Language and Culture in the South African Constitution

A discussion document of the Afrikanerbond
At the outset it is necessary to provide a brief description of language and culture. Furthermore, it is necessary to determine the nature of the so-called "language and cultural rights". In doing so, it must be pointed out that these "rights" do not exist independently as abstract rights. Language and culture are the objects of individual rights, or rather the immaterial “property” which give content to individual rights. They also form the immaterial property and content of group rights when a particular language and culture are practiced and maintained by a group. When language and cultural groups are minorities in the state, the question of the rights of minorities with regards to language and culture are of direct concern.

1. **THE DEFINITION OF LANGUAGE AND CULTURE.**

1.1 Language may be defined as the use of a language vocabulary in a written and unwritten manner. The use of a language vocabulary, has its own rules in the form of syntax, grammar, etc. and are shaped and influenced in many ways. Broadly, it can be said that a particular language is easily recognisable, not just in the manner it is spoken, but also in the writings in that particular language.

1.2 In contrast, it is not easy to define culture because culture reflects the spiritual rewards, habits, customs and history of man in his infinite material and non-physical manifestations. Also, the notion of "culture" may be subjected to many distinctions. For example, there are often references to a "higher" culture as against a "popular or national culture", an old-fashioned against a modern culture, etc.

1.3 The individual is the most important bearer of culture, but culture only gains full vitality and only becomes recognizable when experienced and preserved by a group of people, in other words, when experienced within a particular cultural community. Such a cultural community is identified by various factors, usually by a common language, religion and history. It goes without saying that when a cultural community's language and religion are suppressed and its history ignored, the community's culture is threatened.

2. **LANGUAGE AND CULTURE AS IMATERIAL RIGHT.**

2.1 Language and culture are the objects of immaterial legal rights. Just as in the case of other legal objects or legal goods, such as property and intellectual property, language and culture in itself do not bear any rights. It is the language user and the cultural bearer who is the incumbent of language and cultural rights.

2.2 As stated, it is the individual language user and the bearer of culture as a legal subject, that has rights to his/her language and culture. The language and culture community, namely the collective of language users and culture bearers, may also claim the rights of language and culture.

2.3 The rights to language and culture are usually at stake when the particular language
and culture community is a minority and such language and cultural minority is ignored or suppressed by the dominant language and culture group (or rather by the dominant group that wields the political power.)

3. THE INDIVIDUAL AS BEARER OF LANGUAGE AND CULTURAL RIGHTS.

Language and culture are essential elements of individual rights. Without the recognition of the individual’s rights to language and culture, a group of individuals practicing the same language and cultural rights would also not be able to claim collectively for such rights. The use of his/her language and embracing his/her culture is probably one of the most important manners in which a person can confirm his/her human dignity. Denying an individual’s right to language and culture is therefore a denial of the individual’s inherent right to human dignity, a right explicitly protected by the Constitution (Section 10) as an inalienable right. Just as a person can be treated physically in an inhuman, undignified manner, such a person’s human dignity could also be encroached upon if his/her language and culture is insulted or denied.

The Constitution, directly and indirectly, guarantees the individual’s right to culture and language, such as the ban on the infringement on the privacy of communication (Section 14 (d)), protecting the right to freedom of religion, belief and opinion (Section 15) and freedom of expression (Section 16). It is obvious that if these concomitant freedoms and rights are not guaranteed, the individual’s right to language and culture can not be realised.

4. LANGUAGE AND CULTURE IN A GROUP CONTEXT.

4.1 As indicated, the individual’s right to language and culture becomes operative and realised in a group context, ie within a particular linguistic and cultural community.

4.2 The Constitution guarantees the individual’s right to pursue and express his language and culture within a group with the recognition of certain freedoms, firstly in the freedom of association (Section 18) and secondly with the freedom of assembly, demonstration, picket and petition (Section 17). The freedom of movement (Section 21) is also important to realise language and culture within a group context because without this guaranteed freedom of movement, the right to assembly and free association could not be exercised freely.

5. THE EXPLICIT GUARANTEE AND RECOGNITION OF LANGUAGE AND CULTURE IN THE CONSTITUTION.

5.1 Section 6 declares eleven languages as official languages of the Republic. It is important that none of these languages are indicated as a preferred language, but are explicitly declared as equal. Also, this section makes no mention of an "official language of record" which would mean that such a language in practice has preferential status. Furthermore section 6 states that the status of indigenous languages (which surely includes Afrikaans) and the use thereof must be advanced, that the national government and
provincial governments may use any official language for the purposes of government, taking into account practical considerations (usage, expense, regional circumstances etc) but with the precondition that at least two official languages must be used; whereas the municipalities’ use of language will be determined by the language usage and preferences of their residents. Sub-Section (4) contains the important provision that the national government and provincial governments through legislative and other measures, must regulate and monitor their use of official languages. Section 6 also makes provision for the establishment of a statutory Pan South African Language Board to promote, and create conditions for, the development and use of all official languages, other communities and sign language.

5.2 Section 31 guarantees the right of members of cultural, religious and linguistic communities to enjoy their culture, religion and language and for these purposes, may form, join and maintain cultural, religious and linguistic associations and other organs of civil society. These rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights. In this regard it must be noted that the Constitutional Court ruled that such cultural, religious and linguistic organisations may have exclusive membership requirements to protect the requirements of their cultural, religious and linguistic integrity but conditions for such membership must not constitute racial discrimination.

As explained above, this protection of cultural and religious rights - unlike in the case of the official languages of which the official status, not the right of an official language, is protected as such - is not enshrined in the Constitution to protect culture, religion and language per se, but about the right of every individual to freely to choose his/her culture, religion and language and through free association participate in a language, religious or cultural community of choice (Section 30). It is important to emphasise this aspect, because recognition is given that language, religion and culture are not protected in the abstract, but as an integral part of every person's human rights, either individually or in a group. The practical result is that every citizen inherently empowered to insist on the protection and promotion of his/her culture and language. (See paragraph 6.2 below.)

5.3 Section 29 (2) provides that everyone has the right to receive education in the official language or languages of their choice in public educational institutions which certainly also include higher education institutions. To ensure this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account equity, practicability and the need to redress the results of past racially discriminatory laws and practices. Furthermore, everyone has the right to establish and maintain private educational institutions that do not discriminate on the basis of race, are registered with the state and maintain standards that are not inferior to standards at comparable public educational institutions. The state may subsidise independent educational institutions.

5.4 Section 185 of the Constitution provides for the establishment of a Commission to promote the rights of cultural, religious and linguistic communities. The Commission, broadly representative of the communities and the gender composition of the population, must promote mutual respect for the rights of cultural, religious and linguistic communities
on the basis of equality, non-discrimination and free association. In the execution of its
duties the Commission has broad investigative and monitoring powers, which includes
reporting to the South African Human Rights Commission for further investigation.

5.5 Section 235 is a very important section which recognises the principle of territorial
self-determination of cultural and linguistic communities within the larger context of South
African self-determination. In addition, other methods of self-determination are also
recognised as long as it is adopted in national legislation.

6. THE claims AND ENFORCEMENT OF THE language and cultural RIGHTS OF THE
INDIVIDUAL AND THE GROUP.

The above description makes it clear that the rights and claims to culture and language by
the individual and the group whether directly or indirectly, are recognised explicitly in
broad areas of the Constitution. The often made accusation that the Constitution does not
adequately recognise and protect individual and group rights to language and culture, is
simply not true. People who make this accusation, probably want to see that the
Constitution, protect the language and culture of a particular group. In the context of a
Constitution that provide for all citizens on an equal basis, an exception of a particular
group's language and culture, will disturb the notion of national unity, but worse, make
that particular group a target for suspicion and opposition.

As explained, there are various manners in which the Constitution provides for a claim and
enforcement of the rights to culture and language by an individual and the group. This
claim and enforcement can be done in the following manners:

6.1 Equality of languages. Since all the official languages have equal status and equal
protection, any individual or group can insist on the Constitution's requirements that at
least two official languages at national and provincial government level be used and that
municipalities must consider the language preferences of their residents. Also, the Pan
South African Language Board can be approached if official languages are ignored. As was
ruled in a recent court case, a language user can also insist on the government's
constitutional obligation to adopt a language act.

6.2 Because the denial of the individual's language and culture constitutes a violation of
his human dignity, an individual has the right under the Bill of Rights to accost the
legislature, the executive and all organs of state (Section 8 (1)). In practice this means for
example that a litigant in court may insist on the official language of his choice. Because
the Bill of Rights also binds natural and juristic persons (Section 8 (2)), a language user or
group of language users may also accost businesses and even private companies which
denies his/her or their language and culture.

6.3 Language users and culture bearers have the constitutional right to associate freely.
This right to voluntary association grants a right to the association to utilise all the
freedoms of opinion, demonstration and petition (see paragraphs 3, 4.1 and 4.2 above.) In
this regard, Section 185 (1) (c) is of special interest. This sub-Section gives the Commission
Language and Cultural communities have the constitutional right to education in an official language of choice and to establish private educational institutions (which in all probably also includes higher education institutions) and to claim state subsidies. Where single-medium schools are not practically feasible, a cultural and linguistic organisation could certainly claim that parallel medium-education be offered instead of double medium education.

The Commission for the Protection and Promotion of the rights of Cultural, Religious and Linguistic Communities, under Section 185 (2) has broad powers to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities. Through means of frequent requests, petitions (see paragraph 6.3 above), proposals and representations, a language and cultural community can state its concerns and needs and demand redress. If the protection of human rights is in question, the Commission may refer the matter to the South African Human Rights Commission. (Section 185 (3)).

Section 235 is certainly stated in very general terms and the right of territorial self-determination of language and cultural groups subjected to national legislation for its implementation, but the section does acknowledge the principle of territorial self-determination of a language and cultural community. Other possible ways of self-determination are also provided. As indicated below, this provision has the potential for future planning and activation of cultural and linguistic communities.

International recognition and protection of cultural and linguistic communities. There are a number of international conventions, declarations and protocols which promotes the recognition and protection of cultural and linguistic communities. Most important is the United Nations Charter on Economic, Social and Cultural Rights signed by South Africa in 1994 but not yet ratified. Whilst it is important to constantly make the international community aware of the situation of a linguistic and cultural community and the threats experienced, the international support must not be overrated because the international monitoring organs only have advisory powers. The United Nations will only actively intervene if a linguistic and cultural community faces physical extermination, and even in these circumstances, there are many limitations, namely the extermination must amount to genocide or a threat to world peace.

An explanation of the rights to language and culture by an individual and the group as protected in the Constitution and the opportunities for claiming and enforcing such rights will be incomplete if reference is not made to section 36 of the Constitution. This Section permits the government within certain strict conditions, to limit certain rights. Accordingly certain rights such as freedom of association, conscience or association may be
limited. The right to human dignity may, however, under no circumstances be limited. Because language and culture rights are essential ingredients of human dignity (as explained in paragraph 3) it may be argued that the rights to language and culture may not be limited in such a manner as to encroach on a person’s human dignity.

7. THE RIGHTS OF THE SA COMMUNITIES TO LANGUAGE AND CULTURE.

An extensive network of the South African language and cultural communities' language and culture organisations, which are already in existence, can claim and enforce its constitutional rights to language and culture in various manners.

7.1 Firstly, SA linguistic and cultural communities can insist on the survival of schools and at least one or more institutions of higher education in a specific language. Meanwhile, the possibilities of private schools and a private university in a particular language as provided by the Constitution, must be pursued actively.

7.2 Secondly, SA linguistic and cultural communities, can insist that their language obtain full recognition in government and state administration. It is a fact that the study of indigenous languages at our universities has declined dramatically.

7.3 Thirdly, serious consideration and reflection must be given to the possibilities of territorial self-determination as offered by Section 235. (Example – Virtual self-determination for language groups).

7.4 Fourthly, the establishment of statutory Language and Cultural Councils as provided for in Section 185 (1)(c) may be actively organised and worked towards. Statutory Language and Cultural Councils with powers of influence and constraints on government action which will adversely affect the South African languages and cultures, will give considerable weight to the constitutional rights of SA language and cultural communities.

In this regard a very important starting point can be the preparation and promotion of a comprehensive charter of rights of culture and language. Flowing from this can be the language and culture councils for all SA's languages and cultural communities.

7.5 Fifth, South Africa's linguistic and cultural communities must continue establishing a network of supporting organisations in foreign countries. Although such organisations can not be active in South Africa they may contribute in the form of scholarships, donations and involvement in the promotion of SA language and cultural communities. The cultural institutions of the United Nations, although they have only advisory powers, may also pressure the South African government.

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