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LEGAL OPINION
[Confidential]

TO: Honourable E Mthetwa, MP
Co-Chairperson: Constitutional Review Committee

AND TO: Honourable Dr M Motshekga, MP
Co-Chairperson: Constitutional Review Committee

COPY: Mr. P Tyawa
Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Adv. Z Adhikarie – Chief Parliamentary Legal Adviser]

DATE: 30 November 2020

SUBJECT: Legal Opinion on the submission by Mr Khulso Isaac Selowa to the Joint Constitutional Review Committee- CR 32/2020 (Re: Declaring Khilovedu as an official language)

REFERENCE: 135/2020

Please find attached a legal opinion in respect of the above-mentioned matter.

Adv. Z Adhikarie
Chief Parliamentary Legal Adviser

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MEMORANDUM

TO: Honourable E Mthetwa, MP
Co-Chairperson: Constitutional Review Committee

AND TO: Honourable Dr M Motshekga, MP
Co-Chairperson: Constitutional Review Committee

COPY: Ms. P Tyawa
Acting Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Adv. Z Adhikarie – Chief Parliamentary Legal Adviser]

DATE: 27 November 2020

SUBJECT: Legal Opinion on the submission by Mr Khulso Isaac Selowa to the Joint Constitutional Review Committee- CR 32/2020 (Re: Declaring Khilovedu as an official language)

INTRODUCTION

1. Our Office was requested to advise the Joint Constitutional Review Committee (JCRC) on the submission received from Mr. K I Selowa in response to the JCRC's annual invitation for public submissions on the review of the Constitution.

BACKGROUND

2. Mr. Selowa's submission is made in his capacity as a director of a non-profit organisation called *Valodagoma NPC*, whose mandate it is to develop and advocate for the Khilodevu language.
3. Mr Selowa requests that the Khilodevu language be recognised in the Constitution as an official language.
4. In support of his submission, Mr Selowa notes that in 2018 a comprehensive Khilovedu orthography and dictionary were produced. Furthermore, this work is currently being developed as an English-Khilovedu picture dictionary geared at Grade R-3 learners. In addition, Valodagoma has also identified archived written examples of the Khilovedu language developed during the period 1930 to 1940.

LEGAL FRAMEWORK

5. The South African Constitution contains a multiplicity of language and language related rights. These include:
 - a) Section 6 (1), which recognises 11 languages as official languages namely Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu;
 - b) Section 6 (2), which creates a duty on the State to take practical and positive measures to elevate the status and advance the use of the 9 indigenous official languages mentioned above;
 - c) Section 6 (5), which provides for the establishment of the Pan South African Language Board (PanSALB) which must:
 - I. promote and create conditions for the development of all official languages;
 - II. promote and create conditions for the development of sign language, the Khoi, Nama and San languages; and
 - III. ensure respect for all languages commonly used in South Africa including languages used for religious purposes.
 - d) Section 2(3), which provides that no person may be unfairly discriminated against on the basis of language;

- e) Section 29 (2), which provides that every person has the right to receive education in the official language or language of their choice in public educational institutions where it is reasonably practicable;
 - f) Sections 30 and 31 (1), which afford a person or community the right to use a language of their choice; and
 - g) Section 35 (3) (k), which affords an accused person the right to be tried in a language of their understanding or if not practicable to have the proceedings interpreted in that language.
6. Section 6 (3) (a) of the Constitution further provides that national and provincial government must use at least 2 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.
 7. In contrast, in respect of local government, section 6(3) (b) states simply that “municipalities must take into account the language usage and preferences of their residents.”
 8. Official languages are further regulated and monitored in terms of *The Use of Official Languages Act, 2012 (Act 12 of 2012)* (“the Languages Act”). The Languages Act provides, inter alia, that national and provincial departments must adopt a language policy, which indicates the official languages that it will use for all government business.

Discussion

9. According to academic I Currie, no immediate or practical consequences flow from the mere declaration of a language as an official language.¹ Rather, legal content is given to official language policy through the regulation of state action relating to the use of language in courts, the use of language by legislatures, and the use of language for official government purposes.
10. The above statement is not entirely true in the South African context, as the Constitution, as supreme law, itself regulates the language of national and provincial government by requiring that it conducts its business in two or more of the official languages. This obligation, which finds further expression in the Use of Official Languages Act, means that no national or provincial government entity is constitutionally required to

¹ De Waal, Currie and Erasmus. South African Constitutional Law: The Bill of Rights.

engage with citizens in any languages other than official languages (although, it is submitted that nothing in law would prevent it from doing same in addition to any of the two official languages it adopts) and enjoys a level of discretion in its determination of which official languages to use.

11. However, notwithstanding that the designation of a language as an official language has definitive consequences in as far as it is elevated in the sphere of national and provincial government, the Bill of Rights deliberately refers to language generally rather than official languages in provisions which include language as part of rights.
12. Thus, an accused must be tried in a language that he or she understands, which may or may not be an official language. Similarly, everyone has the right to be educated in an official or other language of his or her choice if it is reasonably practicable to do so.
13. For purposes of government business, local government which is the level of State closest to communities, may choose any language, irrespective of whether it has official status or not, subject to language use and preference within the municipality.
14. It is therefore clear, that notwithstanding the elevated status of official languages for purposes of national and provincial government business, the rights of other non-official language users are also protected.
15. However, the extent of protection afforded to non-official languages in the Constitution differs in respect of the type of language.
16. The Constitution obliges that the PanSALB promotes and creates conditions for the specific development and use of official languages, sign language and the Khoi, Nama and San languages. In contrast, it states that PanSALB must promote and respect all other languages commonly used in South Africa. This distinction is important, in that PanSALB is only constitutionally bound to create conditions for the development of the specific listed languages. This added obligation means that whilst all official languages enjoy parity of esteem and equal treatment, the same cannot be said in respect of all unofficial languages.
17. The legal treatment of language is closely linked to the status of that language in society. The mere recognition of a language as an official language (irrespective of

the legal consequences that flow therefrom) may have important psychological impacts.² This accords with the view that when government recognises the language of a minority as an official language it also acknowledges the minority's right to maintain its identity. Furthermore, it is accepted that where languages enjoy official recognition they are more likely to grow and exist for a long time to come.³

18. It is useful to draw a comparison between the International Covenant on Civil and Political Rights⁴ (to which South Africa is party) and sections 30 and 31 of the Constitution, which protect the rights of individuals and communities to use a language of their choice. Article 27 of the CCPR, which is widely considered as the *grundnorm* of minority rights, states:

“Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

19. According to the Capotorti report commissioned by the UN, Article 27 entails a programmatic element and the State is required to take positive measures to achieve its goals.⁵ Thus whilst Article 27, and the corresponding rights in the Constitution prevent unfair discrimination against minorities (including on the basis of language) it can be argued that this alone is not sufficient because it does not preserve linguistic identity. In other words, whilst allowing a minority to speak their language freely will mean that the Constitutional obligations not to discriminate on the basis of language are met, it does not automatically mean that positive steps are taken to promote the language. It is in this context that the call for any language to be made official must be framed.

20. By way of example, the Broadcasting Act, 1999 (Act No. 4 of 1999) specifically mentions that a range of broadcasting programming in official languages must be extended to all South African's. As such, the legislation creates no positive obligations on the

² The IMPORTANCE OF THE CONFERENCE THEME: 'LANGUAGE AND EQUALITY' - JOSEPH-G. TURI; MISCELLANEA CONGREGALIA 45; UNISA 1993 available at http://uir.unisa.ac.za/bitstream/handle/10500/19553/Prinsloo_K_0869818368_Section1.pdf?sequence=1&isAllowed=y

³ Hill, D 2004. World: English Language gets New Surge of Growth.

⁴ The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976 in accordance with Article 49 of the covenant. South Africa is a party to the treaty with effect from 10 March 1994.

⁵ Study on the rights of persons belonging to ethnic, religious and linguistic minorities / by Francesco Capotorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. UN. Sub-commission on Prevention of Discrimination and Protection of Minorities. Special Rapporteur to carry out a Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, 1979

state broadcaster to promote non-official languages through its service offering. It follows that there is no impetus for the public broadcaster to make a concerted effort to promote the language or culture of the Balovedu people.

21. Similarly, the right to be educated in one's mother tongue is subject to the limitation that it is "reasonably practicable." This despite the fact that studies show that mother tongue education achieves the best outcomes and allows students to compete fairly.⁶

22. In the case of a non-official language, which is neither developed or promoted within or outside the borders of South Africa (such as is the case with international languages such as Hindi, Portuguese and Arabic), it is submitted that it will rarely be reasonably practicable to give effect to the right to be educated in a language of choice. This is because there will likely exist insufficient educational material (such as textbooks, teaching guides, etc.) to allow the right to be exercised. However, if a minority language is afforded official status, it will be more likely (though not guaranteed) that there will be an incentive for the State to promote the language through the publication of educational resources.

23. As discussed above, the recognition of a language as an official language creates certain positive obligations on the State, which in turn increase (but does not guarantee) the possibility of the said language being preserved and will also likely lead to its speakers being better able to access state resources and information. As such, perhaps, rather than using the non-discrimination and protection provisions in the Constitution as the starting point in deliberating the issue of whether Khilodevu should be given official status, consideration should be had to:

- a) whether the Khilodevu language and culture should be afforded the same protection as that of other minority official languages and if not why not; and
- b) the consequences for the language and its speakers if its status is not elevated as well as the consequences of the possible loss of the language for the cultural diversity and history of the nation as a whole.

24. During the Certification of the Constitution⁷, the Constitutional Court did not set out the criteria for determination of a language as an official language. In respect of an objection that Indian languages in particular were not included as official languages, the

⁶ Benson, Carole (2004) "*The importance of mother-tongue based schooling for educational quality*" available at <https://unesdoc.unesco.org/ark:/48223/pf0000146632>

⁷ Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa 1996 (4) SA 744 (CC)

Court noted that this was a policy matter and the recognition of 11 languages sufficiently addressed *Constitutional Principle XI* which required the protection of language diversity. The Court also emphasised that there was no danger of these Indian languages going extinct (presumably, as they are spoken internationally and are well developed).

25. In determining whether a language should be afforded official status, it is submitted that attention be given to, at least, the following non-exhaustive factors:

- a) the number of language speakers (with due regard to the fact that other minority languages in South Africa are official despite being spoken by a relatively small portion of the population);
- b) the geographic location of the language (i.e. can the needs of the community be met at a local level or is provincial and national recognition necessary for speakers to access the political, social and economic spheres);
- c) extent of disadvantage in respect of language rights (if any);
- d) the preference of the community (is the majority of the community desirous of official language recognition? If so why or why not?);
- e) available resources to practically promote the language (official recognition alone is unlikely to have a major impact in the absence of dedicated policy to promote the language. This requires a careful consideration of reasonableness and proportionality);
- f) the distinction between the language and other languages (i.e. is the language a dialect or a stand-alone language; is it mutually intelligible with any other official language);
- g) the extent to which the language has developed and is further capable of being developed in written form (declaration as an official language, in the absence of a language being sufficiently developed means that rights may not be able to be exercised regardless of its status - e.g. having national government forms in an official language is only possible if the language is sufficiently developed); and
- h) the risk that the language is likely to become obsolete (and the effect of this on its speakers and the preservation of their culture i.e. while maintenance of a language in itself is not sufficient to keep a culture alive, the survival of a culture is virtually impossible without it.⁸)

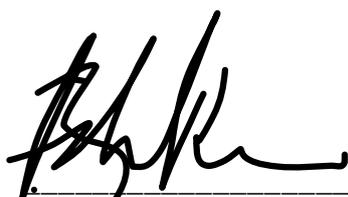
⁸ Eniko Felfodi, *The Characteristics of Cultural Minority Rights in International Law* page 435

Way Forward

26. Whilst, essentially the question of whether a language should be afforded recognition as an official language is a policy matter, it is one that carries with it legal consequences. These legal consequences in turn may contribute to the sustainability of the language and possibly even the culture and tradition of its speakers. Accordingly, the policy cannot be divorced from the legal rights and protections as they relate to official and non-official language.
27. It is submitted that the Committee may consider, after due regard to the factors listed above, four distinct policy options in dealing with the submission:
- a) the first is to not to include Khilovedu as an official language and allow the status quo to remain;
 - b) the second, is to amend section 6 (1) of the Constitution by specifically including Khilovedu as an official language;
 - c) thirdly, to amend section 5 (a) of the Constitution to compel the PanSALB to promote and create conditions for the development of Khilovedu; and
 - d) Lastly, whether there is a need for Parliament to consider the desirability of amending any existing legislation dealing with language or introducing new legislation aimed at directing language policy to specifically promote non-official languages. This may for example include a languages bill aimed at regulating language use within municipalities to ensure that, like national government, municipalities are compelled to adopt language policies that cater to the majority speakers within its boundaries.

Conclusion

28. The decision to designate a language as an official language is a matter that can only be determined after careful consideration of a number of factors. The question is one that demands not only consideration of practical issues and legal consequences but also sensitivity to the rights of minorities and the important role that these cultures play in enriching the fabric of our nation.



Adv. Z Adhikarie

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