

The discretionary nature of the official language clause of the Constitution

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Samevatting

Die diskresionêre aard van die amptelike taalklousule van die Grondwet

Die mees onderskeidende eienskap van die amptelike taalklousule, soos dit in veral artikel 6(1) tot 6(4) van die Grondwet vervat is, is die diskresionêre aard daarvan. Hierdie kwessie word met verwysing na elkeen van die vier tersaaklike subartikels ontleed. Die besondere diskresionêre aard van die taalklousule tree eweneens op die voorgrond wanneer dit met die taalklousules van al die voorafgaande Suid-Afrikaanse grondwette vanaf die Zuid-Afrikawet tot die tussentydse grondwet van 1993 asook met tersaaklike buitelandse reg vergelyk word. Die vorige grondwette het nie alleen amptelike status aan die eertydse twee amptelike tale – Engels en Afrikaans – verleen nie, maar boonop die daadwerklike gelyke amptelike gebruik van die tale in staatsake voorgeskryf. Dit het nouliks enige beweegruimte vir 'n diskresie met betrekking tot die behandeling van die amptelike tale gelaat. Daar kan ook na talle buitelandse regsbedelings met betrekking tot taal verwys word, wat by wyse van grondwetlike en gedetailleerde wetgewende bepalings die taalregte van individue en die taalbelange van gemeenskappe omvattend beskerm. In die onderhawige bespreking word daar in die besonder na die Kanadese en die Belgiese reg in hierdie verband verwys. In teenstelling met die eertydse plaaslike bepalings en die tersaaklike buitelandse reg, word al die tersaaklike subartikels – artikels 6(1) tot 6(4) van die huidige Grondwet – gekenmerk deur vaag en wyd-geformuleerde bepalings wat die uitwerking het dat 'n diskresie deur staatsorgane wat met die amptelike tale gemoeid is uitgeoefen word. Die wyse waarop hierdie diskresie uitgeoefen word, is in die finale instansie bepalend vir die wyse waarop die amptelike tale behandel word en derhalwe vir wat amptelike taalstatus in konkrete terme vir elkeen van die amptelike tale beteken, en het oor die afgelope anderhalf dekade tot grootskaalse amptelike verengelsing gelei. Teen hierdie agtergrond het 'n omvattende taalwet dringend noodsaaklik geword.

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1 Introduction

This article discusses the official language clause in section 6 of the Constitution of the Republic of South Africa, 1996, and aims to expose the distinctive nature of the clause. This distinctive character becomes particularly clear when the clause is compared with the language clauses of previous South African constitutions and with the constitutional and legislative provisions relating to the use of languages in other multilingual states. It will be observed that the most salient characteristic of the present official language clause is its discretionary nature and this discussion will highlight the most crucial consequences of that discretion. The present official language clause dispenses with the clear and unequivocal constitutional injunctions of previous constitutions and replaces them with vaguely formulated principles and injunctions on how to deal with the official languages. This stands in stark contrast with the clear, unequivocal and detailed constitutional and legislative provisions in other multilingual states, some of which will be discussed in this article.

The discussion begins in section 2 with an overview of the language clauses of previous South African constitutions. Section 2.1 focuses on the three constitutions since the establishment of the Union of South Africa in 1910. This is followed in section 2.2 with a discussion of the official language provisions of the interim constitution of 1993. This forms the immediate backdrop of a detailed discussion of section 6 (the official language clause) of the present constitution. The official language clause is discussed with reference to subsections (1) to (4). Section 6(5), which deals with the Pan South African Language Board, is not pertinent to the present topic and is not discussed. The discretionary nature of the present official language clause is already apparent from this comparison with its predecessors. The fourth section of the article places the language clause in international perspective by making a comparison between the present official language clause and the official language dispensation of some other jurisdictions, in particular those of Canada and Belgium. This comparison also confirms the discretionary nature of the language clause of the South African constitution. It is argued that the official language clause is fundamentally flawed as a result of its discretionary character. From a legal point of view this is the main reason for the rampant and amplified Anglicisation that has occurred in South Africa since the constitution took effect in 1997. This malady can only be rectified by a comprehensive and detailed official languages act.

2 The language clauses of previous South African constitutions

2.1 *Actual equal treatment of the two official languages – the official language clauses from Union to 1994*

The legal instrument that created the Union of South Africa as a unitary state in 1910 was the South African Act of 1909. The South African Act was a statute of the British Parliament, which also served as the first Constitution of the Union. Section 137 of the South African Act provided as follows with regard to the country's official languages:

Both the English and the Dutch languages shall be official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom rights and privileges; all records, journals and proceedings of Parliament shall be kept in both languages, and all Bills, Acts and notices of general public importance or interest issued by the Government of the Union shall be in both languages.¹

Through this provision a dispensation of actual equality between the two official languages was established as one of the cornerstones the Union of South Africa. Afrikaner nationalists were prepared to enter into the unitary state only on condition that the constitution made provision for this equality. General JBM Hertzog, the most prominent nationalist leader of the time and a lawyer by profession, centred all his attention during the negotiations for the South African Act, on a careful and – for the nationalists – acceptable formulation of the language clause. This gave rise to the formulation of section 137 of the Act.² The importance of the language clause was underscored by the fact that it was one of a small handful of clauses in the South African Act that was constitutionally entrenched and that could only be amended with the support of at least two thirds of the total number of members of the two houses of parliament sitting together.³

Section 137 was replaced by a substantively similar provision in section 108 of the 1961 constitution, which replaced the South African Act.⁴

Section 89 of the 1983 Constitution substituted this provision but once again regulated the official languages in the same terms as its predecessors. Having

¹Section 1 of the Official Languages of the Union Act 8 of 1925 provided that the word 'Dutch' in s 137 of the South African Act is declared to include Afrikaans with retrospective effect from 1910-05-31 (when the South Africa Act took effect.)

²Van den Heever *Generaal JBM Hertzog* (1943) 267-269.

³Section 152 of the South African Act.

⁴Republic of South Africa Constitution 32 of 1961. Section 108 provided:

- (1) English and Afrikaans shall be the official languages of the Republic, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights and privileges.
- (2) All records, journals and proceedings of Parliament shall be kept in both the official languages, and all Bills, Acts and notices of general public importance or interest issued by the Government of the Republic shall be in both the official languages.

provided in section 89(1) for English and Afrikaans as the two official languages that had to be treated on an equal footing, section 89(2) proceeded as follows:

All records, journals and proceedings of Parliament shall be kept in both the official languages and all bills, laws and notices of general public importance or interest issued by the Government of the Republic shall be kept in both the official languages.⁵

The common feature of all these language clauses was that they provided, in unequivocal terms, for the actual equal treatment by the state of the two official languages. The two languages had to enjoy full equality in the government's dealings with the public and there was no trace of a legislative or executive discretion that could detract from the injunction of actual equal treatment.

Mention should also be made of the official language provisions of the constitutions of the four *states* (referred to in this article as black homelands), namely the Transkei, Ciskei, Bophuthatswana and Venda, that emerged under the policy of apartheid (separate development) pursued by the National Party after 1948. The constitution of Transkei⁶ provided that Xhosa was the official language and allowed for Sesotho, English and Afrikaans also to be used for legislative, executive and administrative purposes. Section 8 of the constitution of Ciskei⁷ provided for English and Xhosa as the official languages and that the two languages had to enjoy equal recognition. Section 5 of the constitution of Bophuthatswana⁸ provided for Tswana, English and Afrikaans as official languages. The official languages of Venda were Luvenda, English and Afrikaans.⁹ When the black homelands were formally re-incorporated into South Africa in 1994 these provisions were temporally stabilised in the non-diminishment clause provided for in section 3(5) of the interim constitution, which is discussed in 2.2 below.

2.2 From two to eleven official languages and the transition away from the equality of the two to equitability of the eleven – the language clause of the interim constitution of 1993

The interim constitution of 1993¹⁰ brought white minority rule which, from 1910, was one of the cornerstones of the South African state, to a close. In section 3,

⁵Republic of South Africa Constitution 110 of 1983.

⁶Republic of Transkei Constitution Act 15 of 1976. On the question of the use of the languages for legislation this constitution provided as follows in s 41:

A bill shall become law on being assented to by the President and the secretary of the Assembly shall cause a copy of the Act in the Xhosa language (together with copies thereof in English and Sesotho) to be enrolled in record of the office of the registrar of the Supreme Court of Transkei and such copies shall be conclusive evidence of the provision of such law.

⁷Republic of Ciskei Constitution Act 20 of 1981.

⁸Republic of Bophuthatswana Constitution Act 18 of 1977.

⁹Section 5 of the Republic of Venda Constitution Act 1979.

¹⁰Constitution of the Republic of South Africa 200 of 1993.

its elaborate language clause, the constitution abolished the longstanding dispensation – and the other cornerstone of the then South Africa – of two official languages and replaced it with a new dispensation that provided for eleven official languages, namely, Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.¹¹

The introduction of eleven official languages made it impossible to deal with these languages on the basis of actual equal treatment as was the case in all the previous constitutions up to 1994. Government simply does not have the means to achieve actual equal treatment for all eleven languages. Moreover, it is doubtful whether all the official languages have the vocabulary required for official use. Hence, the erstwhile equality principle could not be retained. Alternative formulas had to be found to take its place. The new – transitional – principles of the language clause of the interim constitution were of a two-fold nature. Firstly, it laid down the principle of *aspirational* equality and, secondly, it introduced two non-diminishment clauses to stabilise the position of Afrikaans and English (and the official languages of the dismantled black homelands within their erstwhile territories) for the duration of the interim constitution.

2.2.1 Aspirational equality

Having declared the eleven languages as official, section 3(1) of the interim constitution further provided that ‘... conditions shall be created for their development and for the promotion of their equal use and development’.

This provision acknowledged that it would be impossible to treat all the languages equally. However, it strove, in the words of the subsection, towards equality through the conditions that had to be created so that equal use and enjoyment could eventually be achieved. Actual equality was therefore not provided for as a principle that governed the treatment of the official languages, but equality was posited as a constitutional aspiration. The same aspiration featured in the two non-diminishment clauses (s 3(2) and s 3(5)) that are now discussed.

2.2.2 Non-diminishment clauses

(a) The interim constitution had two non-diminishment clauses – in sections 3(2) and 3(5).

Section 3(2) read:

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

¹¹The same eleven languages are also the official languages in terms of s 6(1) of the present constitution – the Constitution of the Republic of South Africa, 1996. The present constitution describes some of the languages somewhat differently, however. Sepedi was, eg, referred to in the interim constitution as Sesotho sa Leboa. In this article I am using the designations of the present constitution.

languages existing only at regional level, to be extended nationally in accordance with the principles set out in subsection (9).

This non-diminishment clause in the first part of this subsection pertained to the position of English and Afrikaans. For the duration of the interim constitution it basically retained the position which these two languages enjoyed under the 1983 constitution. Hence, the actual equal treatment of English and Afrikaans in terms of all the previous constitutions had to be maintained under the interim constitution.

(b) The second non-diminishment clause was provided for in section 3(5). It read:

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.

In this subsection the non-diminishment clause featured as a proviso in the second part of the provision concerned. It related to the rights and status of the official languages in the provinces and clearly pertained to the position of official languages in the territories of the former black homelands, which were now located in the various provinces. According to this provision legislative arrangements of provinces had to respect the existing rights and status of official languages that had been in force when the interim constitution took effect. The provisions of the constitution of the former Ciskei, which provided for English and isiXhosa as the official languages, therefore had to be retained in the territories that constituted this former black homeland (the provinces of the Eastern Cape and the Western Cape). Additional official languages could be introduced, but the rights and status of these two languages had to be retained. The same applied to the official language arrangements of the other former black homelands in terms of their various constitutions as reflected in 2.1 above.

The principle of non-diminishment also featured in section 3(9)(f) of the interim constitution which provided that legislation, as well as official policy and practice in relation to the use of languages at any level of government, had to be subject to and based on a number of principles including the non-diminution of rights relating to language and the status of languages existing at the commencement of the interim constitution.

2.2.3 Specific duties upon the state in relation to the official languages

The interim constitution contained some provisions, notably sections 3(3), 3(6) and 107(1) that created language-related rights for members of the public in their

dealings with the state and within the context of criminal and civil litigation. These provisions placed obligations upon the state to act positively to create the necessary conditions within the state administration and the courts to make it possible that these rights could be exercised. It implied, amongst other things, that a human resource policy had to be followed that would enable members of the public to communicate and be communicated with in their preferred language. This aspect is discussed in 3.6 below, where a comparison is made between the position as provided for by these provisions under the interim constitution and the current position under the 1996 constitution in which provisions of this kind fell by the wayside.

3 The final demise of actual equality in favour of legislative, executive and administrative discretion – the official language clause of the 1996 Constitution

The present constitution has decisively parted with the equality principle in relation to the treatment of the official languages. There is no requirement for the equal treatment of the official languages and, as Currie noted, it '... does not even repeat the Interim Constitution's promise of prospective equality'.¹² It is also significant that the non-diminishment clauses of the interim constitution, which, as indicated in 2.2, provided for the continued equal treatment of English and Afrikaans, also did not find favour with the Constitutional Assembly which drafted the present constitution and were not taken up in the present official language clause. The process of removal of the equality principle, which started with the interim constitution, has therefore finally run its course with the passing of the present one.

The official language clause of the present constitution is now essentially construed on a discretionary basis – a legislative and executive discretion to be exercised by whoever might be dealing with the official use of the official languages. The discretionary nature of the official language clause runs through all four of the first subsections of section 6 that deal with the material aspects of the present official language dispensation. In the remainder of this section of the article I shall indicate why this is the case.

3.1 *The effect of official status*

Official status of a language suggests that such language is used in the legislative, executive and judicial business of government.¹³ According to a socio-legal approach

¹²Currie 'Official languages and linguistic rights' in Woolman *et al Constitutional law of South Africa* (2005) 65-66; Henrard 'Language rights and minorities in South Africa' (2001) *International Jnl of Multicultural Societies (IJMS)* 83 also finds the departure from the erstwhile equality principle striking.

¹³Currie (n 12).

it is convincingly argued however that a language is only truly official if it is actually and moreover regularly used for conducting governmental functions. Hence, affording official status to a language does not necessarily signify anything about its actual official use. Fasold stated that a language will not be regarded as official merely because there is a national law or a section of a constitution that says so: 'Rather, a language will be judged as official only if it actually operates as an official language in a country'.¹⁴ Turi holds a similar view when he states:

As such, making any one or more designated languages official does not necessarily entail major legal consequences. The legal sense and scope of the idea of an official language will depend upon the effective legal treatment accorded to the language concerned. In certain instances, to make one or more designated languages official in a given political context is only declaratory by nature, and consequently non-executory, and therefore has nothing more than a psychological impact, which should not be ignored, however.¹⁵

Fernand de Varennes similarly explains that although official language status signals that the use of such language is provided by law, the exact scope of a right to use any official language can always be subjected to various limitations and considerations.¹⁶ He notes that in Canada, for example, the official status of a language in the constitution is regarded as a political declaration which had to be developed in other constitutional or legal provisions.¹⁷

It should be clear that official status might possibly serve no more than symbolic purposes. The large number of eleven languages that has official status in South Africa already suggests that 'officiality' has a symbolic meaning rather than that their actual (equal) use is mandated. This is so because it is not financially and administratively feasible, if not entirely impossible, to use so many languages regularly on a national scale for the majority of governmental functions. The larger the tally of languages that enjoy official status, the more difficult it becomes to actually use all of them on a regular basis. For that reason affording official status to so many languages constitutes either a symbolic measure or a move of political strategy.¹⁸

¹⁴Fasold *The sociolinguistics of society* (1984). See also Cooper *Language planning and social change* (1989) 101.

¹⁵Turi 'The importance of the conference theme: Language and equality' in Prinsloo *et al* (eds) *Language, law and equality. Proceedings of the third international conference of the International Academy of Language and Law (IALL)* (April 1992) 8.

¹⁶De Varennes *Language, minorities and human rights* (1996) 174.

¹⁷*Id* 174. De Varennes says this with reference to the judgment of the Canadian Supreme Court in *Société des Acadiens du Nouveau-Brunswick v Association of Parents for Fairness to Education* (1986) ISCR 549 (Canada). De Varennes argued however (177-178) that the official status of a language can never be construed in such a way as to permit organs of state to infringe basic human rights.

¹⁸In the assessment of Johnson *South Africa's brave new world: The beloved country since the end of apartheid* (2009) 370 the policy of eleven official languages was necessarily hypocritical. The

In order to judge whether a language with constitutionally afforded official status is genuinely official, or, stated differently, in order to establish what is really meant by constitutionally afforded official status in given circumstances, two further factors need to be considered:

- Firstly, whether there are additional constitutional (or other) provisions that regulate the actual official use of the languages. (The official language clauses in the three South African constitutions for the period from 1910 to 1994 are good examples of provisions that regulated the actual use of the official languages.)
- Secondly, the actual practical use of such languages.

The results of such inquiries will reveal whether a language is in fact official (in actual terms) and, depending on the extent and regularity of its official use, to what extent it is truly an official language.¹⁹ (The present discussion, which focuses on the constitutional provisions regarding the official languages, involves the first aspect.)

Against this backdrop, it is clear that the fact that the eleven languages of section 6(1) of the Constitution enjoy official status does not in itself indicate whether, or to what extent, these languages are truly official. To that end the other provisions of section 6 need to be considered. Do these provisions lay down detailed measures on the actual official use of the languages or are they rather inclined towards conferring decision-making powers on the actual official use of the languages upon organs of state and other state functionaries? Do they create any language-related rights for members of the public as section 3(3) and 3(6) of the interim constitution suggested (see 2.2.3 and generally 4 below) or are no such rights included in the constitution or in legislation? The point is that the declaration of eleven languages as official, without clear additional supporting injunctions on how that official status should be applied in practice, has in itself a discretionary content, since the actual impact of the official status will be determined by legislative, executive and administrative decision-makers. In the absence of additional provisions fleshing out the meaning of official status, the

French were worried, noted Johnson, that the introduction of a third official language would necessarily mean that English would become the sole official language of the EU. They were basically right as English is now the dominant language of the EU. If three languages practically lead to a single official language, then eleven would obviously and even more overwhelmingly tend to produce a single official language dispensation. The present mounting Anglicisation corresponds with the prediction made by Jaap Steyn. See Steyn 'Die taalstryd in die oorgangstyd: Gesindhede teenoor Afrikaans 1990-1994' (April 1995) *Stilet Supplement* 1:16.

¹⁹The notion of the degree to which a language is official is in step with what Fasold (n 14) 72-73 refers to as the continuum principle. The question as to whether or not a language is official is therefore not answered by a simple 'yes' or 'no' depending on a constitution having declared it official or not. On the contrary, *officiality* is in the final analysis rated on a continuum depending on its actual use for governmental purposes.

concrete meaning of official status depends on the way officials who deal with the official languages exercise their discretion. Depending on how they exercise their discretion, *official* assumes a meaning according to the position of the language in question on a continuum: it can on the one extreme be either very significant, or, on the opposite extreme, be entirely devoid of any practical content. Against this backdrop it is imperative to analyse the other provisions of section 6.

3.2 Parity of esteem and equitable treatment – and the abolition of the non-diminishment clauses and aspirational equality

The dual principle – if one can call it a principle – of *parity of esteem and equitable treatment* in the second part of section 6(4) may be regarded as the substitute for the defunct equality principle. (The first part of s 6(4) provides for self-regulating measures to be adopted by the national and provincial governments and is discussed in 3.4.) *Parity of esteem and equitable treatment* have general consequences for the treatment of the official languages, and, as the discussion will show, the other more specific provisions of the official language clause are broadly in step with, and informed, by it. The principle established the essential discretionary nature of the present official language clause and, moreover, it also highlights the final parting with the equality principle of the language clauses of all previous South African constitutions. Section 6(4) provides as follows:

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.

As noted in 2.2 the introduction of eleven official languages rendered the principle of actual equal treatment of the (previously two) official languages obsolete as it would be impossible to deal with all eleven languages on the basis of actual equality. The unfeasibility of the equality principle was already apparent with the first introduction of eleven official languages by the interim constitution in 1994. The non-diminishment clause of section 3(2) of the interim constitution therefore restricted the equality principle to the equal treatment of English and Afrikaans. It further diluted the old equality principle by *aspirational* equality as explained in 2.2. While the equality principle was therefore only retained with regard to the position of Afrikaans and English by the non-diminishment clause in section 3(2), this principle was for the rest – all the newly introduced official languages – abolished.

The present constitution repealed these last vestiges of the principle of equal treatment. The non-diminishment clauses were not taken up in the present constitution and there is no trace anymore of the *aspirational* equality of the interim constitution. Currie is clearly correct in his observation that the present

constitution '... avoids any language that might give rise to a claim that the official languages must be treated equally'.²⁰ Where Afrikaans speakers, relying on the non-diminishment clause under the interim constitution, could still insist that Afrikaans be treated on an equal footing with English, the final abolition of the equality principle now makes this impossible.²¹ The non-diminishment clauses and aspirational equality were therefore sunset clauses – transitional arrangements – of the same interim nature as the interim constitution itself.

Parity of esteem clearly does not mean the same thing as the equal treatment provided for by the earlier constitutions. It represented quite clearly, as Du Plessis and Pretorius correctly pointed out, a subtle but clear paradigm shift regarding language rights in South Africa.²² Having departed from the equality principle, the present constitution allows for the opposite, namely, for unequal treatment. Parity of esteem makes it constitutionally possible for the first time since Union, Currie rightly notes, for the business of government to be conducted in languages other than English or Afrikaans.²³ It might be argued that the total exclusion of the use of an official language for the business of government is inconsistent with the criterion of equitability and that there must at least be a *bona fide* attempt to ensure that all the official languages are used regularly in all aspects of the business of government.²⁴ However, a constitutional foundation for actual equal treatment has disappeared under the present constitution. Rautenbach and Malherbe argued that the requirement of parity of esteem disallows the use of only one official language as a so-called anchor language, ie the consistent use of only one language for legislation (or other official purposes), compared to others that are only rotationally or sporadically used.²⁵ The problem is that equitability (instead of equality) and parity of esteem (instead of equal treatment) also allow for an opposite and arguably more plausible

²⁰Currie (n 12).

²¹The contentions of Wiechers 'Afrikaanse onderrig aan Suid-Afrikaanse universiteite: Grondwetlike vereistes' in a publication of the FW de Klerk Foundation entitled *'n Studie oor Afrikaans op universiteitsvlak* (2010) 8-10 are entirely wrong. In spite of the fact that the non-diminishment clause of the interim constitution was not taken up in the present constitution, Wiechers rather oddly and incorrectly states (10) that the non-diminishment principle is still part of the present constitutional order.

²²Du Plessis and Pretorius 'The structure of the official language clause: A framework for its implementation' (2000) *SAPR/PL* 519, 520. This paradigm shift has apparently escaped Wiechers' attention. He simply ignored the clear wording of s 6(4) and made rather blatant misrepresentations of what s 6 provides. Wiechers stated that s 6 requires: '... dat die tale in gelyke mate in ag geneem moet word en gelykwaardig behandel moet word' (must be taken regard of to the same extent and must be treated equally). This is clearly wrong. There is no provision saying that the languages must be taken regard of to the same extent (dat die tale in gelyke mate in ag geneem moet word). The constitution also does not require equal treatment (gelykwaardige behandeling) as Wiechers incorrectly stated, but equitable treatment (billike behandeling).

²³Currie (n 12) 65-8.

²⁴Du Plessis and Pretorius (n 22) 520.

²⁵Rautenbach and Malherbe *Staatsreg* (2009) 113.

contention. It should be added that the view expressed by Rautenbach and Malherbe does not account for the shift from equal to equitable treatment and is premised on the defunct equality rather than on the present *equitability* principle. *Equitability* may mean precisely that English, being the one language that is understood by all or at least most citizens and inhabitants, be used as the anchor language. What the criterion of parity of esteem and equitable treatment does is hardly more than to seek to prohibit irrational and arbitrary decision-making by government in relation to the use of the official languages. If governmental policy on the use of the official languages is rational and has therefore accounted for all relevant considerations pertaining to the use of the official languages, the requirements of equitable treatment and parity of esteem will have been complied with even if it means diminishment of the previous or existing position of (some of) the official languages.

Parity of *esteem* must be distinguished from parity, ie equality of *treatment*. *Esteem* (*aansien* in the Afrikaans text of the Constitution) refers to how a language is regarded; it pertains to the opinion which is held about a language. It therefore pertains to the reputation of a language. When section 6(4) therefore requires that all the official languages must enjoy parity of esteem, it basically means that the state must have the same (high) regard for all of them. In the eyes of the state they must therefore have an equal reputation. It is virtually impossible to gauge the reputation of a language and even more difficult to establish whether languages are enjoying the same reputation, ie whether they enjoy parity of esteem. In consequence it is difficult to exercise judicial control on the basis of such an elusive formula. It is true that the way in which the state treats the languages may serve as an indication of the state's regard of the languages. However, since *esteem* instead of actual *use* or *treatment* now serves as the criterion for dealing with the languages, actual treatment is not the deciding factor. An official language which does not receive the same treatment as another language and which is not as regularly used in the business of government as another might nevertheless still enjoy the same esteem as the one which is more frequently or consistently used.

In the final analysis the meaning of equitable treatment and parity of esteem depends on the decision-making of legislatures, executives and the administration that deal with the official languages. These bodies decide on the practical content of the criteria of parity of esteem and equitable treatment and therefore on the extent to and the purposes for which each of the languages is used. If they have applied their minds and have thus considered all relevant factors pertaining to the use of the official languages, it would be hard to argue that the criteria of parity of esteem and equitable treatment have not been met. In these circumstances courts will also defer to, rather than intervene in, such decisions. The crux of the matter is that parity of esteem and equitable treatment allows for broadly defined discretionary decision-making for legislators, executives and administrators that deal with the use of the official languages.

3.3 *The use of the official languages by the national and provincial and local governments (section 6(3))*

Section 6(3)(a) provides:

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.²⁶

Section 6(3)(a) is a mandatory provision in that it requires that the national and provincial governments must use at least two official languages. Notwithstanding that, this provision still leaves government with a wide discretion.²⁷ Taking into account the considerations mentioned in the subsection, the governments concerned can still choose which two (or more) of the official languages to use; choose how often and for what purpose to use or not to use any specific language/s, choose to use one language consistently as the so-called anchor language, while the others are used only rotationally or on whatever other basis these governments deem fit, as long as a minimum of two are used, etc. In terms of this wide margin of appreciation²⁸ many choices of a vastly divergent nature would be justifiable, thus once again rendering judicial or similar control of the provision difficult. The discretionary nature (and the accompanying difficulties regarding justiciability²⁹) of the present official language clause, which is a characteristic of section 6(4), is therefore once again present in section 6(3)(a).

Section 6(3)(b) provides for an even wider discretion in relation to the use of the official languages by municipal government in that municipalities, unlike national and provincial governments, are not required to use a minimum of two languages. As long as they act rationally and take into account the considerations mentioned in the subsection, municipal governments are free to use only one language.

3.4 *Self-regulation by national and provincial governments*

The first part of section 6(4) requires that the national government and provincial governments must regulate and monitor their use of the official languages by

²⁶Du Plessis and Pretorius (n 22) 522-523 discuss the factors to be considered in a fair amount of detail.

²⁷Venter 'The protection of cultural, linguistic and religious rights: The framework provided by the Constitution of the Republic of South Africa' (1996) *SAPR/PL* 452.

²⁸Currie (n 12) 65-14-15 states that specifically the considerations of practicality, expense, regional circumstances and the balance of the needs and preferences of the population '... confer a considerable margin of appreciation on the government'.

²⁹Du Plessis and Pretorius (n 22) expressed well-founded doubts on the measure of justiciability of the provision.

legislative and other measures. This provision does not provide for the adoption of a comprehensive language act of the kind found in the jurisdictions referred to in 4 below. Neither does this subsection instruct these governments to use the official languages in accordance with a particular principle or guideline. To the extent that this provision provides a guideline, it is the vague guideline of parity of esteem and equitable treatment, which is discussed in 3.3 above. However, it should be added that the measures that regulate and monitor the use of the official languages by the national and provincial governments must at least be in compliance with section 6(3)(a) which requires these governments to use at least two official languages taking into account the considerations mentioned in that subsection (see 3.3 above).

The use of the languages must therefore be governed by some regulatory framework of a legislative as well as an executive and/or administrative nature. Such a framework must also enable these governments to judge for themselves whether they are in fact acting in accordance with these self-imposed measures. Governments (national and provincial) must pass legislation to this end. However, it is not required that a national or a provincial language act be passed. Previously, section 3(2) of the interim constitution provided that a measure, albeit one with a very restricted ambit, be enacted.³⁰ However, a similar requirement was not taken up in the present constitution. Therefore, the national government and provincial governments once again have a wide discretion on the nature and form of the measures they want to adopt in order to give effect to this requirement. In the unreported judgment of the North Gauteng High Court in *CJA Lourens v Die President van die Republiek van Suid-Afrika*³¹ the court held that the national government had failed to adopt the measures envisaged in section 6(4). It was fairly easy in this case to reach this conclusion as the evidence indicated quite convincingly that government had done basically nothing that would give effect to this measure and was in fact acting randomly. The judgment nevertheless demonstrates the difficulties which the language clause poses for effective judicial review and control of (executive) compliance with the language clause. This is borne out by the fact that in the absence of clear and detailed injunctions on the nature of the language clauses of previous constitutions or of many foreign jurisdictions, some of which are dealt with in 4 below, the court was not in a position to interdict the executive (the third respondent, namely the Minister of Arts, Culture, Science and Technology in the present case) to take specifically defined action. The court could do no more than: first, declare that the executive had failed to adopt the legislative and other measures envisaged in

³⁰Section 3(2) of the interim constitution provided that legislation be passed in terms of which the rights relating to language and the status of languages that existed only at regional level at the time of the adoption of the interim constitution be extended nationally.

³¹Case no 49807/09, delivered on 2010-03-16.

section 6(4) to regulate and monitor the use by national and provincial governments of the official languages; and second, direct the third respondent to comply with these requirements of the constitution within two years.³² However, the non-specific content of section 6(4), lacking any detailed injunctions, made it impossible for the court to make any detailed or more specific orders on precisely what to do in order to give effect to this. Instead of a detailed order the court had no option but to fall back on the broad and non-specific wording of the provision itself.

3.5 *The affirmative action clause (section 6(2))*

Section 6(2) of the Constitution reads:

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.

This clause may be described as the affirmative action provision of the official language clause. Like its counterpart, the affirmative action clause in section 9(2) of the constitution, which provides for the achievement of equality, by corrective (affirmative) measures to protect or advance those who suffered from unfair discrimination,³³ this provision also recognises the 'diminished use and status of the indigenous languages of our people' which the state must then address by 'practical and positive measures to elevate the status and advance the use of these languages'. Section 6(2) quite obviously does not guarantee or aspire to achieve actual equal treatment. The measure can however be regarded as in step with the general dual criterion of parity of esteem and equitable treatment because if measures are taken under section 6(2) and prove to be successful, they will precisely promote the equitable treatment of these languages and also lead to the enhancement of their esteem in the direction of parity with the other languages.³⁴

Unlike its counterpart in section 9(2), section 6(2) is couched in mandatory terms in that the state *must* take the measures referred to in the subsection. Elevation of status and advancement of use arguably refer, amongst other things, to the modernisation and expansion of the lexicons of the languages concerned. This must enable these languages to be utilised for the so-called higher functions,

³²The allegation by Wiechers (n 21) 12, with apparent reference to this judgment, that the court ordered government to adopt a language act is incorrect. The court did not make such an order. Neither *could* it make such an order as there is no provision in the constitution requiring that.

³³Section 9(2) reads:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

³⁴This reading of s 6(2) in line with the principle of parity of esteem and equitable treatment corresponds with that of Currie (n 12) 65-66.

including for the purposes of government and education. This will also boost the social and economic mobility of users of these languages.³⁵ However, there is no clear spelling out of the nature and content of such affirmative measures and therefore no clear indication of what is to be done in order to give effect to the provision. The provision may be interpreted very divergently, on a scale from minimalist to maximalist. All interpretations on the whole spectrum could however claim to be legitimate interpretations of section 6(2). The subsection is once again essentially discretionary in nature and bears out the observation by Du Plessis and Pretorius that the language clause is one of the constitutional provisions that has invited the most divergent interpretations.³⁶ In consequence, it is particularly difficult to judge whether the provision is being given effect to or not, precisely because the directive is open to such a wide variety of divergent interpretations. Meaningful justiciability is clearly a problem.³⁷ A court will find it hard to establish whether or not the directive has been given effect to. In the unforeseen event where the court may find that measures required in the subsection fall short of what is required, it is difficult to conceive how to couch a judicial order that would require compliance with the subsection. The court would most probably have no option other than to fall back on the wording of the subsection itself instead of making an order in more precise terms. As a discretionary measure, its practical application is therefore in the final analysis within the domain of the legislature, the executive and other organs of state.

It is instructive in this context to compare the present section 6(2) with section 3(1) of the interim constitution. Having declared eleven languages as official, section 3(1) proceeded to stipulate that: '... conditions shall be created for their development and for the promotion for their equal use and enjoyment'. The former section 3(1) unlike the present section 6(2) did not distinguish between categories of languages. All the official languages had to benefit from the '... conditions that had to be created for their development and for the promotion for their equal use and enjoyment'. Under the present subsection 6(2) the practical and positive measures to elevate the status and advance the use of these languages are to be taken only in favour of the indigenous languages of our people that suffered historically from 'diminished use and status'. This clearly excludes English and Afrikaans which were the official languages since Union.³⁸ In practice Afrikaans is the only language that falls by the wayside in this context because English, as the dominant language, simply does not need state support to maintain and strengthen its position.

³⁵Du Plessis and Pretorius (n 22) 515-518.

³⁶*Id* 506.

³⁷*Id* 521.

³⁸See the remarks made by Currie (n 12) 65-15 on the position of Afrikaans under this provision.

3.6 *Individual rights and the official language clause*

Language-related rights in constitutions, either expressly or by implication, impose detailed duties upon the state to act positively. For example, the right to receive services in one's preferred language places a positive duty upon the state to appoint officials proficient in that language to render services in the preferred language and make forms in that language available for the use of members of the public for written communication with the state.³⁹ State action in pursuance of such provisions is a prerequisite for the exercise of the language rights concerned. In terms of such duties the state has to establish and maintain institutions and facilities to make possible the enjoyment of the rights concerned. Such institutions and facilities enable the exercise of linguistic rights and a meaningful life for linguistic communities. Without these facilities and institutions rights are seriously impoverished. Probably most important in this regard is that government is required to pursue human resource policies that would enable the members of the public to be served in the language of their choice. The comparative discussion in 4 below shows how the constitutional and legislative provisions in various jurisdictions abound with provisions providing for such facilities. The interim constitution implicitly also imposed at least two obligations upon the state to provide such facilities.

Firstly, section 3 created language rights pertaining to a person's dealing with the public administration. Section 3(3) read:

Whenever 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 South African official language of his or her choice.

(Section 3(6) of the interim constitution had a similar provision pertaining to the provinces.)

There are no similar provisions in the present constitution. Two connected questions arise from this: What were the implications of these provisions under the interim constitution and what are the consequences of the fact that there are no similar provisions in the present constitution?

Section 3(3) of the interim constitution created a right, albeit of a qualified nature (whenever practicable), for a person to use and to be addressed in the official language of his or her choice in his or her dealings with any public administration. This placed corresponding duties on the state to make the exercise of the right possible. This corresponding duty impacted directly on the human resource policy of the state, which was basically required to respond to the language demographics and language preferences of the various communities served by the public

³⁹MacRae 'The principle of territoriality and the principle of personality in multilingual states' (1975) *International Journal of the Sociology of Language* 48, states: 'A man whose language is not understood have no linguistic "freedom" in any meaningful sense ...'.

administration. It could not, for example, staff an office of the Department of Home Affairs in the north of Kwazulu-Natal with public officials with no command of isiZulu, especially if a sufficient number of suitable isiZulu speakers were available for appointment at that office. The same applied for state administered services in relation to the speakers of all the other official languages. Human resource practices that were not sensitive to considerations of language demographics and preferences and that would have obstructed the exercise of this right could therefore be challenged under this provision. The bottom line is that section 3(3) and 3(6) of the interim constitution placed constraints on the human resources practices of the national and provincial administrations. The removal of this right in the present constitution absolved government from this corresponding duty and therefore created much more freedom for government's design and application of its human resources policy. Owing to the repeal of this right government now has a much freer hand to pursue its programme of national representivity which has over the last decade proven to be a core strategy of the transformation programme. Since the passing of the present constitution, this policy has resulted in the general Anglicisation of the public service. In the absence of the kind of language-sensitive policy which section 3(3) once sought to bring about, communication between the public and the staff of state institutions will now be in the medium of English which is often the only language of which both the members of the public and public officials have a basic command.⁴⁰ The closest that the present constitution now comes to language policy in the public service that responds to the language-related needs and preferences of the public is section 195(1)(e), which provides that the public service must respond to people's needs. However, this is a far cry from the erstwhile right to use and to be addressed in dealings with the public administration in the South African official language of choice once provided for by section 3(3) of the interim constitution. Unlike the old section 3(3), section 195(1)(e) of the present constitution is, in the wording of the heading of section 195, one of the *values and principles governing public administration*. It therefore does not create a right and hence no corresponding duties as section 3(3) once did. Section 195(1)(e) is moreover balanced – and weakened – by other values and principles of public administration, in particular that the public administration must be broadly representative of the South African people.

The second provision which is relevant in the present context is section 107(1) of the interim constitution. It provided:

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.

⁴⁰This question of representivity including its Anglicising effect, is discussed in detail in Malan 'Observations on representivity, democracy and homogenisation' (2010) *TSAR* 427.

The provision also translated into duties upon the state to provide the necessary translation facilities to make possible the exercise of this right. The phrase at the beginning of the provision '*A party to litigation*' clearly shows that this right accrued to parties to civil matters, and not only in criminal cases. As the comparative discussion below shows, that right was weaker, yet similar, to the entitlements of parties to civil suits in other jurisdictions. However, this right, like the rights provided for in section 3(3) and 3(6) of the interim constitution, did not find favour with the drafters of the present constitution. The only language-related constitutional right within the context of litigation that has remained in the present constitution is that provided for in section 35(3)(k). This is the right of an accused to be tried in a language that he/she understands or, if that is not practicable, to have the proceedings interpreted in that language.⁴¹

The fact that no rights in the nature of the erstwhile sections 3(3), 3(6) and 107(1) of the interim constitution was included in the present constitution once again emphasises the essentially discretionary nature of the present official language clause. The absence of something in the nature of these provisions created the discretionary space for government to pursue the representivity drive with its Anglicising consequences.

4 Brief comparative survey of the position in some other multilingual states

Many legal regimes in multilingual states have comprehensive systems that accommodate language-related interests by providing for individual rights, institutions for linguistic communities and by placing language-related duties upon governments. Moreover, the number of these regimes seems to be rising while the legal instruments for the protection and promotion of language-related interests are also gaining in sophistication and effectiveness. Some states, such as Spain, which under Francisco Franco rather blatantly trampled the Catalan and Basque (Euskara) languages, in favour of a statist policy that pursued Spanish unilingualism, has now under democratic rule embraced new policies which protect and promote the official use of these languages. Ethiopia is an interesting African example where official multilingualism is now also provided for in the constitution. Amharic is the official language of the country as a whole through the medium of which federal services are provided. However, section 5 of the

⁴¹This is provided for in s 195(1)(i) which reads:

Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

Section 30 of the Constitution which provides for the right to use the language and to participate in the cultural life of the individual's choice is a classical freedom right but a very limited bearing, if at all, on the dealings of individuals with the state.

constitution allows regional governments to afford official status to one or more other languages in which the services of such regional governments may be administered.⁴²

In principle legal regimes that protect language-related claims and interests may be premised on either the territoriality or the personality principle.⁴³ In terms of the territoriality approach a comprehensive package of language-related interests in a multilingual state is protected within a particular area, usually populated in high concentration by a specific linguistic community. A personality-based approach on the other hand protects a selected number of language-related rights for individuals regardless of where in the national territory they might find themselves.

In a concise comparative review below two jurisdictions are attended to, namely, Canada and Belgium. The language situation in these two states is obviously not the same as that of South Africa. They are however at least similar in that both states are inhabited by a variety of linguistic communities. Their legal regimes therefore have to respond, and do in fact respond, to multilingual situations similar to those experienced in South Africa and are therefore useful and instructive models in relation to the local South African legal regime pertaining to the official languages. More particularly, in the present context, they will also bring to the fore the nature and salient features of the language clause of the South African constitution.

4.1 *Canada*

The Canadian Charter of Rights and Freedoms of 1982 deals with the official languages, their use by state organs and the rights in relation thereto in considerable detail. The provisions cover aspects such as service delivery by the state, publication of official documents and the use of the official languages in court proceedings and education. The provisions of the Charter, which forms part of the fundamental law of the country, are further strengthened and expanded by the Official Languages Act of 1988. Some of the provisions in the Charter are nationally applicable, whilst others apply specifically to New Brunswick which is a bilingual province with a population of one third French-speaking and two thirds English-speaking. New Brunswick also has its own languages act. The concise discussion below will focus mainly on the provisions of the Charter, followed by some references to the Official Languages Act.

The provisions of the Charter are detailed and unequivocal and they include clear injunctions upon the state and leave but limited legislative or executive discretion in relation to the concrete design and application of the official

⁴²Fessha 'A tale of two federations: Comparing language rights regime in South Africa and Ethiopia' (2009) *African Journal of Human Rights* 501.

⁴³McRae (n 39) 40.

language dispensation. Section 16(1) provides that English and French are the official languages of Canada and proceeds to stipulate that the two languages have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada. In terms of subsections (2) exactly the same is provided in relation to New Brunswick.

In terms strikingly reminiscent of all previous South African constitutions, the Canadian Charter's section 18(1) provides that all statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative. In terms of section 18(2) precisely the same also applies to statutes, records and journals of the legislature of New Brunswick. Michel Doucet notes with reference to various scholarly opinions that there can be no doubt that these provisions place specific obligations upon the state. The provisions declare the equal status of the two official languages as to their use in the institutions of the federal government and the government of New Brunswick and prohibit the promotion by these institutions of one language over the other.⁴⁴ Section 7 of the Official Languages Act further expands the ambit of this obligation. It requires, apart from legislation, that any instrument in the execution of legislative power, instruments in the exercise of prerogative or executive powers, which are of a public and a general nature shall be made available in both official languages and, if printed, and published, it must be done in both official languages.

Section 20(1) provides that any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French. Members of the public have the same rights with respect to any other office of any such institution where there is a significant demand for communication with and services from that office in such language; or where, due to the nature of the office, it is reasonable that communication with and services from that office be available in both English and French.

In less qualified terms subsection (2) provides with regard to New Brunswick that any member of the public has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French. Doucet highlights the fact that this provision creates two distinct rights:

... the right to communicate in the official language of choice and, secondly, the right to receive services in that language from the offices of an institution of the legislature or from the government of the province. The right to 'communicate' confers the right to address, verbally or in writing, the office of an institution in the

⁴⁴Doucet *Language rights in New Brunswick: The pursuit of substantive equality: Myth or reality* hitherto unpublished paper read on 2010-11-1 at the 12th International Congress entitled Law, Language and the Multilingual State, of the International Association of Linguistic Law, University of the Free State, South Africa 7-8.

official language of choice and the right to receive a reply in that language. This right also includes the right to be heard and understood by the office in the official language that was used.⁴⁵

These rights are also applicable to the police and municipal services.⁴⁶ The Official Languages Act (MDI) also places additional obligations upon the state in relation to communication with the public. Section 12 stipulates that all instruments directed to or intended for the notice of the public, purporting to be made or issued by or under the authority of a federal institution, shall be made or issued in both official languages.⁴⁷

Section 20 is very similar to section 6(3) and 6(6) of South Africa's erstwhile interim constitution. (As noted above, these provisions were not included in the present constitution). It creates language-related individual rights for a person in his/her dealings with government, which impose corresponding duties on the state to make the exercise of the right possible.

Section 16.1 deals with the equality of the language communities and their right to distinctive educational and cultural institutions in New Brunswick. Section 16.1(1) provides:

The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Section 19(1) deals with the use of the official languages in courts and stipulates that either English or French may be used by any person in, or in any pleading in or process issued from, any court established by Parliament. Section 19(2) has a similar provision for the courts of New Brunswick. These provisions establish an unqualified right for litigants in Canadian courts and leave no room for any organ of state to rule otherwise. Section 8 of the Official Languages Act further provides in relation to the courts that all rules, orders and regulations governing the practice or procedure in any proceedings before a federal court shall be made, printed and published in both official languages. As to the use of official languages for evidence, section 15(1) provides that every federal court has, in any proceedings before it, the duty to ensure that any person giving evidence before it may be heard in the official language of his choice, and that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language. Under section 15(2) of the Act these courts also have the duty to provide interpreting services in any court proceedings whenever requested. Of crucial importance is section 16 of the Act, the

⁴⁵Doucet (n 44) 18.

⁴⁶*Id* 18-20.

⁴⁷See further s 22 of the Official Languages Act of 1988, which places further duties upon the federal government in relation to the languages in which it has to communicate with the public.

implication of which is that judges must be assigned to cases in accordance with their language proficiency. If English is the language chosen by the parties for proceedings conducted before it in any particular case, the judge or other officer who hears the proceedings must be able to understand English without the assistance of an interpreter. The same applies when the parties choose French. Section 16(3)(c) provides that if both English and French are the languages chosen by the parties for proceedings, every judge or other officer who hears the proceedings must be able to understand both languages without the assistance of an interpreter.

4.2 Belgium

Belgium is divided into language regions (*taalgebieden*) for the various language communities. The language regions correspond largely with, but predate, the federal structure of the country which divides Belgium into three *gewesten*, namely Flanders, Wallonia and the capital Brussels, known as *Brussel Hoofstedelijk Gewest (BHG)*. The geographical areas of the *gewesten* correspond with the language regions – *taalgebieden* – for each linguistic community: the Dutch language region for Flanders, the French and German language region for demarcated areas of Wallonia and the bilingual language region for Brussels.

Instead of placing the focus on the status of the officiality of the languages, Belgian law provides for a comprehensive official language dispensation, setting out in elaborate detail and a high measure of specificity, precisely how to deal with language matters. The two most relevant laws dealing with the position of the official languages are the *Taalwet Bestuurszaken* (Language Act of Administrative Affairs)⁴⁸ and the *Wet op het Gebruik der Talen in Gerechtszaken* (Act on the Use of Languages in Judicial Matters).⁴⁹ These statutes are now concisely discussed with a view to reflecting the basic character of the Belgian official language dispensation, thus also juxtaposing it to – and contrasting it with – the South African official language dispensation. The *Taalwet Bestuurszaken* with its very broad scope is firstly referred to, followed by the *Wet op het Gebruik der Talen in Gerechtszaken* which focuses specifically on language use in judicial matters.

The *Taalwet Bestuurszaken* provides for a territorially-based official language dispensation. It is structured on the basis of the language regions, namely a Dutch, French and German region and a region for the capital, Brussels.⁵⁰ Each municipality, (*gemeente*), which in all cases are located in one of the *taalgebieden*, is also linguistically characterised.⁵¹ Apart from the nineteen municipalities in the Brussels region which have a bilingual (Dutch and French)

⁴⁸ *Taalwet Bestuurszaken* van 8 Juli 1966 (of 8 July 1966).

⁴⁹ *Wet op het Gebruik der Talen in Gerechtszaken* van 15 Juni 1935 (of 15 June 1935).

⁵⁰ Section 2 of the *Taalwet Bestuurszaken* (n 47).

⁵¹ Sections 3-6 of the *Taalwet Bestuurszaken* (n 47).

status the municipalities are monolingual (either Dutch, French or German). Having defined the various language regions (and *gemeenten*), the Act proceeds to set out precisely how the languages have to be dealt with in each region. It provides equally detailed provisions for central government.

The act takes as its basic premise that the language of public service delivery will be determined by the linguistic character of each language region. Hence, in a Dutch *gemeente* or in the Dutch language region all public services are delivered only in Dutch and in a French *gemeente* or in the French language region only in French.⁵² However, the Act also provides for the circumstances in which a person is entitled to be furnished with translated documents in one of the other official languages.⁵³

The Act assumes as one of its cornerstones that public office bearers have to be proficient in the language of the community where they are placed and which they have to serve. The functioning of the system is premised on the availability of sufficient office bearers in the public service who are suitably proficient in the language of each region concerned. Consequently, there are a number of provisions dedicated to assuring that public officials are fully in command of the language of the region (or *gemeente*) where they are employed. Section 15(1), for example, provides in relation to local government that no one may be appointed or promoted in the Dutch, French or German language area unless he or she knows the language of the region.⁵⁴ The same subsections have provisions relating to examinations for the testing of language proficiency of officials in order to ensure that they actually have the capacity to render services in the language concerned. Section 21 has similar provisions in relation to the proficiency in Dutch and French of officials in the service of the multilingual Brussels. In some cases promotion to senior positions is subject to candidates having passed examinations in the second language (either Dutch or French).⁵⁵

There are similar detailed provisions for the use of the languages for national services, ie basically services provided by the central government. The ground rule, expanded upon by many more similar and more detailed provisions premised on the same rule, is laid down in section 39(2), which provides that central services have to be rendered in the language of each *gemeente* or region concerned.⁵⁶

⁵²For example, ss 10, 11, 12, 14, 33 of the *Taalwet Bestuurszaken* (n 47).

⁵³For example, s 13 of the *Taalwet Bestuurszaken* (n 47).

⁵⁴In de plaatselijke diensten, die in het Nederlandse, het Franse of het Duitse taalgebied gevestigd zijn, kann niemand tot een ambt of betrekking benoemd of beveoerd worden, indien hij de taal van het gebied niet kent. Own English translation: In the local services situated in the Dutch, or French language region, no one may be appointed or promoted to a position if he does not know the language of the region.

⁵⁵For example, s 15(2) of the *Taalwet Bestuurszaken* (n 48).

⁵⁶In hun betrekkingen met de plaatselijke en gewestelijke diensten uit het Nederlandse, het Franse en het Duitse taalgebied, gebruiken de centrale diensten de taal van het gebied. Own English translation: In their exercise of local and regional services in the Dutch, French and German

Concerning central public services, the Act once again accounts for the fact that services in any particular language depend on the language proficiency of public servants in such language. Hence it provides that a record be kept – a so-called *taalrol* – containing lists of officials of the central government who are proficient in Dutch and French respectively, and in the case of senior officials, a list of bilingual officials.⁵⁷ Appointment and promotion, as in the case of government on the levels of the *gemeenten* and *gewesten*, depend amongst others on the proven proficiency of officials in the language concerned (and the corresponding appearance of their names on the *taalrol*). Public servants have to pass language proficiency examinations in order to be appointed and promoted in a particular region. Administrative officers responsible for administrative function in the administration of justice are in addition to this, also tested for their command of legal terminology.⁵⁸

The second act, the *Wet op het Gebruik der Talen in Gerechtszaken*, regulates the use of the languages in judicial matters. The act provides for a similar territory-based dispensation as the *Taalwet Bestuurszaken*. Firstly, civil and commercial cases must be adjudicated in the language of the region where the case is heard, save for special arrangements in the case of bilingual Brussels.⁵⁹ The same principle generally applies to criminal cases including cases in military courts. In these matters provision is also made for the transfer of cases to the closest neighbouring court in another language region in order to accommodate accused who are not speakers of the language in the region in which the offence was allegedly committed.⁶⁰ The general rule is that appeals are heard in the same language as that of the court of first instance.⁶¹ Chapter IV of the Act makes provision for a number of arrangements to ensure that litigants can conduct their cases in their mother tongue. Translation facilities and interpreters are for example provided in civil matters at state expense.⁶² Almost forty percent of the total volume of the act – section 43 to 54bis – is taken up by the detailed measures towards ensuring that officers of the court – presiding officers, prosecutors, registrars and even legal representatives (advocates) – not employed by the state are proficient in the language of the region where they work. No one may for example be appointed or promoted to a court in the Flemish provinces of West-Vlaanderen, Oost-Vlaanderen, Limburg and the district of Leuven if the appointee has not obtained his/her law degree in the medium of

language regions, the central services use the language of the region concerned.

⁵⁷Section 43(2) of the *Taalwet Bestuurszaken* (n 48).

⁵⁸Section 43ter of the *Taalwet Bestuurszaken* (n 48).

⁵⁹Chapter 2 of the *Wet op het Gebruik der Talen in Gerechtszaken* (n 49).

⁶⁰See in general ch II of the *Wet op het Gebruik der Talen in Gerechtszaken* (n 49).

⁶¹Chapter III of the *Wet op het Gebruik der Talen in Gerechtszaken* (n 49).

⁶²See, eg, ss 30 and 31 of the *Wet op het Gebruik der Talen in Gerechtszaken* (n 49).

Dutch.⁶³ There are similar provisions for the other languages in the other regions of the country. In bilingual Brussels at least one third of all presiding officers (*magistraten*) must have completed their law studies in Dutch and one third in French. Two thirds of all magistrates in Brussels must have a proven knowledge of both languages.⁶⁴ These measures ensure that the inhabitants of Brussels are also served in their mother tongues.

4.3 *Some concluding remarks*

Unlike the position in Canada where the language dispensation is partially based on territoriality and partially on personality, the Belgian dispensation is almost exclusively – and very strictly – based on territoriality. However, the strongest common denominator of the two systems is that they set out in considerable detail the various language-related rights and have clear, unequivocal and detailed injunctions directed to the state that go a long way to ensure strict compliance and enforcement of these rights. There is hardly any trace of a discretion vesting in the state and consequently no uncertainty and unpredictability when it comes to language-based rights and interests. In this regard there is a clear resemblance between the language dispensation of these two jurisdictions and that provided for by all South African constitutions prior to the present one.

5 Conclusion

The official language clause of the present constitution is essentially of a discretionary nature. This runs through all four of the relevant subsections of section 6 that have been discussed. The replacement of the equality principle with the vague and broadly formulated criterion of parity of esteem and equitable treatment has created a wide margin of appreciation on the basis of which concrete content is given to the official language dispensation under the present constitution. The comparison of the present language clause with the official language clauses of previous constitutions and with the language-related foreign law referred to in 4 above also underscores the discretionary nature of section 6 of the present constitution. The repeal of the non-diminishment clauses and of the language-related constitutional rights of the interim constitution has also expanded the legislature's and executive's discretion in relation to the treatment of the official languages. The question that arises against this backdrop is how this discretion is exercised and what factors underpin the exercise of this discretion. Currently the way in which the discretion is exercised is overwhelmingly in favour of a monolingual English dispensation, with all the other official languages lagging far behind.

⁶³Section 43.2 of the *Wet op het Gebruik der Talen in Gerechtszaken* (n 49).

⁶⁴Section 43.5 of the *Wet op het Gebruik der Talen in Gerechtszaken* (n 49).

From a practical point of view language-related rights occupy a more fundamental position than many other constitutional rights in the sense that one's ability to use one's (preferred) language is a prerequisite for exercising virtually all the other rights. This is so because rights can in most cases only be exercised by expressing oneself either orally or in written form through the medium of language. Apart from that – and occasionally of even greater importance – is that language is constitutive of, and a prerequisite for, linguistic and cultural communities. Such communities are dependent on institutions and facilities that provide the infrastructure to stabilise and secure the functioning of linguistic communities in multilingual and multicultural states. When such communities are small minorities in large multilingual states and/or in states with a dominant language, these facilities and institutions do not only stabilise and enhance the functioning of these communities, they are in fact the basic prerequisites for the meaningful existence of these communities. Well-designed constitutional official language clauses, language-related rights and language-based institutions, provided for in constitutions or in legislation (such as in a comprehensive language act) provide the basis for such institutions and facilities. Owing to the discretionary nature of the language clause in the South African constitution and the complete absence of a language act, such institutions and facilities are currently not (sufficiently) provided for in South African public law. The current language clause with its salient discretionary character does not solve any problem in this regard. On the contrary, it has contributed, if not created a host of problems in the field of language-related rights, interests and claims. Conferring a discretion on government and failing to place obligations of adequate detail and specificity upon government in relation to language claims and interests, it has in fact paved the way for the increased official monolingual English dispensation that South Africa is currently experiencing, as well as for the deterioration of Afrikaans as an official language and the stagnation of the official African languages.

Against this backdrop the need for a comprehensive language act has become imperative. The primary objective of such an act should be:

- to overcome the detrimental consequences of the discretionary official language clause in the constitution;
- to spell out in detail the language-related individual rights accruing to members of the public in their dealings with government and the corresponding duties upon government to ensure enjoyment of these rights; and
- to provide for language-related institutions and facilities for the various language communities.