Roxan Laubscher
University of Johannesburg, South Africa
rventer@uj.ac.za
ORCID: 0000-0003-1342-7655

https://doi.org/10.26881/gsp.2022.4.05

Recognition of Language Rights in South Africa: Innovation or Dismal Failure?

1. Introduction

One of the main goals of the Constitution of the Republic of South Africa, 1996 is to bring about transformation within South African society from one that was deeply divided by discrimination and oppression to an open and democratic society premised on the values of human dignity, freedom and equality.[1] This transformative goal touched on virtually every aspect of the lives of South Africans, including language. Where only two languages were previously recognised as official languages under the *apartheid* regime,[2] the new Constitution recognised no less than eleven languages as official languages, including various previously neglected indigenous languages.[3] Another constitutional innovation is the South African Constitution's recognition of the historically "diminished" status and use of indigenous languages, and the corresponding duty of the South African government to take practical and meaningful steps to raise the status and promote the use of these languages.[4] Various other constitutional provisions further enhance the status of these official languages, such as the provisions on the use of official languages by government organs (section 6(3) of the Constitution), the duty of government to monitor the use of languages (section 6(4) of the

[1] For more about transformative constitutionalism see E. Mureinik, "A bridge to where? Introducing the interim bill of rights", *South African Journal on Human Rights* 1994, pp. 31–48.

[2] After the Anglo-Boer War, English and Dutch were recognised as official languages in terms of the South Africa Act of 1909, s 137. Dutch was later replaced as official language by Afrikaans. This position continued in terms of the Provincial Government Act 32 of 1961, s 119 and the Republic of South Africa Act 110 of 1983, s 99(2). For more information on the history of official languages in South Africa, see K. Malan, "The discretionary nature of the official language clause of the constitution", *SAPR/L* 2011, 383–387; and K. Malan, "Observations and suggestions on the use of official languages in national legislation", *SAPR/L* 2008, pp. 60–62.

[3] See s 6 of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution); s 6(1) of the Constitution provides as follows: "The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu."

[4] See s 6(2) of the Constitution.

Constitution), as well as the establishment of the Pan South African Language Board to promote official and other languages (section 6(5) of the Constitution). Although no-one can deny that these are positive and meaningful innovations that can and should be welcomed, the status and use of official languages in practice paints a much different picture than its status on paper. South African government organs do not always adhere to the constitutional requirements on the use of languages, public institutions of higher learning have nearly all scrapped tuition in languages other than English and legislation is rarely (if at all) published in other official languages.

The aim of this paper is to show how the recognition and use of languages in South Africa differs significantly in theory and in practice by means of two examples, namely the translation of legislation and the use of languages at institutions of higher learning. The paper illustrates this discrepancy by first setting out the constitutional and legislative framework regarding the recognition and use of official languages in South Africa. Second, by looking at some South African judgments on the two issues, the paper considers how official languages are used in practice and how language disputes have been dealt with. Third, the paper concludes that, instead of being a beacon of innovation, the South African Constitution's language provisions are failing in practice. Finally, the paper makes some recommendations on how this unfortunate situation may be addressed.

2. The Constitutional and Legislative Framework

The use of official languages by the South African government is governed by section 6 of the Constitution. Section 6(1) specifies the Republic's eleven official languages, while section 6(2) acknowledges the historically diminished usage and status of indigenous languages, as well as specifying that the state must adopt real and effective measures to elevate the status and advance the use of these languages. Section 6(3)(*a*) of the Constitution provides that the national and provincial administrations must employ at least two languages for "government purposes", taking into account "usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or the province concerned". The term "government purposes" most likely refers to the enactment of legislation, the making of government decisions, and inter-departmental communication.[5] In addition, municipalities must choose an official language for communication with their citizens based on the language usage and preferences of their residents, according to section 6(3)(*b*) of the Constitution. As a result, municipalities are not required to employ at least two languages.[6] Section 6(4) states that all official languages "must enjoy parity of esteem". It is however not clear what this entails. It appears that it does not imply

[5] I.M. Rautenbach and R. Venter, *Rautenbach-Malherbe Constitutional Law*, Durban 2018, p. 82.
[6] *Ibid.,* p. 83.

perfect equality, but it also cannot be without legal consequences.[7] As the Constitution is unlikely to contain any meaningless clauses, it can only be taken to suggest that official languages should be represented fairly.[8] According to Rautenbach, this means that some languages should "not dominate at the expense of others, and some will not be neglected".[9] Section 6(4) of the Constitution further mandates that national and provincial governments should utilise "legislative and other measures" to regulate and monitor their use of official languages.[10]

The remainder of the constitutional language provision, in section 6(5), requires the establishment of the Pan South African Language Board in terms of national legislation. This body is responsible for promoting and creating conditions for the development and use of all official languages, the Khoi, Nama, and San languages and sign language (section 6(5)(*a*)), as well as ensuring respect for and promotion of all other language communities (such as German and Greek) and religious languages (such as Arabic and Hebrew) (section 6(5)(*b*)). The Pan South African Language Board Act 59 of 1995 duly established this body.

Unfortunately, what is meant by the phrase "official language" is not always apparent. According to Malan, a language must "actually and… regularly [be] used for conducting governmental functions" in order to be considered as "official".[11] What, though, is the status of a recognised official language that is not utilised by the government on a regular basis? Would this be an example of symbolic recognition without actual legal ramifications?[12] I'm not convinced that the express recognition of eleven official languages in our Constitution was solely for the purpose of allowing some of them to be used by the government and others to have mere symbolic value.[13] If there is a disconnect between the recognition and the use of official languages, the government should remedy such discrepancy.[14]

In addition, the language provision in section 6 should be analysed in conjunction with other constitutional provisions. The Constitution's equality provision, for example, states that neither the state nor anyone else may unfairly discriminate against anyone on the basis of language,[15] whereas section 30 of the Constitution provides the right to language and culture of choice, as long as such choice is not exercised in a way that is incompatible with the South African bill of rights. Members of cultural, religious, and linguistic communities have the right to enjoy and practice their culture, religion, and

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7 *Ibid.*, p. 81; R. Venter, "Are some official languages more equal than others? Reflections on constitutional duties toward official languages, the Use of Official Languages Act and respecting diversity", *Tydskrif vir die Suid-Afrikaanse Reg (TSAR)/Journal of South African Law* 2015, pp. 872–874.

8 I.M. Rautenbach and R. Venter, *Rautenbach-Malherbe Constitutional Law*, p. 81; R. Venter, "Are some official languages more equal than others?…", p. 874.

9 *Ibid.*, p. 81.

10 This aspect was later expanded upon in terms of the Use of Official Languages Act 12 of 2012.

11 K. Malan, "The discretionary nature of the official language clause of the constitution", p. 388.

12 *Ibid.*, see also R. Venter, "Are some official languages…", p. 873.

13 *Ibid*.

14 *Ibid.*, pp. 873–874.

15 See ss 9(3) and (4) of the Constitution.

language, as well as form, join, and participate in the activities of cultural, religious, and linguistic associations, as guaranteed by section 31 of the Constitution. In accordance with sections 185 and 186 of the Constitution, these rights are safeguarded by their own agency, the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities. The South African Constitution also contains a provision which expressly addresses language rights in education. According to section 29(2) of the Constitution, everyone has the right to an education in an official language or languages of their choice, when such instruction is reasonably practicable. All reasonable educational alternatives, including single-medium instruction, should be considered in order to determine what "reasonably practicable" means, taking into account equity, practicability, and the need to redress the effect of past discriminatory laws and practices.[16] Especially in the context of higher education, this constitutional provision has been the subject of much litigation.[17]

With the enactment of the Use of Official Languages Act 12 of 2012, the constitutional situation as set out above has been altered slightly. Unfortunately, it appears that the Act complicates the use of official languages even further. One of the main purposes of the Act is to give effect to the duty contained in section 6(4) of the Constitution with regard to the monitoring of the use of official languages by the national and provincial governments. However, the Act makes no provision for provincial governments to oversee the use of official languages, because the Act only applies to "national departments, national public entities and national public enterprises".[18] It is however unclear whether this omission was deliberate or merely an oversight. As a result, the Act doesn't provide for provincial governments to monitor the use of official languages, which is contrary to the duty on provincial governments created in section 6(4) of the Constitution. This is regrettable because provincial monitoring of official language usage will therefore trail behind national departments until the provinces enact their own provincial legislation to address the issue.[19]

One of the innovations of the Act is that it mandates the adoption of a "language policy" for the use of official languages by these national departments, national public institutions, and enterprises.[20] The Act then states that the language policy must identify at least three official languages that the department, entity, or enterprise should employ for government purposes.[21] This effectively extends the protection provided by the constitutional provision on the use of official languages in section 6(3)(*a*) of the Constitution, which obliges the national government to utilise at least two official languages. Although the adoption of a third official language should be welcomed, it

16 See ss 29(2)(a)–(c) of the Constitution.
17 See par. 3 below.
18 See s 3 of the Use of Official Languages Act.
19 R. Venter, "Are some official languages…", p. 882; Some of the South African provinces have addressed the issue in their own legislation, for example see the Gauteng Provincial Languages Act 3 of 2016 and the Use of Free State Official Languages Act 1 of 2017 which are discussed below.
20 See s 4(1) of the Use of Official Languages Act.
21 See s 4(2)(*b*) of the Use of Official Languages Act.

may be argued that the use of three languages is not a huge advance over the use of two.[22] Unfortunately, the Act now creates a complicated scenario in which the national government's use of official languages, on the one hand, is governed by the Use of Official Languages Act, which mandates the use of at least three official languages and imposes detailed language usage monitoring. On the other hand, the Constitution still regulates the use of official languages by provincial governments, which requires the use of at least two official languages, although there are no measures to monitor language usage inside provincial administrations. In addition, the municipal governments' use of official languages is therefore still governed by the Constitution. This situation is concerning since it handles languages differently at the national and provincial government levels, despite the fact that this was clearly not the intention of section 6 of the Constitution.[23] Consequently, this could be construed as a type of language discrimination, which could ultimately lead to more litigation.[24] Although the Act's basic objectives should be welcomed, it still fails to address key concerns such as the monitoring of the use of official languages at the provincial level, the increased use of official languages at all government levels, the translation of legislation into official languages and the use of official languages at institutions of higher learning.

In the absence of provisions in the Official Languages Act that address the use and monitoring of languages at the provincial level, some provincial governments have opted to adopt provincial language statutes. The Gauteng Provincial Languages Act 3 of 2016, for example, establishes rules for monitoring the provincial government's usage of official languages.[25] The Gauteng Provincial Languages Act's section 2 states that the Act's objectives include, but are not limited to: "provide for the designation of official languages for the Province"; "regulate and monitor the use of official languages" and "promote parity of esteem and equitable treatment [of official languages] in the Province" (s 2(a)–(g)). The provincial executive council, legislature, and municipal councils are all governed by the Act (s 3). All eleven languages "enjoy equal status in the province" according to section 4(1) of the Act. The appropriate executive council member shall designate "no less than two official languages" for use by its provincial government institutions, according to section 4(2) of the Act. In addition, the Gauteng Languages Act increases the minimum number of official languages that municipalities must use to two, which enhances the usage of official languages with reference to local administrations within the province.[26] Furthermore, the Gauteng Languages Act stipulates that translation services must be made "readily accessible" in order to connect with provincial government bodies (s 4(5)), which is crucial when doing so in a language other than one of the two official languages the province has designated.[27]

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22 R. Venter, "Are some official languages…", p. 883.
23 *Ibid*.
24 *Ibid*.
25 R. Venter, "Official Languages and Higher Education: The Story of an African University", *Tydskrif vir die Suid-Afrikaanse Reg (TSAR)/Journal of South African Law* 2019, pp. 558–563.
26 *Ibid.*, p. 563.
27 *Ibid.*

Translation services could also play a crucial role in the translation of provincial legislation in the province. Additionally, the Gauteng Languages Act, like its national counterpart, calls for the creation of one or more intergovernmental language forums (s 8) and a provincial language unit (s 5). It is argued that these requirements have significant ramifications for institutions of higher learning in the province that have opted to adopt single-language policies.[28]

The Use of Free State Official Languages Act 1 of 2017 was adopted in 2017 by the province of the Free State. Section 4(2)(b) empowers the Free State provincial government to employ at least three official languages for administrative purposes in addition to other measures that are comparable to those of the Gauteng Languages Act, such as language units and monitoring. Additionally, only "provincial departments and provincial public entities" are subject to the province's language policy (s 3(1)(a)–(b)). A provincial public entity would unquestionably include a public university.[29] For purposes of this discussion, this may have intriguing ramifications for the use of languages at the University of the Free State as a government entity, as well as the use of languages in enacting provincial legislation.[30]

In the context of language usage in higher education the abovementioned legislative provisions need to be considered alongside the Higher Education Act 101 of 1997 and the national language policy that the Department of Higher Education and Training may develop in order to regulate the use of official languages at institutions of higher learning. In terms of section 27(2) of the Higher Education Act, higher education institutions must adopt their own language policies subject to the national language policy determined by the Minister of Higher Education and Training. A new national language policy, the *Language Policy Framework for Public Higher Education Institutions* of 2020,[31] was recently adopted by the Department of Higher Education and training and came into effect on 1 January 2022. It is beyond the scope of this paper to analyse this policy paragraph by paragraph, however, some of the most important elements will be emphasised. According to the Preamble of the 2020 *Language Policy Framework* "it is apparent that there has been little progress made in exploring and exploiting the potential of African languages in facilitating access and success in higher education institutions", therefore the policy seeks to promote "multilingualism as a strategy to facilitate meaningful access and participation by university communities… in various university activities, including cognitive and intellectual development". The 2020 *Language Policy Framework* therefore clearly supports a *multilingual approach* to the use of official languages in higher education. Paragraph 15 of the *Language Policy Framework* (2020) states that the language policies of both public and private higher education institutions must consider "constitutional imperatives such as access, equity and inclusivity and be context sensitive in order to avoid racial discrimination, unjust exclu-

28 *Ibid.*
29 *Ibid.*
30 *Ibid.*
31 https://www.gov.za/sites/default/files/gcis_document/202011/43860gon1160.pdf (accessed: 2022.07.26).

sion, preservation of exclusivity so as to promote social cohesion and nation building in all institutions of learning". The *Language Policy Framework* (2020) indicates that all higher education institutions need to adopt two official languages, "other than the medium of instruction or language of teaching and learning" (own emphasis) in order to develop such other languages as languages for future scholarly discourse and for use in official communication (par. 24). This implies that three languages need to be used by higher education institutions – one may be used for instruction, while the other two must be used in communication and must be developed for purposes of future use as a medium of discourse and instruction. For this purpose, institutions must develop language plans and strategies in order to develop and promote indigenous African languages in research and scholarship (par. 25).[32] Furthermore, institutions are required to report annually to the Department on their progress in developing and implementing their language plans and strategies (par. 42) and the Department will monitor the success of these plans and strategies and identify challenges (par. 44). In addition, the Department must "establish and implement a funding model to enable the implementation of this Policy framework" (par. 43). The national *Language Policy Framework* (2020), together with the Use of Official languages Act and the relevant provincial legislation, therefore has significant implications for institutions of higher learning. However, in practice, it does not seem that higher education institutions are complying with these provisions as yet.

3. South African Court Judgments on Official Languages

In recent years, multiple disputes about the use of official languages by the South African government and state institutions have come before the South African courts. The first example is a trilogy of cases which challenged the government's adherence to the duty in terms of section 6(4) of the Constitution to monitor the use of official languages. The cases also questioned whether parliament has a duty to translate legislation into all official languages. In the first case, *Lourens v President van die Republiek van Suid-Afrika*,[33] the applicant filed an application in the North Gauteng High Court, seeking an order compelling the national government (or, more specifically, parliament and the minister of arts and culture) to fulfill its constitutional obligations by giving effect to section 6(4) of the Constitution, which states that the national and provincial governments must regulate and monitor their use of official languages through legislative and other measures. The applicant also requested an order requiring par-

[32] According to the definition clause of the *Language Policy Framework* (2020) an "indigenous language" is defined as: "Languages that have their heritage roots in Africa (also referred to as African languages in literature and some policy documents) and that belong to the Southern Bantu language family, where 'Bantu' is used purely as a linguistic term. An indigenous language is a language that is native to a region or country and spoken by indigenous people." Interestingly, Afrikaans is therefore not seen as an indigenous language.

[33] 2013 1 SA 499 (GNP); also see R. Venter, "Are some official languages…", p. 875.

liament to publish all legislation in all official languages with retrospective effect to 1996.[34] Given the length of time since the Constitution's adoption, the court correctly observed that the government's failure to comply with this requirement was intolerable. As a result, the court directed the national government to fulfill its constitutional duties under section 6(4).[35] Regarding parliament's duty to translate legislation, the court concluded that, although there is a duty to translate legislation, the nature of the legislative process reveals that, once legislation has been adopted by parliament, the legislature's work is complete, and any supposed duty to translate falls within the powers of the executive authority.[36] The court's decision in this case led to the adoption of the Use of Official Languages Act, which is discussed above.

In the second case, *Lourens v Speaker of the National Assembly*,[37] Lourens filed another application in the Equality Court against the speaker of the national assembly, the chairperson of the national council of provinces, the minister of arts and culture and the Pan South African Language Board.[38] The applicant claimed that parliament's failure to translate legislation into the official languages jeopardised all official languages and amounted to unfair language discrimination under the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).[39] It falls outside the scope of this paper, however, to discuss the many intricacies of PEPUDA, suffice it to say that language is one of the so-called "prohibited grounds" established under PEPUDA.[40] If a prima facie case of discrimination is established, the respondent must prove that either the discrimination did not occur as alleged or that it was not based on one of the forbidden grounds.[41] If the discrimination did occur as claimed, it will be ruled unfair unless the respondent shows that the discrimination was justified.[42] Certain elements must be considered in order to substantiate that the discrimination was reasonable and justified.[43] The Equality Court accepted that the failure to publish legislation amounted to "discrimination" on a "prohibited ground" for the purposes of PEPUDA, leaving only the question of whether the discrimination was fair.[44] The court argued that the Constitution does not demand complete equality for all official languages, which is exactly what the applicant is requesting when he requests that all laws be translated and published in all official languages.[45] The Constitution, according to the court, requires the use of at least two languages for government functions, implying

34 *Lourens v President van die Republiek van Suid-Afrika* 2013 1 SA 499 (GNP) par. 16.
35 *Ibid.*, par. 22.
36 *Ibid.*, par. 20.
37 2015 1 SA 618 (EqC); also see R. Venter, "Are some official", p. 877.
38 *Lourens v Speaker of the National Assembly* 2015 1 SA 618 (EqC) par. 3.
39 *Ibid.*, par. 4.
40 See s 1 of the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (hereafter PEPUDA).
41 See s 13(1) of PEPUDA.
42 See s 13(2) of PEPUDA.
43 See s 14(2) of PEPUDA.
44 *Lourens v Speaker of the National Assembly* 2015 1 SA 618 (EqC) par. 27.
45 *Ibid.*, par. 28.

"sanctioning discrimination against the other nine official languages".[46] Parliament then proceeded to justify its limited use of official languages. Parliament averred that, because all members of parliament can communicate in English, it will invariably be the language in which bills are introduced.[47] The Equality Court then all too quickly concluded that parliament had discharged the burden of proof that the discrimination was in fact fair, dismissing the applicant's claim.[48]

In the third case, *Lourens v Speaker of the National Assembly of Parliament and Others*,[49] Lourens appealed to the Supreme Court of Appeal against the judgment of the Equality Court. Although the Supreme Court of Appeal accepted the finding of the Equality Court that the non-translation of legislation into the official languages amounts to unfair language discrimination in terms of PEPUDA,[50] the Court held that neither the Constitution nor the newly adopted Use of Official Languages Act required the national government to use more than two or three languages respectively – therefore the appellant's contention that omitting to translate legislation into all official languages amounted to unfair language discrimination had to fail.[51]

In *Afriforum v University of the Free State*[52] the Constitutional Court was called upon to determine whether the University of the Free State's new language policy was contrary to its obligations in terms of section 29(2) of the Constitution. Since 1993, the University of the Free State has provided courses in both Afrikaans and English. The institution adopted a parallel-medium language policy in 2003, which remained in effect until March 2016, when the university senate enacted a new language policy. According to the university's 2016 language policy, English would be the primary medium of instruction, with Afrikaans being used exclusively in a small number of professional programs, such as education and theology.[53] The Constitutional Court, however, seemed to assume from the start that keeping Afrikaans as a language of instruction would be "the antithesis of fairness, feasibility, inclusivity".[54] Consequently, the Constitutional Court held that the university was justified in the adoption of their new language policy as "seeking to have Afrikaans-speaking students enjoy their own constitutional right to be taught in their official language of choice" amounts to "[u]njust denial of access" to education and as "racial segregation".[55] The Court stated as follows

"It would be unreasonable to wittingly or inadvertently allow some of our people to have unimpeded access to education and success at the expense of others as

46 *Ibid.*, par. 29.
47 *Ibid.*, par. 30.
48 *Ibid.*, par. 21.
49 [2016] 2 All SA 340 (SCA).
50 *Lourens v Speaker of the National Assembly of Parliament and Others* [2016] 2 All SA 340 (SCA) par. 26.
51 *Ibid.*, par. 29–30.
52 2018 2 SA 185 (CC); also see: R. Venter, "Official Languages and…", 558.
53 *Afriforum v Chairman of the Council of the University of the Free State* (A70/2016) 2016 ZAFSHC 130 (21 July 2016) par. 2; also see the Supreme Court of Appeal judgment in *University of the Free State v Afriforum* 2017 4 SA 283 (SCA).
54 *Afriforum v University of the Free State* 2018 2 SA 185 (CC) par. 46.
55 *Ibid.*, par. 76–77, 79.

a direct consequence of a blind pursuit of the enjoyment of the right to education in a language of choice. This, in circumstances where all could properly be educated in one common language."[56]

The Court's assertions are quite remarkable given South Africa's history. Is this not what the Soweto revolt students during the 1970s were told when they complained about being taught in "one common language" – in their case, Afrikaans? Is this not also comparable to the reasons behind the Great Trek where the Boers objected to instruction in "one common language" (in that case English) under British rule? Given our particular history of linguistic persecution, is it rational to continue along such a course in a nation as diverse as South Africa? Furthermore, whose education is being hampered by providing education in Afrikaans? At the University of the Free State, no student has been denied admittance because of their language. In addition, success is not solely dependent on the study of one's preferred language. Regardless of the language employed as a medium of instruction, no one can guarantee success in higher education.[57] The main thrust of the Constitutional Court's argument, as with the Supreme Court of Appeal's ruling, is the assertion by the university that English students are "packed in lecture rooms", while only "a negligible number of students" (Afrikaans students) receive "close, personal, and very advantageous attention" in small classes.[58] These problems could however be resolved in other ways, such as by making English classes smaller, setting up tutorial sessions, or by the government giving universities more funding so they can hire more lecturers or create additional language development strategies.[59] These are really "large-class" difficulties rather than linguistic ones.[60] Additionally, it appeared that the Constitutional Court essentially accepted the university's claim that segregated Afrikaans and English classes led to "racial tension" on campus.[61] Surely, if there had been racist occurrences, the offenders could and should have been punished? The court's reasoning seems to infer that the only people who cause racial tension are white Afrikaans students, which cannot possibly be the only reasonable conclusion.[62]

In a dissenting judgment, Judge Froneman emphasised the importance of distinguishing between language usage and language users, and that future generations of white Afrikaans speakers should not be unfairly blamed for previous injustices committed by (predominantly) white Afrikaans speakers.[63] The majority of the Court, according to the dissenting judgment, also failed to take into account the national and provincial language legislation, as well as the responsibilities of government with re-

56 *Ibid*., par. 49.
57 R. Venter, "Official Languages and…", pp. 558, 570.
58 *Afriforum v University of the Free State* 2018 2 SA 185 (CC) par. 52.
59 R. Venter, "Official Languages and…", pp. 558, 571.
60 *Ibid.*
61 *Afriforum v University of the Free State* 2018 2 SA 185 (CC) par. 59–62.
62 R. Venter, "Official Languages and…", pp. 558, 571.
63 *Afriforum v University of the Free State* 2018 2 SA 185 (CC) par. 88.

gard to the promotion of other official languages in terms of the Constitution.[64] The majority judgment also appears to be unaware of the extreme irony in the privilege it has now granted to yet another colonial language (English) – possibly much more privilege than Afrikaans was claimed to have enjoyed and undoubtedly more privilege than any other official language has ever enjoyed.[65] According to the minority judgment, the majority's reasoning was defective since they essentially accepted the university's own conclusion that the application of the current language policy amounted to racial discrimination.[66] Surely, this claim requires some supporting evidence? Moreover, this question should be answered by a court, rather than the institution concerned, and the court should do so following a careful analysis of all the relevant evidence and the applicable legal standards.[67] No such evidence was submitted.[68] Judge Froneman concluded by saying that the reasoning of the majority did not "bode well for the establishment and nurturing" of other official languages.[69] In addition, dissenting judgment affirmed that the court's role was to "create a space for other official languages", which is "what true unity in diversity entails".[70] It is therefore submitted that one cannot wholly agree with the Court's conclusion that the University of the Free State's new language policy does not infringe section 29(2) of the Constitution.

In another case, the constitutional validity of the University of Stellenbosch's 2016 language policy was challenged in *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch*[71] on the basis of section 29(2) of the Constitution in terms of which everyone has the right to obtain education in an official language of their choice in public educational institutions if such education is reasonably practicable. Gelyke Kanse, a non-profit organisation dedicated to ensuring equal opportunities for Afrikaans and other indigenous languages, requested that the Stellenbosch University's previous 2014 Language Policy be reinstated, claiming that it was more in line with section 29(2) of the Constitution and the Ministerial Language Policy for Higher Education (2002).[72] In essence, the University's 2014 language policy stated that all students wishing to study in Afrikaans were able to do so in all courses and levels, whereas students wishing to study in English were not necessarily able to do so.[73] Following the 2015 language upheavals and student demonstrations that occurred in South Africa, the University rethought their strategy and adopted the 2016 language

64 *Ibid*., par. 91.
65 *Ibid.*, par. 93, 123.
66 *Ibid.*, par. 110.
67 *Ibid.*, par. 112.
68 *Ibid.*, par. 113–115.
69 *Ibid.*, par. 127.
70 *Afriforum v University of the Free State* 2018 2 SA 185 (CC) par. 127.
71 2020 1 SA 368 (CC); also see R. Laubscher, "Overview of the constitutional court judgments on the bill of rights – 2019", *Tydskrif vir die Suid-Afrikaanse Reg (TSAR)/Journal of South African Law* 2020, pp. 308, 318–319.
72 *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* 2020 1 SA 368 (CC) par. 1–12.
73 *Ibid.*, par. 3.

policy, which established three language specifications: parallel, dual, and single medium.[74] The 2016 language policy mandated tuition in English with Afrikaans translations (dual medium) in most cases, and parallel medium only when it was reasonably practicable.[75] The Western Cape High Court dismissed the claim that the 2016 language policy violated section 29(2) by finding that it conformed with the *proviso* of reasonable practicability.[76] According to the Court, the 2014 language policy worked as a barrier to black students who were not fluent in Afrikaans, and the University's language practices, such as real-time translators, only served to marginalise, stigmatise and exclude them.[77] The Court rejected Gelyke Kanse's claim that the University could eliminate the exclusionary effect of Afrikaans by providing identical parallel tuition in both Afrikaans and English in all courses, as this would be prohibitively expensive for the University and would result in a 20% increase in tuition fees for students.[78] As a result, the Constitutional Court was convinced that Stellenbosch University met both the factual and constitutional components of the "reasonable practicability" criteria of section 29 of the Constitution.

In the most recent decision of the Constitutional Court on the higher education language issue, *Chairperson of the Council of UNISA v AfriForum NPC*,[79] the Constitutional Court was asked to consider an appeal against a decision of the Supreme Court of Appeal that reviewed and overturned a revised language policy by the University of South Africa (UNISA). According to section 27(2) of the Higher Education Act 101 of 1997, the language policy at issue allegedly aimed to encourage indigenous African languages in teaching and learning while also eliminating Afrikaans as a language of instruction.[80] In the Supreme Court of Appeal, AfriForum successfully challenged the university's decision to impose the new language policy.[81] The Constitutional Court therefore had to decide whether UNISA's decision to adopt a new language policy violated section 29(2) of the Constitution. The Constitutional Court, however, determined that UNISA had failed to justify its new language policy and had failed to give any convincing evidence that continued use of Afrikaans as a medium of instruction was not "reasonably possible".[82] UNISA's claims about equity, costs, diminishing demand for Afrikaans, and demographics, as arguments for its new language policy, were also

74 *Ibid.*, par. 4.
75 *Ibid.*, s 4.
76 See *Gelyke Kanse v Chairman of the Senate of Stellenbosch University* 2018 1 All SA 46 (WCC); *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* 2020 1 SA 368 (CC) par. 9.
77 *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* 2020 1 SA 368 (CC) par. 27–28.
78 *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* 2020 1 SA 368 (CC) par. 30–31.
79 2022 (2) SA 1 (CC); also see R. Laubscher, "Overview of constitutional court judgments on the bill of rights – 2021", *Tydskrif vir die Suid-Afrikaanse Reg (TSAR)/Journal of South African Law* 2022, pp. 356, 367–368.
80 *Chairperson of the Council of UNISA v AfriForum NPC* 2022 (2) SA 1 (CC) par. 3.
81 *Ibid.*, par. 37.
82 *Ibid.*, par. 57.

found to be unsupported by any evidence, according to the Court.[83] As a result, the Constitutional Court decided that UNISA, as a state entity, should be allowed to conduct the necessary investigations and feasibility assessments in order to alter its language policy in order to comply with section 29(2) of the Constitution.[84]

From the judgments above it may be concluded that the courts portray some hesitancy in adopting a wide and inclusive approach to the use of languages by government organs. This is a most unfortunate development. The *UNISA* judgment therefore seems to be a step in the right direction with regard to a more inclusive approach toward multilingualism in public higher education institutions. However, the Court still did not consider the provisions of either the Use of Official Languages Act or the Gauteng Provincial Languages Act, nor its possible ramifications for public institutions of higher learning. This may be seen as a major deficiency of the judgment.

4. Recommendations and conclusion

While the South African Constitution states that official languages should be treated equitably rather than equally, it's hard to argue that languages with "official" status that are often neglected are being handled fairly, while one official language is promoted at the expense of all others. The courts' differing views regarding the language issue, on the other hand, creates legal uncertainty and make it impossible for people to properly exercise their language rights.[85] Now that the country's top court has handed down diverging judgments on the subject, in the *University of the Free State* case and the *UNISA* case, it opens the door for courts to continue to take a restricted approach in cases involving language rights.[86] The government's unwillingness or neglect to accommodate official languages should however not render official language status in terms of the Constitution useless.[87] The designation of a language as an official language in a state's constitution implies that the government is willing to employ and accommodate that language in the exercise of its powers and functions.[88] If this was not the case, it would mean that official language status was given to these languages at random, with no meaningful commitment from the government to promote or utilise them – which could not possibly have been the goal of the South African Constitution's drafters.[89]

The initial innovation of our transformative Constitution to give official recognition to eleven languages had been a triumph for multilingualism, equality, inclusiveness and the indigenous value of *ubuntu*. However, it has become clear that the gov-

83 *Ibid*., par. 65–77.
84 *Ibid.*, par. 85.
85 R. Venter, "Official Languages and Higher Education: The Story of an African University", p. 573.
86 *Ibid.*
87 R. Venter, "Are some official languages…", pp. 885–886.
88 *Ibid.*, p. 886.
89 *Ibid.*

ernment has not been very diligent in its use all of its official languages, and it may therefore be time to reassess these languages' status as official languages. We cannot afford to pay lip service to official languages in the Constitution while doing nothing to promote their usage in practice in a multi-cultural and multilingual country like South Africa.[90] This would jeopardise our constitutional order's foundational values of human dignity and equality.[91] In the context of higher education, the *Language Policy Framework* (2020), however, seems to be a step in the right direction with regard to the recognition and use of official languages at such institutions. However, it remains unclear in terms of the *Policy* when the two languages chosen by institutions of higher learning for communication and development purposes, as opposed to the language of instruction, should start being used as languages of instruction, if ever. Although the *Policy* therefore seems to require the use of three languages at higher education institutions, only one of those need to be used as a language of instruction – which essentially sanctions the restrictive approach to language usage at most public universities in South Africa, maintaining the *status quo*.

What is needed in South Africa is a definitive language plan and a coordinated language system, allowing all levels of government to successfully utilise a greater number, if not all, of the official languages in their activities, proceedings, and publications.[92] Because of our unique discriminatory past, the South African government has a clearer obligation than most states to demonstrate its commitment to promoting diversity.[93] This is however impossible to achieve when the majority of official languages have mere "symbolic" official status.[94] If we allow this unfortunate state of affairs to continue, our once innovative and inclusive language provisions will continue to be a failure in practice.

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Summary

Roxan Laubscher

Recognition of Language Rights in South Africa: Innovation or Dismal Failure?

One of the main goals of the Constitution of the Republic of South Africa, 1996 is to bring about transformation within South African society. The new Constitution recognised no less than eleven languages as official languages, including various previously neglected indigenous languages. Where only two languages were previously recognised as official languages under the *apartheid* regime, this was replaced with a range of languages. However, South African government bodies do not always follow the Constitution's language obligations; public higher education institutions have nearly all eliminated tuition in languages other than English; and legislation is rarely (if ever) issued in other official languages. The present paper shows how the recognition and use of languages in South Africa differs significantly in theory and in practice. The paper highlights this disparity by first laying out South Africa's constitutional and legislative framework for official language recognition and use with regard to two issues, namely translation of legislation and the use of languages in higher education. Second, the paper looks at various rulings from South African courts that shows how official languages are used in practice and how language issues have been resolved by the courts. Third, the paper concludes that, rather than becoming a beacon of innovation, the South African Constitution's language provisions have become a terrible failure. Finally, the paper offers several suggestions for dealing with this sad predicament.

Keywords: language rights; official languages; language discrimination; translation of legislation; languages in higher education.

Streszczenie

Roxan Laubscher

Uznanie praw językowych w RPA: innowacja czy ponura porażka?

Jednym z głównych celów Konstytucji Republiki Południowej Afryki z 1996 r. jest doprowadzenie do transformacji w społeczeństwie południowoafrykańskim. Nową Konstytucją oficjalnie uznano aż jedenaście języków za języki urzędowe, w tym wcześniej zaniedbywane języki ludności tubylczej, w miejsce dwóch języków uznawanych za oficjalne w czasach reżimu apartheidu. W praktyce organy państwowe RPA nie zawsze jednak przestrzegają praw językowych wynika-

jących z Konstytucji. Publiczne instytucje szkolnictwa wyższego prawie całkowicie zlikwidowały naukę w językach innych niż angielski a ustawodawstwo rzadko (jeśli w ogóle) wydawane jest w innych językach urzędowych. Niniejszy artykuł ma na celu wskazanie różnic pomiędzy ustrojową regulacją praw językowych w RPA i ich implementacją w praktyce. Autorka podkreśla tę rozbieżność, przedstawiając najpierw konstytucyjne i ustawowe regulacje dotyczące uznawania i używania języka urzędowego w dwóch kwestiach, a mianowicie w tłumaczeniu ustawodawstwa i stosowaniu języków w szkolnictwie wyższym. Po drugie, analizie poddane zostały orzeczenia sądów RPA, które pokazują, jak języki urzędowe są używane w praktyce i jak kwestie językowe są rozwiązane przez sądy. Autorka konkluduje, że konstytucyjna regulacja praw językowych w RPA zamiast stać się latarnią innowacji, stała się porażką. Artykuł kończą wnioski *de lege ferenda* mające celu zaproponowanie sposobów rozwiązania tej trudnej kwestii.

Słowa kluczowe: prawa językowe; języki urzędowe; dyskryminacja językowa; tłumaczenie przepisów; języki w szkolnictwie wyższym.