertiary institutions. Section 29 (2) of the Constitution provides that every one has the right to receive education in the official language or language of their choice. As already indicated educational institutions based on common culture , language or religion may established in order to promulgate an own, African education that would equip the native speaker with the tools to adapt to an "Africanized technological and media-controlled era would require the adaptation in South Africa alone of about eleven languages to this era and its specialized vocabulary.

- *Bilingual personnel*

Bilingual police department interpreters, private language service companies, law enforcement terminology enhances language proficiency amongst institutional personnel. Encourage officers to use their language skills

- *Develop legal terminology in African languages*

The reason why court proceedings and legal documents cannot be conducted or written in African languages is that there is no legal terminology in African languages. Therefore there is need to develop legal terminology in African languages.

- *Appoint African judges to appeal courts*

One of the reasons for not using the accused language in court is that judges of appeal and review cannot speak African languages. Appointment of African judges of appeal will solve the problem. See Matomela's case as well.

- *Assessors*

The use of assessors is an immediate solution to the language problems. In court proceedings where the assessor's mother tongue is used, those assessors could be utilized in order to comprehend what the accused or witness's testimony, or could read legal provisions that are written in their mother-tongue.

- *Plain and simple language*

There is a strong argument for plain and simple language for purposes of legal communication.

- *Personnel training on language access*

Law enforcement agencies provide language access training to their staff in order for them to do their job effectively.

- *Public education on language access*

Studies have shown that it is important to inform the public about your agency's language access policy and language assistance services, e.g.:

- *An adequate network of accessible and orientated court*

- *An integrated and coherent system that is expeditious, effective inexpensive and responsible to the needs of the users*

- *An independent judiciary and personnel who are professional, representative and sensitive to especially, race, gender and children's issues*

- *Law enforcement agencies may be informed about language access tips, tools and practices*

- *Developing a language policy for interacting with the community you serve.*

5. Conclusion

It should be noted that language is the means of communication, self-fulfillment and is upon which with minorities finds expression and domination. Lack of linguistic equalities will always cause inconveniences and inconsistent with the expectations of the broad masses of the society. One is bound to conclude that the system of justice perpetrates the mass injustices in South Africa and elsewhere.

Our legal system is based on reality, certainty and consistency. Procedure is perceived as a neutral devise facilitating decisions embodying these elements. There is general discontent that African languages are undermined in all spheres of government and commerce.

If the law remains or is perceived to be an institution for the erection and maintenance of extreme forms of inequalities, it is doubtful whether the simplicity in language of such law and the accessibility of the processes of administering it would be popular with the broad masses on the society.

Perhaps through the suggested solutions above, the discontent about injustices caused by language barriers may be minimized.