

LEGAL OPINION

LANGUAGE REQUIREMENTS FOR LEGISLATION

INTRODUCTION

1. With reference to section 6 of the Constitution and Joint Rules 220 – 222 our opinion has been requested on the constitutionality of Parliament's language requirements for Bills.
2. Section 6 of the Constitution designates eleven languages as the official languages of the Republic. No express provision is made for language(s) of legislative enactment. However, one of the consequences normally associated with the designation as an official language is usage for legislative enactment. In principle national legislation, given its function and scope, ought to be published in all eleven official languages. See *Currie: Official Languages* in Chaskalson et al (Eds) *Constitutional Law of South Africa*, 37-8; and *Julien Hofman: Official Languages for a New South Africa: Article 5 of the ANC's Bill of Rights*, 1991 Stell LR, 333.
3. Section 6(3) of the Constitution makes provision for the use of certain languages "for the purposes of government", which in our opinion includes legislation. The relevant part of section 6(3) reads as follows:

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... but the national government ... must use at least two official languages.
4. For the purposes of this opinion we assume that there are sufficient grounds (on account of usage, practicality, expense, etc) for not publishing legislation enacted by Parliament in all the official languages of the country. Hence, the only question is whether Parliament complies with the requirement to use at least two official languages for legislation.

OFFICIAL TEXT AND TRANSLATIONS (JOINT RULE 220)

5. In terms of rule 220 of the Joint Rules, a Bill introduced in Parliament must be in one of the official languages. That is the "official text". That text must be translated into at least one of the other official languages before the official text is sent to the President for assent.

6. According to the Head of the Legislation and Proceedings Unit most Bills are currently introduced in one official language only (it has up to now always been English). In some cases the translated versions of Bills arrive at Parliament, or are ready for tabling and printing, only after both Houses have agreed on the final version of those Bills. The question that needs to be considered is whether that amounts to the use of two official languages as contemplated by section 6(3).
7. This illustrates a problem with rule 220 as currently formulated. There is no indication at which stage of the parliamentary process on a Bill the official translation has to be available. The only requirement seems to be that it must be ready at the time when the Bill is sent to the President for assent. In so far as rule 220 allows any Bill (and, therefore, all Bills) to be introduced, discussed and passed in one language only, without a translation in another official language being available, we doubt whether it can be said that Parliament uses two languages for legislation within the meaning of section 6(3). In any event, if a Bill is translated only at the stage that it is to be submitted to the President for assent, it would seem to be immaterial whether the translated text is channelled through Parliament (for what purpose?) or sent directly to the President (eg by an outside translation agency).
8. As far as we are aware the Courts have not yet expressed themselves on this issue. The Technical Constitutional Working Group (consisting of representatives from state departments, the Presidency and Parliament) in its 1999 Report published guidelines regarding the language requirements of the Constitution (copy attached). In terms of paragraph 3.7 of the guidelines one of the "minimum requirements" is that a Bill introduced in Parliament or a provincial legislature must be tabled, passed and published (as an Act) in at least two official languages.
9. In our view it will not necessarily be unconstitutional if a particular Bill were to be introduced, taken through the parliamentary process, and even sent to the President for assent, in one official language only. There might be circumstances necessitating such a route. However, if it were to be done without cogent reason or if it were to become the practice, Parliament would in our opinion open itself to constitutional challenge for failing to comply with section 6(3).
10. In view of the above considerations we would recommend that joint rule 220 should be amended in accordance with the proposal of the NCOP Subcommittee (see note after that rule); ie that subrule (2) should read as follows:

(2) When a Bill is introduced it must be accompanied by at least one official translation.

11. In order to provide for urgent matters, we would further recommend that the Speaker or the NCOP Chairperson (depending on the House in which the Bill is introduced) be authorised to dispense with rule 220(2) if the member in charge of a Bill, in consultation with the Speaker or Chairperson, has certified the Bill as urgent (see eg NA rules 233(2) and 241(5)). Provision will have to be made that in such a case an official translation of the Bill must be provided at a specified later stage.

AMENDMENT BILLS (JOINT RULE 222)

12. There is a further problem with rule 220, read with rule 222, in that it is not a requirement that the text of an amendment Bill must be in the same language(s) as the Act that is being amended. Rule 222(2) does provide that if the official text of a Bill is not in the same language as the signed text of the Act concerned, then one of the official translations of the Bill must be in the language of the signed text. But it is not clear whether this provision applies to all amendment Bills or only to those that amend Acts passed after the adoption of rule 220 (see rule 222(1)). Since only the official text is considered by Parliament (rule 220(4)), it would in our view be problematic if the official text of an amendment Bill were to be in a different language than the official text of the principal Act.
13. Had we followed a non-textual method of amending statutes, it might not have been such a problem since the amending legislation would "explain" the amendments. However, Parliament applies a textual method of amendment, ie legislation is amended by replacing or inserting or deleting words, sections or other constituent parts directly in the text of the legislation that is being amended. That being the case, it would seem confusing and inappropriate (at least from a practical point of view) for an Act to be amended in a language in which the Act was not promulgated. It would simply render both the amending and the amended legislation unintelligible and incoherent, thereby defeating the aim of formulating legislation in clear and plain language, which the public can understand. In this regard it is important to note that Parliament does not provide consolidated versions of its Acts (although such consolidations are available from various publishers).
14. We would recommend that rule 222 be amended to read as follows, the underlining showing the proposed amendments:

(1) If an Act passed after the adoption of joint rule 220 is amended, the official text of the amendment Bill amending that Act must be in the same language as the text of the Act that was signed by the President.

(2) If an Act passed before the adoption of joint rule 220 is amended-

(a) the official text of the amendment Bill must be in any of the languages in which the Act was promulgated; and

(b) the official translation of the Bill must be at least in all other languages in which that Act was promulgated.

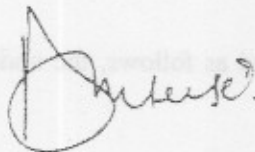
SUBMISSION OF BILLS TO PRESIDENT FOR ASSENT (JOINT RULE 221)

15. When Parliament has passed a Bill it must be submitted to the President for assent (sections 74, 75 and 76 of the Constitution). The Constitution does not specify a time frame for the submission of a Bill to the President, but in our view it can be accepted that it must be done without delay.

16. Joint rule 221 provides that when a Bill is sent to the President for assent the official text must be accompanied by the official translation or translations. In our view it would be unacceptable if the submission of a Bill to the President were to be delayed because the translation was not ready. To prevent such a situation it would seem advisable for the official text of a Bill to be accompanied by the official translation during all stages of Parliament's legislative process; from introduction to adoption.

OTHER PROVISIONS OF THE CONSTITUTION

17. In conclusion we refer briefly to other provisions of the Constitution that are relevant for the purposes of Parliament's language policy, also with regard to the languages used for legislation. Section 6(2) requires the state to take practical and positive measures to elevate the status and advance the use of "indigenous languages". In terms of section 6(4) all official languages must enjoy parity of esteem and must be treated equitably. These provisions, in particular section 6(4), to some extent qualify Parliament's power to decide which official languages to use for the purposes of legislation. See Haysom and Kahla: Language and Culture in Davis, Cheadle and Haysom: Fundamental Rights in the Constitution, 280.



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