A CRITIQUE OF THE LANGUAGE OF RECORD IN SOUTH AFRICAN COURTS IN RELATION TO SELECTED UNIVERSITY LANGUAGE POLICIES

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DECLARATION

I, Zakeera Docrat, hereby declare that this thesis is my own original work and has not, in its entirety or part, been submitted at any other university for a degree.

Signed: 

Date: 19 November 2019

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ABSTRACT

This interdisciplinary research located in the research area of forensic linguistics seeks to provide a critique of the monolingual language of record directive for courts in South Africa, while investigating how university language policies contribute the formulation of a monolingual language of record policy for courts, by graduating monolingual LLB students. The research commences with identifying the research problem, goals and objectives and how the language of record policy for courts is linked to university language planning. The research proceeds to an overview of scholarly literature concerning the historical developments of language planning in both the legal system and higher education in South Africa. The theoretical principles concerning the enacting of language legislation and policies is advanced in relation to the constitutional framework.

This research furthermore provides a thorough critique of the constitutional framework where the language rights the other related language provisions are discussed in relation to the theory and the application thereof in case law. The research explicates that the language rights of African language speaking litigants is unfairly limited and that access to justice for these litigants is either unattainable or achieved to a lesser extent. The disparities between language, law and power are brought to the fore, where the relevant legislation and language policies fail to determine the language of record in courts as well as legislate the African language requirements for legal practitioners in giving meaning to the constitutional language rights. The language policies of six selected universities is discussed in relation to the legal system's legislative and policy frameworks, outlining the need to transform the language of learning and teaching and develop the curriculum to support the legal system. In doing so, the shortcomings of the interpretation profession in South Africa are highlighted and the effects thereof on the language rights of litigants.

This thesis advances seven African and international case studies, comprising Kenya, Morocco, Nigeria, Australia, Belgium, Canada and India. Each of the case studies provides an in-depth analysis of the language of record/proceedings in courts and the language competencies of legal practitioners and judicial officers in relation to their university education. The African case studies are illustrative that English on the African continent in courts and higher education is dominate and the resultant loss of indigenous languages marginalises people from mainstream society. The international case studies provide two

models, Belgium and Canada, which South Africa can emulate, in enacting new legislation and policies and the amendment of current legislation, to ensure bilingual/ multilingual language policies are drafted for courts per province, where the language demographics present majority spoken languages alongside English. Furthermore, where courts interpret language rights and legislative and policy provisions in a purposive manner, where African language speakers are able to, fully realise their rights. Australia and India as multilingual models serve as important case studies where South Africa can learn from what to avoid, how to subvert challenges or adequately address these. These case studies highlight the dangers of a political elite who pursue an English only agenda at the expense of the indigenous languages and the speakers thereof. This thesis in conclusion provides interdisciplinary recommendations that need to be implemented in order to address the language question in South African courts and higher education.

CHAPTER ONE

INTRODUCTION

1.1 Introduction

This chapter introduces the research undertaken in this thesis. The chapter commences with the contextualisation of the current legal and linguistic frameworks in which this interdisciplinary research is undertaken. The interdisciplinary nature of this research is expounded upon in the sections comprising the purpose of the study, research problem and research area, where the term forensic linguistics/language and law is introduced. The chapter provides a historical account on the languages used in South African courts. The historical account delves into how universities through their language policies assisted the political language planning agenda at the time to ensure the maintenance of the language(s) of record. In light of the contextual overview and historical account of language usage in the South African legal system, specific research goals of the thesis are advanced. The chapter concludes with a brief summary of each chapter in this thesis, to provide clarity and structure.

1.2 Context of the research

The historically hegemonic legislative position occupied by English and Afrikaans as the two official languages, as discussed in section 1.3 below, resulted in the marginalisation of use and development of African languages (Bambust *et al*, 2012). The bilingual official languages of English and Afrikaans were reflected across disciplines including the legal system (McLean, 1992).

With the commencement of the new democratic era, the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution) ushered in a constitutional democracy founded upon dignity, equality and freedom (Alexander, 2002 and 2013). With a progressive all-encompassing transformative Constitution, implementation thereof was essential in redressing the past discriminatory injustices. The legal system was and is central to the implementation and realisation of the constitutional rights and ideals. The legal system is mandated to ensure the non-infringement of rights and any form of linguistic discrimination perpetrated by either the state or private citizens. It therefore ensures

protection of all citizens, regardless of race, ethnicity, culture, religion, sexual orientation or language as underpinned constitutionally.

The discriminatory redress envisioned in the Preamble of the Constitution resonated in the drafting of Section 6, the languages section in the Constitution. The common thread in Section 6 is discriminatory redress, envisioned through the recognition of eleven official languages as opposed to the previous two official languages. In accord with the eleven official languages, Section 6(2) elevates the status of African languages with a positive obligation conferred upon the state to adopt measures to ensure redress. This research engages with Section 6 in more depth in chapters two, six and seven below. The research examines the provisions of Section 6, the effect thereof and the implementation thus far. In doing so I engage in a critical analysis of Section 6, where the issues of the constitutional framework are discussed, substantiated through scholarly works, namely Perry (2004) and de Vos (2008) amongst others, and case law in chapters four and five.

The Bill of Rights (BOR) establishes specific language rights in Sections 9; 29(2); 30 and 35(3) (k) within disciplines, in order to provide practical implementation and the realisation of Section 6. Section 35(3) (k) of the Constitution, provides that an accused person has the right to be tried in a language that they understand, and where impractical to do so, proceedings are to be interpreted accordingly. Given that the right in Section 35(3) (k) is applied within the legal system, the research explores the parameters of this right. The theoretical discussions pertaining to the right in relation to the constitutional and legislative frameworks (Currie and de Waal, 2013) is discussed extensively in chapter two of this thesis.

A clear disjuncture exists between Section 35(3) (k) and the new' language of record policy directive, exacerbated by the monolingual language policies of universities whom are graduating LLB English only LLB graduates. The first step towards addressing the deficient legislative language requirements for legal practitioners would be to ensure, LLB graduates are linguistically competent when they leave universities. The Parliamentary Justice and Corrections Oversight Committee chairperson, at the time, Mathole Motshekga in 2017, made such a proposal, that all LLB students pass one of the indigenous languages before being awarded a law degree (Ndenze, 2017: 4). This proposal forms an integral part of this thesis and is discussed in further detail in chapters two, six and seven.

Cognisance must be taken of the fact that although the right in Section 35(3) (k) exists squarely in the legal system, the broader rights framework applying to language both directly

and indirectly to the legal system is of relevance, given the holistic approach of the thesis. The rights framework referred to includes the legal determination of the fairness of decisions taken in implementing the right as well as where infringements of rights are alleged. This analysis is undertaken with the purpose of determining the sociolinguistic effects on the broader citizenry in a constitutional democracy. Furthermore, it provides insight on the equality based approach to limiting constitutional rights in the form of the limitations analysis in Section 36 of the Constitution and the language specific limitations analysis, namely the sliding scale formula (Currie and de Waal, 2005).

As part of limiting language rights, demographics and other relevant sociological data has to be taken into account, which must in turn influence the language of record policy. To this effect, Legal Aid South Africa's Language Survey (2016) revealed in civil and criminal cases, that English was spoken by a minority of litigants, the majority of whom are African language speakers. The study found that English language proficiency of litigants in criminal and civil court systems, across all nine provinces was either poor or satisfactory, in the categories of understanding, speaking, reading and writing English. Thus, it would probably be impractical for the language of record to be English only; this would mean that African language litigants would rely solely on interpretation and translation services, which has the potential of placing the litigant at a disadvantage in the South African context where interpretation services are unreliable and of a poor quality. Although the following quotation by Gibbons (2003: 202) focusses on the non-existence of interpreters in courts, the quote expressly mentions the disadvantage second language speakers are faced with, where they cannot speak the language of the court.

> A second language speaker who does not speak the language of the court, and who is not provided with interpreting services may receive the same treatment as native speakers, but such a process is clearly unjust, in that s/he can neither understand the proceedings, nor make a case.

In South Africa Hlophe (2004: 46) states that interpreters lack consistency, due to their inadequate level of training, which results in the possible miscarriage of justice. The Section 35(3) (k) right could then be curtailed due to the limited linguistic competencies of legal practitioners and court personnel (Ndlovu, 2002).

Given that the legal system is attempting to navigate its way with regard to language rights and the determination thereof where infringements are alleged, comparative foreign and

international jurisprudence may be of assistance. Section 39 of the Constitution acknowledges the need to consider international law and confer a discretion on courts to consider foreign law, when interpreting the rights in the BOR. In light of this constitutional position, I engage in a comparative language rights analysis, focussing on the Belgian, Canadian and Indian jurisprudential models. The theoretical framework comprising of the comparative analysis is advanced in chapter four, where scholarly views such as those of de Vos (2001) and Cowling (2007) are advanced on how and why a comparative approach is necessary. The comparative study brings to the fore innovative means of how language rights are implemented across disciplines and how a fully bilingual legal system, is possible. The comparative approach also illustrates the linguistic challenges the respective countries legal system continues to grapple with in maintaining a linguistically inclusive legal system. The comparative studies serve as models which can be emulated and where lessons on how to successfully implement language rights in a legal system in a multilingual country can be achieved. Furthermore, in doing so what needs to be avoided and how to skilfully subvert challenges that could possibly hinder the implementation of such models.

A legislative and policy framework is essential in supporting the constitutional framework, by providing further interpretation of the constitutional provisions and language rights as well as providing discipline specific directives for implementation. Given that the Apartheid legislation concerning language in the legal system was adopted into the democratic dispensation, legislative and policy reform was needed. In response to this call the Legal Practice Act 28 of 2014 and the Use of Official Languages Act 12 of 2012, hereinafter referred to as the Languages Act (2012) become relevant. According to the preamble of the Legal Practice Act (2014), it is aimed at providing a framework for the transformation of the legal profession in accordance with the constitutional provisions, in order to ensure that the diversity of South Africa's demographics is represented within the legal profession. The Languages Act (2012) provides a framework for the successful implementation of Section 6 of the Constitution across disciplines. This creates an onus on government to adopt certain measures and create structures with the aim of realising the language rights conferred upon South Africans. This legislative framework emphasises the importance of transformation of the legal system and the role of language therein, which is discussed fully in chapters six and seven of this thesis (Pretorius, 2013).

In engaging with the legislative and policy frameworks, I advance and discuss the various types of legislation in accordance with Turi's categories (1993) and du Plessis's (2012)

sociolinguistic analysis thereof. In applying the categories and sociolinguistic analysis the Higher Education Act 101 of 1997 (HEA) also arises as the legislative framework enabling the drafting of university language policies. This links back to the research area of forensic linguistics/ language and law, where legislation is at the centre of regulating language usage for use in the legal system. In explicating the theoretical discussions underpinning language planning and policy formulation at universities, housed in chapter two of this thesis, relevant case law is provided as practical examples in chapters five and six. These cases include: *Afriforum and Another* v *University of the Free State* (2018); *Afriforum and Another* v *Chairperson of the Council of the University of Pretoria and Others* (2017); and *Gelyke Kanse and Another* v *The President of the Convocation of the Stellenbosch University* (2017). In all instances, the courts reaffirmed the English only approach, entrenching monolingualism at the expense of bilingualism or multilingualism.

The practical effect and implementation of the right in Section 35(3) (k) in relation to the legislative and policy frameworks as well as the current language of record policy directive, is analysed with reference to case law in chapters five and six of this thesis. At this point in the thesis, however it can be noted that the legislative and policy frameworks fail to acknowledge that African languages can be used as languages of record. Evidence of this are the cases of *State* v *Matomela* (1998) and *State* v *Damoyi* (2004) which were conducted in an African language, giving effect to the accused's Section 35(3) (k) language right. The accused persons in both instances were isiXhosa and isiZulu speakers. The cases illustrate that where there are linguistically competent legal practitioners and judicial officers, cases can be heard and recorded in an African language, where the litigant is a mother tongue speaker.

What is needed is a thorough engagement of the language of record policy directive in relation to monolingual language planning in the legal system and at universities. Such critique and engagement needs to take place in accordance with Mclean's (1992: 153) four ideologies underpinning language planning, namely assimilation, closely linked to internationalisation, given that English is an international language. Based on the language statistics, this was idealistic and there remains an urgent need for language planning in the legal system to be informed by the ideologies of pluralism and vernacularisation. These two ideologies conform with the language statistics, whereby citizens conform to the linguistic diversity of the country and government commits to the maintenance of these languages (Mclean, 1992: 153). Emphasis would be placed on centralising the role of African languages

in the legal system, through practical implementation of discipline specific policies (Docrat, 2017: 39).

What would be required is a new inclusive language planning process for the legal system and universities, where language is seen as a resource and a right rather than a problem (Ruíz, 1984). A fourth tier of language planning, opportunity planning (Antia, 2017: 166) would be relevant, allowing for marketing and reinforcement of the language policy. This will be in addition to the coercive legislation, which is often ineffective (Antia, 2017: 166). Opportunity planning is "understood and offered as a framework that foregrounds implementation in language planning and policy" (Antia, 2017: 166). Opportunity planning provides strategies for the implementation of a language policy in the specific domain. In doing so opportunity planning addresses incentives and directives on implementing the language policy, infrastructure and training (Antia, 2017: 166).

An inclusive language planning process for both the legal system and universities will ensure a transformed system, where African languages are seen as a tool to enable transformation. Wesson and du Plessis (2008: 2) define transformation as "a change from a state of affairs that existed previously". Wesson and du Plessis (*ibid.*) provide that transformation will not carry one meaning and may be defined according to the various themes in the discipline to which it is being applied. The legislative position regarding language as part of the broader process of transformation must be engaged with, given that language is integral to racial demographics (Lubbe, 2008: 4) which the Legal Practice Act (2014) seeks to develop. I argue that transformation of the legal system must include language alongside race and gender, if a transformative agenda is to emerge following the implementation of the Legal Practice Act (2014) and the Languages Act (2012).

The process of transforming the legal system guided by the legislative and policy framework requires the proposal of legal reform, which can be advanced through the constitutional concept of meaningful engagement. Meaningful engagement was conceived in the socio-economic rights spectrum with specific reference to eviction (Muller, 2011). Meaningful engagement has since been expanded and developed in the realm of language policy by Docrat and Kaschula (2015: 8-9), in ensuring successful implementation. Meaningful engagement was defined by the court in the case of *Occupiers of 51 Olivia Road, Berea Township, and 157 Main Street, Johannesburg* v *City of Johannesburg* (2008: 212), as a two-way process in which government and the affected persons are required to find common

ground where issues are addressed and solutions found or agreements forged, and outcomes are favourable to all stakeholders. 'Meaningful engagement' should occur in good faith, transparently, with mutual understanding and sympathy and the necessary skill to achieve the objectives (Chenwi and Tissington, 2010: 4).

1.3 History of the language(s) of record in South African courts of law

A brief historical account of the role of use of language(s) in the legal system is important in understanding the conceptual linguistic issues currently plaguing the democratic legal system. Historically the language(s) of record policy was influenced politically, where the position of those in power was exploited in entrenching a language on the people of South Africa. Evidence of this can be traced back to the arrival of Jan Van Riebeck in the Cape (van Niekerk, 2015: 373). During the Dutch occupation, Dutch as a language was imposed on the local population, and the language of the courts was Dutch. English was introduced during the British occupation in the 18th and early 19th century. There was an insistent move to ensure English became the sole official language for use in courts. Arguably, what is happening today is merely a re-enactment of the 19th century colonial or now neo-colonial sentiments. In 1813 Governor Sir John Cradock, published his sentiments about the importance of English and the need to acquire good English skills for all government employees (van Niekerk, 2015: 377). On 5 July 1822, a proclamation was issued, where English was adopted as the 'exclusive official and judicial language' (van Niekerk, 2015: 382). The proclamation applied to all judicial proceedings of the lower and higher courts. The move to have English as the sole official language for legal proceedings was justified on the basis that it would unite 'local inhabitants' and those of British origin (van Niekerk, 2015: 383). Van Niekerk (2015: 383) questions what he calls the 'curious notion that a single language would lead to unity', this point must be borne in mind, specifically with regard to the proceeding discussion on the reasoning behind the recent monolingual language of record decision.

The dominance of English as the language of record was cemented further through the Royal Charters of Justice (van Niekerk, 2015: 386). In 1827, the first Charter of Justice determined that the language medium would be English only in both the Supreme Court and circuit courts. The Second Royal Charter, in effect from 1834, identical to the First Royal Charter, reaffirmed the English only language of record decision. Section 2 of the Constitution Ordinance Amendment Act 1 of 1882 reintroduced Dutch as an official language and

awarded equal status alongside English. The Dutch Language Judicial Use Act 21 of 1884 permitted the use of Dutch to be used as a language of record, where the parties in court chose Dutch to be heard in as their language of choice.

The South Africa Act of 1909 recognised English as an official language in addition to Dutch. With the South Africa Act of 1909 resulting in the establishment of the Union in, Section 137 cemented the dual official language status of Dutch and English. The definition of Dutch was extended to include Afrikaans in the Union Act, 8 of 1925. Through Act 8 of 1927, Afrikaans replaced Dutch as an official language alongside English. With the onset of Apartheid in 1948, the legislative formulations constantly reaffirmed the position of English and Afrikaans as the official languages. The Republic of South Africa Constitution Act 110 of 1983, specifically Section 89(1) entrenched the position of English and Afrikaans as official languages.

It is evident that legislative recognition of African languages in the form of official, developmental status or use was always absent; hence, the entrenchment of English and Afrikaans and the marginalisation of African languages from mainstream society. It can be argued that the usage of African languages was recognised in Act 110 of 1986 in the form of an African language being utilised within the self-governing territories or homelands. In effect, African languages were being developed in the self-governing territories, through the schooling system, where linguistic segregation was utilised to achieve racial segregation (Bambust, 2012).

Mirroring the legislative language position in South Africa, advanced above, the legal system adopted English and Afrikaans as the mediums for court use. Bambust *et al* (2012: 221) advance that the current legislative position regarding the use of language in court was inherited wholly into the democratic dispensation. This resulted in the use of English and Afrikaans as official mediums in lower courts as prescribed by Section 6 of the Magistrates' Courts Act 32 of 1944.

The English and Afrikaans language requirements were legislated for attorneys and advocates in the Attorneys Act 53 of 1979 and the Admission of Advocates Act 74 of 1964. These statutes in conforming to the official languages at the time of enactment prescribed that English and Afrikaans in addition to Latin at university level were requirements for admission to the Side Bar and Bar. In an amendment the Latin, English and Afrikaans requirements were removed, however there was no insertion of African language

requirements. According to de Vos (2008) the perpetuation of this linguistic discrimination fails to recognise the demographics of South Africa, while in turn undermines the constitutional framework supporting the transformational process of the legal system. The current language dispensation of the legal system mirrors the historical position of African languages, which van Niekerk (2015: 375) succinctly summarises in the excerpt below:

> Indigenous African cultural institutions, including languages, have notoriously been ignored in the history of early South Africa. Thus, the needs of the indigenous population played no role in any decisions relating to judicial language during both the Dutch and the English administrations of the Cape, later in the territories beyond the borders of the Cape.

1.4 Purpose of the study

The primary purpose of this research is to critique the 2017 monolingual language of record policy directive. Moreover, the research aims to identify the linguistic challenges plaguing the monolingual English legal system, which hinders access to justice for litigants who are non-mother tongue English speakers. This research furthermore seeks to advance the importance of legislating African language requirements for LLB students, legal practitioners and judicial officers to ensure that a linguistically competent legal profession will enable African languages to be used as languages of record. The research is aimed at laying bare the exclusionary legal system that perpetuates English as a sole official language of record, entrenching monolingualism at the expense of African languages and bilingualism or multilingualism more broadly. This research was motivated by the undermining of the principle of bilingualism and multilingualism and the lack of importance placed on African languages as potential languages of record.

The relationship between law and language in South Africa is pivotal in ensuring the constitutional rights, obligations, values and principles are implemented across society through the assistance of the legal system. What has recently emerged from the litigation concerning the university language policies is the judiciary's endorsement of monolingualism under the guise that English enables access for all at universities and the legal system.

Given that I am an African languages and LLB graduate, I value the importance of graduating linguistically competent law graduates, where the importance of language is understood as facilitating and enhancing access to justice, this has motivated me to undertake the research

as part of an auto-ethnographic approach. Specifically my interest in forensic linguistics and the relationship between law and language including the role of language policies and legislation, in ensuring the constitutional provisions are realised, and language rights are conferred equally upon all persons.

In pursuing the primary goal of critiquing the language of record for courts directive, the constitutional provisions are analysed, in providing the foreground for this research. These constitutional provisions establishing language rights create a false impression that the interpretation and application thereof is unambiguous. The cases, which this research engages with, will illustrate this point, where the basic fundamentality of language rights have been questioned. This constitutional framework in turn affects the contents of statutes and policies tasked with the implementation and realisation of the constitutional rights.

With regards to the legislation, the criteria used by the Magistrate's Services Commission and the Judicial Services Commission in appointing judicial officers, in accordance with Section 174 of the Constitution will be consulted. Relevant court cases will be analysed, which have been heard and recorded in an African language.

This research will examine the relationship between the language planning processes of universities and the legal system in giving meaning to the language provisions of Sections 6 and 29(2) of the Constitution. The role, which university language policies play in affecting the linguistic competencies of legal practitioners, will be assessed and how this impacts on the realisation of Section 35(3) (k) of the Constitution and the development and elevation of the status of African languages. Other cases concern the litigation surrounding the constitutionality of the monolingual university language of teaching and learning policies of the Universities of the Free State, Pretoria and Stellenbosch.

1.5 Research area: Forensic linguistics or language and law

This research is interdisciplinary, as it critiques the language of record policy for South African courts. Secondary to this critique is investigating the extent to which African languages are recognised in the South African legal system, through usage and development. More specifically the research pertains to language policy and planning in both contexts of the South African legal system and Universities, thus being sociolinguistic in nature, located within the humanities. Sociolinguistics is the study of languages in relation to society (Webb and Kembo-Sure, 2000: 84). Sociolinguistics combines sociological and linguistic concepts

and techniques to study the role and function of language in society. It is relevant to the thesis at hand, given that one of the goals of this research is to investigate the status and use of African languages in the South African legal system. Moreover how the role of language can enhance access to justice for broader society. These points are discussed in further detail in this chapter, with reference to the goals of the research.

The legal aspect is the constitutional and legislative frameworks as well as the case law. In almost all instances, academic texts as evidenced from the bibliography refer to this interdisciplinary research as law and language or language and law. What has recently come to the fore following the dissemination of research across countries is the emergence of a network of what is termed forensic linguists in the field of forensic linguistics. The use of the phrase forensic linguistics only emerged in 1968, when Professor of linguistics Jan Svartvik recorded its first mention, while linguistically analysing a set of legal statements. These legal statements were statements by accused persons provided to police. Svartvik, specifically analysed phrases from the statements such as 'I then observed' (Olsson, 2008: 5). This became known as 'police register' and continues to be an area of research within forensic linguistics (Olsson, 2008: 5).

The question arises as to what is forensic linguistics. Olsson (2008) explains that there are many definitions of forensic linguistics. It is simply the application of linguistics to legal questions and issues. Olsson (2008: 3) who looks at the term through an applied linguistics lens narrows down this very broad definition. According to Olsson (2008: 3) "... it is the application of linguistic knowledge to a particular social setting, namely the legal forum (from which the word forensic is derived)". The following excerpt by Olsson (2008: 3) provides an in depth understanding of what forensic linguistics is and reads as follows:

> In its broadest sense we may say that forensic linguistics is the interface between languages, crime, law, where law includes law enforcement, judicial matters, legislation, disputes or proceedings in law, and even disputes which only potentially involve some infraction of the law or some necessity to seek legal remedy.

Grant (2017) provided a brief all-inclusive definition which to an extent summarises the definition by Olsson (2008), explaining that forensic linguistics is an attempt to improve the delivery of justice. It furthermore involves linguistic analysis of legal texts, contexts and processes. In applying the definitions to the nature of the research at hand, it is clear that this research can be positioned within the forensic linguistics context, where the role of language

is assessed in legislation, policies and case law. Forensic linguistics is a developed research area in Europe and Australasia, evidenced by the numerous publications on the matter (Coulthard and Johnson, 2007; Gibbons, 2003) where forensic linguists are called as expert witnesses in court cases to provide linguistic analysis of legal documents or the parameters of language rights when being infringed upon (Grant, 2017). According to Olsson (2004: 4), there are eight disciplines of forensic linguistics namely:

1. Authorship identification/ mode identification;
2. Legal interpreting and translation;
3. Transcribing verbal statements;
4. The language and discourse of court rooms;
5. Language rights;
6. Statement analysis;
7. Forensic phonetics;
8. Textual status

These eight disciplines are not static in nature and with the constant evolving nature of forensic linguistics, there may well be further disciplines developed. At this present stage of the research, disciplines four and five above are classified as the study of language and law, a term which has now been used interchangeably with forensic linguistics, particularly in Southern Africa where it is a relatively new research field. To date, in South Africa there has been a focus on interpretation and translation in courts. This research is subsumed under language and law, given that it focuses on the language of record and language policies of universities and legislation that influence the language of record policy.

Discipline four, comprises a:

> study of the relationship between courtroom participants and the language they use- issues of power, prejudice, culture clashes, etc.

In addition, discipline five includes:

> the language rights of minority groups in cultures dominated by other languages or dialects of the same language, the linguistic rights of those without language, and the oppressiveness of bureaucratic language.

In applying discipline four, it will be evident from the discussions within this chapter in additions to chapters five and six of this thesis, that language, class and power are evident in South African courtrooms. It can be applied threefold. Firstly, the current language of record decision elevates English to a super official status. Secondly, the language of record from the point of view of litigants being disadvantaged, given that the language of record is English only

Thirdly, the research involves creating a transformative legal system in which language is not a barrier in accessing justice. The centrality of this research in the area of forensic linguistics will become more apparent in the following sections of this chapter and the remaining chapters of the thesis.

1.6 Study area

With regard to the legal system, the study area comprises of both lower and higher courts. I specifically refer to the higher and lower courts, given that South African courts are structured hierarchically, in accordance with Chapter 8 of the Constitution specifically Section 165 to Section 180 and the various statutes governing each court structure. Section 8(1) prescribes that the courts are bound by the rights in Chapter Two of the Constitution, namely the BOR. The courts are obliged by subsection (3) to give effect to these rights (Theophilopoulos *et al*, 2012: 8). Section 165 provides the hierarchical structure of the courts, namely the Constitutional Court (CC); the Supreme Court of Appeal (SCA); High Courts including all High Courts of appeal, which may be established through an Act of Parliament hearing appeals from High Courts; Magistrates Courts; and any other court which may be established through an Act of Parliament, resembling the status of a Magistrates Court or a High Court.

The language of record policy directive, applies to High courts only, however due to the hierarchical structure of the courts in South Africa and the appeal and review processes the lower courts are directly affected. The issue is therefore three fold. Firstly, the Magistrates' Courts being the lower courts will in effect be obliged to hear cases in English for the purposes of review and appeal in the High Courts, where the language of record is English.

Furthermore, the Magistrates' Courts are bound by the judgments of the High Courts, through the doctrine of *stare decisis* most commonly referred to as the doctrine of precedent. The doctrine of precedent is applicable to the courts' structure, where the lower courts are bound by decisions of higher courts on similar matters, thus where precedent has been set. Furthermore the doctrine of precedent can be understood in terms of the appeal and review processes where a higher court hearing the case previously heard in a court *a quo* (lower court), sets aside a judgment and order of the lower court. The doctrine of precedent will become more apparent in chapters five and six of this thesis, where case law is advanced and critically discussed.

The third reason relates to legal practitioners. Similar to the hierarchal courts' structure the legal profession is similarly structured. The judiciary comprises of judges and magistrates who are assigned to the various courts to hear cases. The governance of the judiciary is in terms of the Judicial Service Commission Act 9 of 1994 and the Magistrates' Court Act 32 of 1944. In addition, given the independence of the judiciary from the legislative and executive branches of government in accordance with the doctrine of Separation of Powers (SOP), the judiciary is subject only to the Constitution and the Rule of Law (ROL) (Currie and de Waal, 2013: 18). Executing their duties without fear, favour or prejudice, ensuring the rights in the BOR, including language rights are realised.

Apart from the judiciary, there is a divide between private and state for both the attorneys and advocates professions. The state hierarchical structure comprising of prosecutors in both the Magistrates' Courts and state advocates for the High Courts. The National Prosecuting Authority in terms of Section 179 of the Constitution regulates the state attorneys and advocates. Non-state Attorneys are affiliated to the Side Bar while non-state advocates who are specialist litigators are affiliated to the Bar. Attorneys and advocates are affiliated to one of four law societies and bar councils, dependent on their geographical position. This point is elucidated in chapters five and six where, the law societies and bar councils' rules are advanced and critiqued with specific reference to language. Furthermore, a point of discussion, which emerges in chapters five and six, is the geographical argument where the language demographics per province are advanced and discussed in relation to the geographical position of practicing and attorneys and advocates.

Selected universities will be utilised as case studies, namely the universities of the Free State (UFS), Pretoria (UP), Cape Town (UCT), KwaZulu-Natal (UKZN), Stellenbosch and Rhodes

University. These universities have been selected given the recent language policy developments at each institution. The UFS has enacted an English only policy, which was found to be constitutionally sound by the Constitutional Court. Similarly, the UP opted to adopt an English only language policy, after previously having a bilingual language policy. The trend of moving from a bilingual to a monolingual language policy was once again opted for at Stellenbosch University with judicial approval of a monolingual language policy. UCT is included as an example of a liberal English institution of higher learning, where the demographics of the university are assessed in relation to the language policy of the University in accordance with UCT's transformational mandate. Both Rhodes University and the UKZN serve as examples where African languages, namely isiXhosa and isiZulu are taught as vocation specific courses for law students. Furthermore to identify issues concerning vocational specific courses and their effects on the linguistic competencies of law students.

In essence, the legal system has moved from a bilingual language of record policy to a monolingual English only policy ironically in the name of transformation. This complexity is explored further in chapter two of this thesis. This in effect is supported by the removal of all language requirements for attorneys and advocates and the non-inclusion of African language requirements in both the Constitution and amended statutes regulating the admission of legal practitioners to the Side Bar and Bar. The situation is furthermore exacerbated by the adoption of English only language policies for universities. What is needed is a legal system that is linguistically competent to render justice in the languages spoken by the majority of persons in South Africa. This in turn requires universities to graduate linguistically competent law graduates. A legislative and policy framework premised on the need for a multilingual inclusive legal system is needed.

1.7 Research problem

The research problem that this thesis will address concerns the monolingual language of record policy for South African courts. The language of record is "... the language(s) used in an official capacity in court proceedings... and for the delivering of judgments by presiding officers" (Malan, 2009: 141); the language of record is discussed further in Chapter two of this thesis. As part of critiquing this policy, the legislation and case law are discussed in illustrating the need for universities to graduate linguistically competent legal practitioners,

given that the language demographics for each of the nine provinces has a majority of African language mother tongue speakers.

The Attorneys Amendment Act 115 of 1993 and the Admission of Advocates Amendment Act 55 of 1994, both governing the admission of attorneys and advocates to the legal profession saw the removal of the Afrikaans, English and Latin language requirements at university level. However, there is no reference made to the insertion of African language requirements, in line with the constitutional mandate. Section 6 obligates that the African languages, which were marginalised during Apartheid be advanced through practical and positive measures. Further to this Section 174 of the Constitution, regulating the appointment of judicial officers provides only racial and gender imperatives to the exclusion of language (Moerane, 2003). The situation has been exacerbated by the slew of litigation concerning university language policies. The proposed revised language policies favour English monolingualism over bilingualism and multilingualism, where the judiciary has endorsed the monolingual approach of learning and teaching, where the focus for graduates is on English only.

With no legislative authority conferred on the importance and need for linguistically qualified legal practitioners and judicial officers in a multilingual setting such as South Africa, the question then is what is the authoritative position concerning the use of language in courts. To this end the legislative and policy frameworks resembles that of the frameworks governing the admission of legal practitioners. Simply put, the exclusionary legislative position concerning the language(s) of record in South Africa during Apartheid was adopted post democracy, where the language(s) of record remained English and Afrikaans. The Superior Courts Act 10 of 2013 as well as the Magistrates Courts Act 32 of 1944 evidence this. In addition, the Uniform Rules of court (2013), which regulates the proceedings in the higher courts, reiterates the exclusionary position of English and Afrikaans only.

In April 2017 the position, concerning the language of record worsened with an announcement in the national Sunday newspaper wherein it was reported that the language of record for high courts in South Africa would be English only with immediate effect. Chief Justice Mogoeng Mogoeng made the communiqué. An open letter was written in this regard as a response from concerned academics and legal practitioners (Docrat *et al*, 2017d). To date no reply has been received. The reasons cited by the Chief Justice, were premised on the need

for transformation in and of the legal system. The removal of Afrikaans as a language of record was reported as marking an achievement towards reversing the past discrimination.

The decision according to Docrat *et al* (2017d) was contrary to the constitutional provisions of Section 6. In addition, it weakens the prospect of ensuring language equality for all languages and speakers thereof. What in effect is the result is the elevation of English to a super official language () which needs to be guarded against.

Following the critique of the decision the Judge President of the Western Cape High Court Division, Judge Hlophe, released a directive. The directive applies to the jurisdictional area of the Western Cape High Court division. The directive reaffirms the English only language of record decision and that it be implemented with immediate effect.

Docrat *et al* (2017d) argued that there is no legislative authority conferred upon the Chief Justice in determining the language(s) of record. Furthermore that the determination of the language(s) of record is to be undertaken by the Minister of the department of Justice and Constitutional Development in consultation with the judiciary, following a public participation, consultative initiative. This is in accordance with the bottom up approach advocated for by the late Neville Alexander (1992) when drafting language policies. Pretorius (2012) writing on the importance of public participation in the legislative drafting process, holds that the exclusion of meaningful public participation will in effect weaken the effectiveness of a statute or policy during the implementation stage.

A further problem contributing the language of record policy is the Department of Justice and Constitutional Development's Language Policy (2019). The policy was drafted by the department as was required through the primary legislation of the Use of Official Languages Act, 12 of 2012. Section 9.1 of the policy provides no clarity or directive on the determination or regulation of the language(s) of record. The policy refers to the Rules of Court and the enabling legislation such as the Magistrates Courts Act, 32 of 1944 and the Superior Courts Act 10 of 2013.

The most recent legislative development concerning the transformation of the legal system in alignment with the constitutional vision is the Legal Practice Act (2014). The Legal Practice Act (2014) does not refer to the use of language in courts nor does the statute provide any legislative directive on the language of record. Furthermore, there is no mention of language requirements for legal practitioners as per the constitutional mandate of Section 6.

Based on the aforementioned, the primary problem at the centre of this thesis is the exclusionary monolingual language of record policy. The monolingual language of record correlates with the exclusionary legislative framework regulating the admission of legal practitioners to the South African legal system. There is no acknowledgement of the relationship between law and language. What is needed is a thorough investigation of the language of record decision. Moreover, to discuss the linkage between the need for linguistically qualified LLB graduates to positively affect a future language of record policy, one that is legally sound and linguistically inclusive.

1.8 Goals of the research

This research seeks to advance that the language of record policy directive is unconstitutional and that there is a need for legislating African language requirements for LLB students, legal practitioners and judicial officers in order to change the language of record. This will include critiquing the language of record policy directive against the backdrop of the constitutional provisions and the legislation regulating the admission of attorneys and advocates. Furthermore, the criteria used by the Magistrate's Services Commission and the Judicial Services Commission in appointing judicial officers, in accordance with Section 174 of the Constitution will be consulted. This research will examine the relationship between the language planning processes of universities and the legal system. The nature of the role, which university language policies play in affecting the linguistic competencies of legal practitioners, will be assessed and how this affects the realisation of the constitutional language right in Section 35(3) (k) and the development and elevation of the status of African languages, in accordance with Section 6 of the Constitution. Relevant court cases are analysed, which have been heard and recorded in an African language. Other cases concern the litigation surrounding the constitutionality of the monolingual university language of teaching and learning policies of the Universities of the Free State, Pretoria, Stellenbosch and the University of South Africa (UNISA). This research will assess the impact the language of record has on the concept of access to justice.

More specifically the purpose of this research is to pursue the following interrelated goals:

- To critique the language of record decision by the Heads of Courts, and critically engage with the reasoning underpinning this decision; and in doing so to determine if there should be a distinction drawn between the language of record and language of justice;

- To examine court cases, where African languages have been utilised in conducting trials in their entirety to illustrate that African languages can be used as languages of record;

- To critically analyse the legislation, amended legislation and policies regulating the admission of attorneys, advocates, magistrates and judicial officers to the side bar, bar and judiciary in light of Sections 6, 9, 29, 35 and 174 of the Constitution;

- To critically engage with the proposal by the Parliamentary Justice and Corrections Oversight Committee in relation to the language policies of the selected universities below;

- To critique the language of learning and teaching of selected universities, namely the Universities of Free State (UFS), Pretoria (UP), Cape Town (UCT), KwaZulu-Natal (UKZN), Stellenbosch and Rhodes University; to determine whether the policies promote the development of African languages and produce LLB graduates who are linguistically competent in one or more African language; These specific universities have been selected as UKZN has a bilingual model where isiZulu is taught alongside English; UFS, UP and Stellenbosch offered parallel medium of instruction, these policies are furthermore relevant to the case law where the judiciary has endorsed monolingualism; Rhodes and UCT are included as liberal English institutions, who are beginning to implement vocation specific courses;

- To advance the linguistic and constitutional implications emanating from the recent judgments concerning the monolingual language policies of the UFS, UP and Stellenbosch (Kaschula and Maseko, 2012);

- To engage in an African and international comparative model between Kenya, Morocco, Nigeria, Australia, Belgium, Canada and India, which present as multilingual countries;

- To propose legal reform to ensure effective legislation and policies are drafted and successfully implemented.

1.9 Chapter outline

The chapter outlines of this thesis are as follows:

Chapter One: Introduction

The chapter introduces the thesis by providing an outline tracing the historical development of the language(s) of record in South African courts. In doing so, the chapter hones in on the exclusionary role of African languages as language(s) of record. The chapter furthermore outlines the legislative and policy developments concerning the language of record and the impact thereof on the constitutional language rights of citizens. Problems were highlighted in illustrating the reasons why the research is being undertaken, succinctly advanced through the research goals. The chapter in essence presents as a historical backdrop against which the current position concerning the language of record is critiqued. To this end, the link between university language policies and the language of record emerges for further in-depth discussion in the proceeding chapters, specifically chapters two, four, five and six.

Chapter Two: Literature Review

This chapter includes critical engagement with scholarly articles relating to the various stages of legislative drafting in determining the language of record. In addition, the chapter engages critically with the language planning process of universities in drafting language policies and the relationship between the language legislation regulating the admission of attorneys, advocates and judicial officers. The constitutional rights framework provides the backdrop for the critical analysis. In addition, the chapter advances a definition of forensic linguistics, the research area in which this research was undertaken. The chapter provides the theory underpinning the data presented in chapter five of this thesis. The chapter furthermore informs the analysis of the data, as seen in chapter six of this thesis.

Chapter Three: Methodology

This chapter is dedicated entirely to the methods and techniques employed during the research process, which were carefully formulated in accordance with the goals of the research. The validity and reliability of the findings as well as the data obtained from the interviewees are assessed. The chapter furthermore identifies the limitations of the research and the challenges experienced in collecting the data. To this end, the chapter discusses how each challenge was addressed and how this affected the research in its entirety.

Chapter Four: African Comparative Analysis

Chapter four is an African comparative jurisprudential case study, comprising of Kenya, Morocco and Nigeria. A distinction is sought between the African comparative case study and the international comparative case study in chapter five. An African comparative case study is included to in illustrating the similarities the between South Africa in the South of the African content, while Kenya, Morocco and Nigeria, represent the East, West and North of the continent. The use of language and the language of record development between the three countries and that of South Africa will be evident. The language legislation of the legal systems of each of the three countries is advanced with relevance to specific literature concerning the language of record and language usage in these courts. Language problems and solutions are identified in each of the three models and cross-referenced to South Africa. The African comparative analysis illustrates the need for forensic linguists not only in South Africa but also on the African content more broadly. It is important that this thesis not only contribute to Southern Africa, but to the African content in its entirety.

Chapter Five: International Comparative Analysis

The chapter advances a comparative international jurisprudential case study, comprising of three countries, namely Australia, Belgium, Canada and India. The reasons for selecting these specific countries is explained where a globalised view is sought on how to determine the language of record in a bilingual/multilingual setting. The chapter comprises of a detailed overview of the role of the official languages in each of the three countries' legal systems and how the languages are treated equally as well as the speakers thereof. The constitutional, legislative and policy developments of the legal system concerning language are explicated fully. Furthermore, the chapter outlines the important role university language policies play in influencing the language of record. This would entail law graduates possessing linguistic competencies that are responsive to the language demographics of the country and more specifically the province in which they practice law. The three countries present as models which can be emulated in South Africa in pursuit of determining a language of record policy, which is responsive to the linguistic needs of litigants and where legal practitioners and judicial officers are linguistically competent in realising this goal.

Chapter Six: Data Presentation

The chapter presents the data in the form of the constitutional language provisions, legislation, policies and case law pertaining to the language of record. Parallel to this there is an overlap with the legislation in regulating the admission of legal practitioners and judicial

officers to the legal profession. Furthermore, the selected university language policies are discussed in relation to the legislative framework in assessing the relationship between these policies and the language of record. Moreover, language statistics are presented in the form of the language demographics of the country and the attitudes of legal practitioners towards to the use of African languages as language of record (de Vries, 2018). The South African language rights model is contrasted to the international comparative models.

Chapter Seven: Data Analysis

Chapter seven provides the analysis of the data presented in chapter six against the theoretical backdrop of chapter two. The analysis is conducted through a critical lens, where the reliability of the captured data from the interviews is assessed and the impact of the data on the research at hand. The chapter balances the views of authors and interviewees that inform my own opinions. I have considered these views in the broader process of assessing whether there is a link between university language policies enabling the graduation of linguistically competent legal practitioners and how this influences the language of record policy for courts. The chapter is essentially a culmination of discussions in the thesis thus far and informs the conclusions and recommendations in chapter eight.

Chapter Eight: Conclusions and Recommendations

The chapter summarises the primary arguments of the thesis. In doing so, the issues brought to the fore in the thesis are yet again highlighted where solutions are summarized. In essence, the chapter provides a brief overview of the main aspects of the thesis. This chapter acknowledges the need to provide solutions to the issues raised and discussed above. The chapter identifies specific recommendations and how each can be implemented and whose responsibility it should be to implement and review the implementation process. The recommendations are linked to the international comparative studies where the Belgian and Canadian models can be drawn upon in ensuring a flexible and practicable working model for South Africa.

1.10 Conclusion

This chapter has provided an overview of the historical position concerning the language(s) of record in South African courts. The chapter has furthermore illustrated the need for further investigation concerning the effect of the current monolingual language of record policy directive in relation to the constitutional language rights framework, which provides for the

elevation of nine African languages alongside English and Afrikaans. The chapter furthermore introduces the linkage between university language planning, specifically relating to the LLB programmes and the language planning and policy formulations of the legal system, with reference to determining the language of record. The linkage is evidenced through the legislative framework regulating the admission of attorneys, advocates, magistrates and judges to the legal profession, where no language requirements are needed, although the language demographics provide that the majority of litigants are African language speakers, as indicated in chapter six of this thesis. In summation, this chapter provides introductory discussions on the nature of the research, the research problem and the goals of the research against the contextualised setting, all of which are discussed in greater depth in the proceeding chapters of this thesis. The chapter that follows contains a literature review, which serves to underpin the thesis.

CHAPTER TWO

LITERATURE REVIEW

2.1 Introduction

This chapter provides a literature review in support of the thesis, particularly the data that is presented in chapter six and analysed in chapter seven of this research. This chapter comprises the theory pertaining to the language of record in South African courts. The chapter traces the historical development of the language of record through the three phases of colonialism, pre-Apartheid and Apartheid the current era of constitutionalism. In doing so, the research is located in the research area of forensic linguistics, which was briefly defined in chapter one of this thesis.

The chapter continues to engage with the relevant principles underpinning the legislative drafting, enacting and implementation processes in South Africa. Given the interdisciplinary nature of this research, the chapter commences with the general principles concerning all types of statutes. I then proceed to discuss the legislative principles concerning the drafting of language legislation.

The chapter engages with authors' works concerning the development of language policy in South Africa, where the relationship between language and law is discussed. This chapter identifies four types of language planning, with the fourth tier of opportunity planning (Antia, 2017), linked to the research area of forensic linguistics. This in itself reinforces the point that forensic linguistics is a branch of applied linguistics and related to African sociolinguistics. The development of the fourth tier is traced back to the work of Kaschula (2004) and the development thereof by Grin (2010) and more recently Antia (2017). In this instance, the economic effects of language planning are discussed with reference to how and why a language policy may fail during the implementation stages. Language planning as a process is differentiated in this chapter from language policy.

The chapter hones in on language planning and policy development in the domains of higher education and the South African legal system. The discussion in chapter two provides the theoretical basis upon which the selected university language policies are critiqued in chapters six and seven of this thesis. The relationship between language planning at

universities and the South African legal system is discussed in elucidating upon the interdisciplinary nature of this research.

As part of the development of language planning in the legal system and at universities, the language question is discussed with reference to transformation and decolonisation. These two terms are defined in relation to each other and the contemporary debates as to what is understood by linguistic transformation and decolonisation in the context of this research.

2.2 Defining the language of record

From the outset, it must be noted that the language of record in South African courts currently is English only. The discussion that follows refers to a bilingual language of record policy, given that the monolingual language policy is being contested on a constitutional basis. A further discussion of the monolingual language of record directive is contained in further sections of this chapter in addition to chapters six and seven of this thesis.

According to Malan (2009: 141), there is official and unofficial use of language in South African courts. Language used in official capacity concerns the language of record. In this instance the language of record is the language in which the court proceedings are recorded and in which the judgment is written and delivered by presiding officers (Malan, 2009: 141). The unofficial use of language is the language(s) used by accused persons, litigants and witnesses (Malan, 2009: 141). Official and unofficial usage are related to each other. If there is a monolingual language of record policy in place and an accused person is for example isiXhosa speaking with no proficiency in English, they are then solely reliant on an interpreter and will not understand the proceedings as presented in English. Gibbons (2003: 202) expresses this point in the following excerpt:

> A second language speaker who does not speak the language of the court, and who is provided with interpreting services may receive the same treatment as native speakers, but such a process is clearly unjust, in that s/he can neither understand the proceedings, nor make a case.

This quotation highlights the important role of the language of record and the effect it can have on the administration of justice and the Section 35(3) constitutional right to a fair trial, part of which is reinforced by an accused person's right to be tried in a language they fully understand. This part of the discussion pertaining to language rights of accused persons is housed in chapters six and seven of this thesis. At this stage of the discussion, the question

arises as to the determination of which of the two official languages of record to use in criminal proceedings.

Malan (2001: 144) identified two factors used in determining which of the two (English or Afrikaans) languages of record would be used in criminal cases:

1. If the accused were a mother tongue speaker of either of the two languages of record, the case would be recorded in the language of the accused. The preference of the magistrate or judge ordinarily did not play a substantive role in exercising a choice between English and Afrikaans. In line with this, judge presidents of the high courts also assigned cases in accordance with the relative language proficiency of the judges of the court concerned. Afrikaans cases, *i.e.* cases where the accused was Afrikaans speaking, were not assigned to judges with a poor mastery of Afrikaans but to judges who were proficient in Afrikaans. In principle, the same applied in English cases (where the accused was English speaking).

2. If the accused was a mother-tongue speaker of an African language, the language of record was to a greater or lesser extent determined by the preferences and language proficiency of the presiding judge or magistrate. If the magistrate was English speaking and less fluent in Afrikaans, the proceedings would ordinarily have been in English, while the presence of Afrikaans speaking presiding officers usually meant that the proceedings were recorded in Afrikaans. The linguistic trends in the area in which courts were situated also exerted an influence in this regard, however. Criminal cases in the Eastern Cape and KwaZulu-Natal, where English (aside from the African languages concerned) has always been dominant, were therefore conducted in English rather than Afrikaans regardless of the personal preferences of the presiding officer. The same held true for Afrikaans in, for example, the Free State and various other provinces.

In applying the criteria above, mother tongue speakers of English and Afrikaans were / are placed at an advantage in the legal system, given that the language of record policy to conduct proceedings in was English and Afrikaans. Speakers of the nine official African languages would then be placed at a disadvantage in comparison to English and Afrikaans mother tongue speakers who have a choice of which language to proceed in. There are four points of discussion arising from the excerpt above, these include and are not limited to a determination of whether this constitutes fair or unfair discrimination against persons on

grounds of language as protected by Section 9 of the Constitution in addition to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Secondly, whether an accused person's Section 35(3) (k) constitutional right to be tried in a language they fully understand is unfairly limited through the application of the limitations analysis in Section 36 of the Constitution and the sliding scale formula (Currie and de Waal, 2005). Thirdly, to discuss the use of language demographics in formulating practical language policies for the courts. Fourthly, to engage with the language requirements for legal practitioners to ensure linguistic competency in the official languages. This fourth point is linked to the university language policies, language requirements and or vocation specific courses for LLB students. These points are discussed fully in chapters six and seven of this thesis.

For current purposes, the language of record can be understood to be the language in which the court records the proceedings and delivers judgment. The following section of this chapter traces the history of the language of record.

2.3 Historical development of the language of record in South African courts

With a definition of the language of record advanced in the preceding section of this chapter, this section provides an historical overview of the language of record in South African courts. This section provides a thorough discussion of the legislative and policy enactments concerning the language of record.

The language of record was determined by the political dispensation at the time. Evidence of this dates back to the arrival of the missionaries in South Africa, who imposed their language on the indigenous persons of South Africa. Dutch as a language was imposed in all facets of society upon the arrival of Jan Van Riebeck in the Cape, as an official of the Dutch-East India Company (Van Niekerk, 2015: 373). At that stage, deep legal pluralism together with multilingualism was introduced into the territory (Van Niekerk, 2015: 373). The Dutch rule of the Cape saw Dutch being implemented in the courts. This language decision was reinforced through the Dutch East India Company's instruction on 16 April 1657, that the language of court would be Dutch only (Van Niekerk, 2015: 373).

The political influence on the language of record continued with the insurgence of the British occupation in the late 18th century and early 19th century, with English introduced alongside Dutch. According to Van Niekerk (2015: 373- 375) there are several questions arising as to

why English was introduced as a legal language. It is argued that it was not introduced for practical reasons, but for political purposes and that of power. During the introduction of both Dutch and English as legal languages, the South African people had no power in determining the legal language. In fact, there was a blatant disregard of the "indigenous African cultural institutions, including languages…" (Van Niekerk, 2015: 375). This was the case not only for the Cape, but also for all provinces across South Africa during this period.

On 24 July 1797, a Proclamation was issued establishing a Court of Appeals for civil cases. The proclamation prescribed that all appellants and respondents were to translate their documentation into English. During the period of 1803 to 1806, Dutch was once again the language of record in courts and returned to English only in 1806. The 1797 Proclamation was repeated to entrench the position of English for the use of all documentation in the court proceedings for litigants (Van Niekerk, 2015: 375).

An important development in the history of the language of record took place in 1811 with the establishment of circuit courts which were not only founded on the English legal model, but saw officers being appointed on a preferential basis if they were conversant in English (Van Niekerk, 2015: 377). English proficiency for presiding officers became a benchmark requirement. To this end the Governor at the time, Sir John Cradock publicised his sentiments concerning the importance of English in the legal system and for presiding officers (Van Niekerk, 2015: 377). He stated his reasons were underpinned by the practical need to be conversant in English:

> … commerce had suffered because of the lack of proper translators and because the use of translators was an imperfect and limited way of communicating and contrary to the spirit and effect of government (Van Niekerk, 2015: 377).

Sir John Cradock's sentiments on the importance of English proficiency for presiding officers must be borne in mind when I discuss the 2017 monolingual language of record of directive in chapters six and seven. Furthermore, this point is of relevance to the discussion concerning the language requirements for legal practitioners and presiding officers. This point is explicated in chapters six and seven with reference to the relevant legislation regulating the admission of legal practitioners to the profession as well as the language policies of universities, with regard to the language competencies of LLB graduates. The history and power of English in the legal system must also be noted as the discussion progresses in this thesis.

Reverting to the discussion at hand, in 1820 the Colonial Office approved a decision to use English exclusively in judicial proceedings (Van Niekerk, 2015: 382). In 1822, the Colonial Office Secretary instructed the governor at the time, Lord Charles Somerset to issue a Proclamation on 5 July 1822 for the adoption of English as the exclusive official and judicial language. The 1822 Proclamation was said to have been adopted, as a single language would unite all South Africans with the British occupants (Van Niekerk, 2015: 382). This point is important to bear in mind with regard to the reasons provided by Chief Justice Mogoeng Mogoeng to make English the sole official language of record in courts on the basis of unifying all South Africans in the present transformational era. In this thesis, it is argued that such unity through English-only remains a misnomer. This is true of most African countries, including Nigeria, Zimbabwe and so on where English-only has not necessarily led to national unity. This reasoning by the Chief Justice is discussed fully in chapters six and seven of this thesis.

The language question in the legal system was once again in question with Acting Governor Richard Bourke from 1826 to 1828. During this period, Bourke held off on implementing the 1822 Proclamation and permitted the use of Dutch, where it was practicable in the circumstances to use the language. In 1827 however, Bourke issued an Ordinance for the creation of the office of the Resident Magistrates (Van Niekerk, 2015: 385). Section 7 of this ordinance prescribed that all sentences, judgments and summons had to be in English.

1827 marked the first Royal Charter of Justice, which officially only came into effect on 1 January 1828. The Royal Charter of Justice had a significant effect on the use of language in the legal system. The Charter prescribed that English would be the sole language used in the Supreme Court and circuit courts (presently Magistrates' Courts). The Charter also saw the appointment of Sir John Wylde as Chief Justice and along with several judges being appointed to the Supreme Court, all of whom were British (Van Niekerk, 2015: 385). This point is important in illustrating the dominance of the British and their positioning in domains such as the legal system, where the indigenous people of South Africa failed to feature in authoritative positions. The appointment of British presiding officers meant the dominance of English in the legal system.

The English-only position was strengthened further through the Second Royal Charter of Justice dated 4 May 1832, coming into effect on 1 March 1834. Section 32 stated that English would be the sole medium through which sentences, judgments and orders were to be made.

The use of English only in courts continued until the enactment of the Dutch Language Judicial Use Act, 21 of 1884 (Dutch Act). The Dutch Act (1884) stated the following:

> … it was expedient to afford facilities for the use of the Dutch language equally with the English in courts of justice and in legal proceedings… when requested to do so by any of the parties (Van Niekerk, 2015: 388).

The next legislative enactment concerning the use of language in the legal system was with Section 137 of the South African Act of 1909, which declared English and Dutch as the official languages of the Union of South Africa (Van Niekerk, 2015: 390). The South African Act (1909) unequivocally prescribed that both languages be treated equally. The point concerning equality of languages in both status and use is important to note concerning the discussion of the constitutional provisions in chapters six and seven of this thesis. The Union Act 8 of 1925 extended the definition of Dutch to include Afrikaans. In 1961 and 1983, the Republican Constitutions saw Afrikaans replace Dutch as an official language alongside English (Van Niekerk, 2015: 390).

The discussions in this chapter thus far, have illustrated the historical development of the language of record in South African courts. Evident from this discussion is that the use of language in courts was politically determined, given who was in power at the time. Significant to note is the power of English as a language of record and how it was imposed upon the indigenous people at the time and how it established its dominance. A further point to note is that the language of record was determined through legislative means, where acts, ordinances and proclamations were enacted. These types of statutes and laws are described in this chapter in the sections that follow below. The language of record discussion thus far will be of relevance to the discussion in chapters six and seven of this thesis where the current language of record policy is advanced and critiqued. What follows is a discussion on the language of record during Apartheid up to the period of the Interim Constitution of 1993.

2.4 The language of record in the interim phase to democracy

Building on the discussion in the preceding section 2.3 the language of record in South African courts during Apartheid was English and Afrikaans. In section 2.2 of this chapter I advanced the criteria used to determine what the language of record should be. This according to Malan (2009) was a choice of either English or Afrikaans, which were the only official languages during Apartheid. If an accused person or witness had no understanding of

either of the two official languages, an interpreter would have been provided only for purposes of evidence and not for interpreting the remaining proceedings. The accused would thus not understand the proceedings. The language of record was therefore instructive and decisive in affecting the administration of justice and even access to justice.

The language of record was considered once again during the political transitional period. The CODESA talks and implications for language are advanced below in this chapter with reference to language planning. At this stage, my focus is solely on the language of record. The Interim Constitution (1993) dealt extensively with the language of record and language usage in the course of judicial proceedings more broadly. Chapter 1: Constituent and Formal Provisions, specifically Section 3, comprises the provisions concerning language in the Interim Constitution (1993) and the relevant provisions read as follows:

(1) Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu shall be the official South African languages at national level, and conditions shall be catered for their development and for the promotion of their equal use and enjoyment.

(2) Rights relating to language and the status of languages existing at the commencement of this Constitution shall not be diminished, and provision shall be made by an Act of Parliament for rights relating to language and the status of languages existing only at regional level, to be extended nationally in accordance with the principles set in subsection (9).

(3) Wherever practicable, a person shall have the right to use and to be addressed in his or her dealings with any public administration at the national level of government in any official South African language of his or her choice.

(4) Regional differentiation in relation to language policy and practice shall be permissible.

(5) A provincial legislature may, by a resolution adopted by a majority of at least two-thirds of all its members, declare any language referred to in subsection (1) to be an official language for the whole or any part of the province and for any or all powers and functions within the competence of that legislature, save that neither the rights relating to language nor the status of an official language as existing in

any area or in relation to any function at the time of the commencement of this Constitution, shall be diminished.

(6) Wherever practicable, a person shall have the right to use and to be addressed in his or her dealings with any public administration at the provincial level of government in any one of the official languages of his or her choice as contemplated in subsection (5).

(7) A member of Parliament may address Parliament in the official South African language of his or her choice.

(8) Parliament and any provincial legislature may, subject to this section, make provision by legislation for the use of official languages.

(9) Legislation, as well as official policy and practice, in relation to the use of languages at any level of government shall be subject to and based on the provisions of this section and the following principles:

(a) the creation of conditions for the development and for the promotion of the equal use and enjoyment of all official South African languages;

(b) the extension of those rights relating to language and the status of languages which at the commencement of this Constitution are restricted to certain regions;

(c) the prevention of the use of any language for the purposes of exploitation, domination or division;

(d) the promotion of multilingualism and the provision of translation facilities;

(f) the non-diminution of rights relating to language and the status of languages existing at the commencement of this Constitution.

The 'general' language provision as quoted in the excerpt is clear, unambiguous and authoritative. By authoritative I mean the provisions are not littered with discretionary words such as 'may', 'if', 'when' and so forth. I acknowledge that ss (3) includes the word 'practicable' and that this can be seen as an internal limitation or modifier, however read in the context as a whole ss (3) provides no alternative to the effect that an interpreter will be provided as with the final Constitution . This is illustrative of the clear mandate the drafters

of the Interim Constitution had at the time. There is a resolute undertaking to confer language rights upon all speakers of the official languages. The provisions are not watered down in a sense where they are qualified in each subsection. These provisions of the Interim Constitution are important to keep in mind when Section 6 of the final Constitution are advanced in chapter six and juxtaposed to Section 3 of the Interim Constitution (1993), as advanced in chapter six of this thesis.

As will become clear in chapter of this thesis, Section 3 of the Interim Constitution (1993) as with Section 6 of the final Constitution informs the other specific provisions on language rights. Section 3 of the Interim Constitution informs Section 107 (languages) of chapter 7, comprising the provisions of judicial authority and the administration of justice, which reads accordingly:

> (1) A party to litigation, an accused person and a witness may, during proceedings of a court, use the South African language of his or her choice, and may require such proceedings of a court in which he or she is involved to be interpreted in a language understood by him or her.
>
> (2) The record of the proceedings of a court shall, subject to section 3 be kept in any official language: Provided that the relevant right relating to language and the status of languages in this regard existing at the commencement of this Constitution shall not be diminished.

Section 107(1) of the Interim Constitution (1993) as opposed to the final Constitution, discussed in chapters six and seven of this thesis, makes specific reference to the language usage by witnesses, litigants and accused persons. This is important in that a distinction is drawn between the parties before court. A witness can be defined as a person providing evidence; a litigant can be defined as a person litigating in court primarily in civil cases, and which could include an appellant or respondent; and an accused person: a person charged with committing a criminal offence. The language rights of these individuals are thus recognised and protected through Section 107(1) of the Interim Constitution (1993). Cassim (2003: 25) explains that language rights in the judicial system, discussed in chapter six and seven of this thesis, has direct implications for the determination of the choice of the language for purposes of the proceedings and the right to address the court in the official language of one's choice. Bearing in mind that the language used to conduct the court proceedings in, is the language of record. Thus, there is an inextricable linkage between an

accused's language right and the language of record. Cassim (2003: 25) further states that there is a fundamental distinction that needs to be drawn between the right of a party/litigant or witness to obtain the services of an interpreter, which flows from the principles of fundamental justice; while there is the right of everyone appearing before a court to use the official language of his or her choice. The language of the accused in a criminal matter would then be the language of record for that case. This was how the language of record was determined during Apartheid, given that only two languages were official and considered languages of record as per the criteria and explanation by Malan (2009) quoted above.

According to Cassim (2003: 25), it is a fundamental principle that persons not only have access to the courts and law more broadly, but also understand it. With specific reference to accused persons, Cassim (2003: 25) holds that such persons must understand the language of the proceedings and be able to communicate in the language. The sentiments imparted by Cassim (2003) are essential as theoretical underpinnings for the discussion on the case law in chapter six of this thesis as well as the discussion on the parameters of the Section 35 language rights for any accused, arrested and detained persons, thereby determining the yardstick for linguistic proficiency. The latter point expressed by Cassim (2003: 25) would entail that the language of the accused person determine the language of record, where such language is an official language as per the constitutional provisions of Section 6 of the Constitution. Cassim (2003: 25) encapsulates this in the following excerpt:

> … proceedings must be conducted in a language that he or she (accused person) understands and that it must fall within the scope of his or her ability to comprehend the proceedings.

The Interim Constitution (1993) is therefore significant, given the specific mention of the language of record. Cassim (2003: 26) however notes that Section 107(2) of the Interim Constitution was subject to two qualifications: the first qualification pertains to Section 3(8) of the Interim Constitution (1993), quoted in full above, where parliament could designate which official language should be used on the basis of usage, practicality and expense. The second qualification is in accordance with Section 3, which prescribed that by designating the official languages, the status and use of English, and Afrikaans as official languages of record could not be diminished. Selecting an official language as a language of record will be determined by taking into account "… usage, practicality, expense, regional circumstances and the needs and preferences of the population in a particular province" (Cassim, 2003: 26).

With determining practicability, it would follow that where the language the accused understands is not one of the official languages of record it would not be practicable to do so (Cassim, 2003: 28).

This section of this chapter is illustrative of the developments of the language of record in South African courts during the political transitional period prior to the adoption of the final Constitution. The developments are positive, in that the language of record is included in the Interim Constitution (1993). The qualifications in determining the language of record in each province, is made up of a practical approach taking into account the number of speakers in a given area. This point is discussed in greater depth in chapters six and seven of this thesis with reference to language demographics of each province, as well as the criteria in the sliding scale formula (defined and explained in chapter seven of this thesis), when limiting a constitutional language right. The provisions of the interim Constitution (1993) are instructive on the role of the legislature in determining the language of record. The role of the legislature on enacting legislation is discussed in preceding sections of this chapter, while specific statutes are advanced in chapter six and critiqued in chapter seven of this thesis. The overarching point of departure emanating from the Interim Constitution (1993) is that the language of record must be the language that the accused person understands. The process of ensuring that the accused person's language be used as a language of record, where such language is an official language is explored through the international comparative case studies in chapters four and five of this thesis. Having proceedings conducted in a language the accused understands is a fundamental principle of access to justice for all persons. What follows is the advancement of historical developments from 1996 onwards.

2.5 The language of record in South African courts: 1996 onwards

The final Constitution was enacted and replaced the Interim Constitution (1993) as discussed above. For purposes of the discussion at hand, the constitutional provisions of the final Constitution are explicated in chapter six and critically engaged with in chapter seven of this thesis. A Language Plan Task Group (LANGTAG) was established to provide an extensive report and recommendations to the Minister of Arts, Culture and Technology (as it was then) on language usage in South Africa. This is a broad explanation of LANGTAG (1996); a more detailed discussion follows in this chapter. At the current stage of this thesis, it must be noted that the LANGTAG (1996) report conceded that language in all domains could not have been discussed in producing the report; one such omission was the legal system. As a result, the

LANGTAG (1996: 9) report recommended that a special study be undertaken to address the use of language in this domain.

Du Plessis (2001) documented the developments concerning the language of record in South African courts from 1996 onwards. Use of language in South African courts, including the language of record was discussed and debated at an internal meeting of the Department of Justice (as it was then) on 10 November 1997 (Du Plessis, 2001: 101). The next development took place a year later, where the Judicial Service Commission (JSC) was tasked by the Minister of Justice to investigate the possibility of having English as the sole official language of record. The paper released in 1999, proposed that it might be cost efficient to have one official language of record, English. It appears from the developments documented by Du Plessis (2001) which were traced back to newspaper articles that appeared in *Die Volksblad*, an Afrikaans newspaper, that the Afrikaans community was most disgruntled by the announcement of removing Afrikaans as a language of record. In fact, the Department of Justice stated that it was merely an intimation and a final decision had not been taken on the matter. Despite saying this the Minister of Justice forged ahead and organised a roundtable discussion, which included the JSC, Magistrates' Commission (MC) as well as the National Director of Public Prosecutions (NDPP) to be part of such discussions (Du Plessis, 2001: 101). The discussions were seen as a façade at ensuring public participation on the issue of the language of record.

In February 2000 the Department of Justice announced the conclusion of its round of consultations at the roundtable discussions, and was consequently preparing a report for the Minister of Justice. On 6 February 2000, the *Rapport* newspaper reported that the roundtable report recommended English as the sole official language of record. On 7 February 2000, *Die Burger* Newspaper subsequently reported that the English-only position would be implemented by June 2000.

The Minister of Justice seemed to have done a complete turnaround, when he announced on 18 February 2000 at a gathering of the legal fraternity in Johannesburg that his department presented to him the above recommendation. The turnaround came, when he explained that despite the recommendation, that a monolingual language of record would be unconstitutional and he would prefer a situation where all eleven official languages could be used on an equal basis (Du Plessis, 2001: 102). There was strong resistance from the officials at the Department of Justice, where the Minister's views were contradicted. In fact *Die*

Volksblad reported on 22 March 2000 that a representative of the Department of Justice argued that the then current bilingual language of record was unconstitutional. Furthermore, that it would be impractical to use all eleven official languages, thus the only practical solution to the problem in his opinion was to have English as the sole official language of record.

On 30 March 2000, *Die Volksblad* reported on the Second Language Indaba in Durban, which was held on 29 March 2000. At this Indaba the Chairman of the Advisory Panel on Language Policy and a Language Plan to the Minister of Arts, Culture, Science and Technology, further criticised the English-only language of record proposal (2000: 102).

It remains a concern that the Minister of Arts, Culture, Science and Technology in May 2000 sent a letter to the then Minister of Justice saying the following:

> Looking at all the implications… I am inclined to say that one should seriously consider introducing one official language of record in our courts. This view is supported by the role South Africa is to play in not only Africa but also the broader international world. To play this role, proceedings need to be recorded in a language, which can be understood by everyone, locally, nationally and internationally. Practice therefore, it seems to me, dictates that English needs to be the language of record in our courts (Strydom, 2001: 108).

The discussion on the developments of the language of record following the immediate conception and enactment of the Constitution is marred by an agenda to drive an English-only legal system. Once again, there is a clear element of politicking by an elite for a legal system that serves a minority in South Africa, and without any informed background knowledge of the linguistic implications of multilingualism as a transformative agent. This discussion happened as soon as a constitutional democratic state was established without involving (forensic) linguists. This point is expanded upon in this chapter where the language policy developments are advanced. During Apartheid, persons were marginalised and excluded on grounds of race, ethnicity and language. The language of record developments during this period of 1996 to 2000 sees the entrenchment of monolingualism through a language, English, which has a long colonial history of oppression as evidenced in section 2.3 of this chapter. Simply put Afrikaans and English were pitted against each other, contrary to the constitutional provisions of Section 6, which calls for all languages to be treated equitably. On the point of the Constitution, Section 6(2) instructively calls for the elevation of

the nine African languages in status and usage, given the past marginalisation of such languages. The complete opposite was taking place, instead the African languages were only mentioned twice where it was said that it would be impractical to use these languages as languages of record, the common assumption being that English-only will solve the 'problem' of multilingualism.

The only consistent dissenting voice was of the Afrikaans speaking community, who protested in the strongest terms against the removal of Afrikaans as a language of record. Such criticism undoubtedly influenced the decision to hold off on removing Afrikaans as a language of record. There were important developments from the Afrikaans perspective that were in my opinion never brought to the fore or considered. One such development was the conference organised by the *Federasie van Afrikaanse Kultuurvereniginge* (Federation of Afrikaans Cultural Organisation) which took place on 21 March 2000 to discuss language in the judiciary (Du Plessis, 2001: 101-102). Dissenting voices need to be vocal and they need to be given a space to be heard and their views considered before dismissing them or paying lip service to speakers of languages other than English. There remains a silence by African language associations and speakers on advocating for the use of African languages as languages of record in South African courts.

An important point to take cognisance of is the fact that the Department of Arts, Culture, Science and Technology and the Department of Justice were at the forefront of proposing the changes to the language of record. The importance of this fact will become clearer as the thesis progresses, especially in chapters six and seven, where the 2017 language of record directive is presented and critiqued. In the letter by the Minister of Arts, Culture, Science and Technology to the Minister of Justice, English was proposed as a sole official language of record for international accessibility. This reasoning will be juxtaposed against the reasons given by Chief Justice Mogoeng Mogoeng in the 2017 language of record directive, premised on English as enabling and fostering transformation.

The concurrent point throughout the historical developments and post the enactment of the Constitution, is that the language of record appears to be determined by the executive. The executive is enable to make the decision through the legislative arm of the state, while the third arm, the judiciary, merely plays a consultative role in informing the eventual language of record policy for courts. Again, this is important to note with the critique of the 2017 language of record directive in chapter seven of this thesis.

2.6 The relationship between forensic linguistics and applied language studies

In chapter one of this thesis, I advanced the definitions of forensic linguistics and the categories thereof with reference to the work by Olsson (2008). As per the discussion in chapter one, disciplines four and five (see above) are classified by Olsson (2004) as the study of law and language. This section of chapter two builds on the definition and introductory aspects of forensic linguistics presented in chapter one.

The language of record as discussed above in this chapter is concerned with the use of language in which an accused persons' case is heard. It is the language used to record proceedings and deliver judgment. Thus the language of record can be subsumed within discipline four of forensic linguistics (Olsson, 2004: 4), the language and discourse of court rooms, given that it concerns the use of language within the proceedings of a courtroom. It is also relevant to discipline five (Olsson 2004: 4) language rights, as an accused would be exercising his or her Section 35(3) (k) constitutional language right, to provide evidence in a language he or she fully understands. This is a broad theoretical application of forensic linguistics as a discipline to the language of record in courts.

Olsson (2008) and Gibbons (1994) both advance that forensic linguistics is a far more intricate research area, although it covers a broad spectrum of sub-disciplines. By understanding what precisely forensic linguistics is, one has to ask the question of what type of texts forensic linguists examine? (Olsson, 2008: 1). In answering this question, Olsson (2008: 1) explained that where a text is implicated in a legal or criminal context then it is classified as a forensic text. This is one instance in which forensic linguistics is applied.

Another way in determining what forensic linguistics is, is to consider the application of linguistics to legal questions and issues. Forensic linguistics is the application of linguistic knowledge to a particular social setting, in this instance the legal forum, hence the derivation of the word 'forensic' (Olsson, 2008: 3). Again, the application of linguistic methods to legal questions is only one sense in which forensic linguistics is an application of a science, whereby linguistic theories may be applied in analysing language samples either in textual or oral form (Olsson, 2008: 3). Olsson (2008: 4) summarises these points in the following excerpt:

> … the forensic linguist applies linguistic knowledge and techniques to the language implicated in (i) legal cases or proceedings or (ii) private disputes between parties which may at a later stage result in legal action of some kind being taken.

Gibbons (1994) adopts a more practical approach to explaining what forensic linguistics is and how it can be used in courtroom discourse. The primary focus for Gibbons (1994: 319) is the work of forensic linguists in the legal system, where forensic linguists provide expert evidence in court. Forensic linguistic evidence according to Gibbons (1994: 320) can be categorised into two main classes:

1. There is evidence as to whether a specific person, persons or a class of people could comprehend certain language.

2. There is evidence as to whether a specific person, persons or class of people could produce certain language.

The first point Gibbons (1994: 320) makes concerns persons understanding a specific language for example English and understanding legal language. Thus, 'certain language' has two meanings. This is also the case concerning the second point. These two points speak to the linguistic proficiency of accused persons, litigants and witnesses in court proceedings. Understanding proceedings is pivotal to ensuring justice and is a central principle underpinning the justice system as espoused by Cassim (2003). Gibbons (1986) succinctly summarises the issue of proficiency stating that:

> … it is not possible for a low proficiency, or second language speaker to suddenly begin to speak like a native speaker.

As touched upon with reference to Cassim's (2003) work, proficiency is directly related to determining the language of record. One cannot expect a majority of African language speakers to be proficient in an English-only language of record as is the current situation in South Africa. A double disadvantage is in existence in the legal system. The first concerns the fact that there is a need to master the legal language. According to Gibbons (1994: 196), there are people who are disadvantaged by their lack of mastery of the language through which the law is accessed and applied. Expounding the problem is spoken interaction in courtrooms, where there is an intrinsic difficulty of understanding legal language, which is compounded with disparities of power in the courtroom (Gibbons, 1994: 196). Examples of this includes cross-examination, which can be stressful and difficult for those on the receiving

end, in this instance an accused person (Gibbons, 1994: 196-197). The purpose of cross-examination is to discredit the version of the opposing party. This becomes increasingly easy when legal language is being used. A current example is the case of *State* v *Omotoso* (see *Omotoso and Others* v *State, 2018*) whereby the complainant testifying first, Cheryl Zondi, has been badgered through cross-examination by counsel with an onslaught of intricate questions loaded with legalese. The witness is a non-English mother tongue speaker, who appears to be linguistically competent in English, given her understanding of the questions and her responses, which she expresses, directly in English and not through an interpreter. Simply put, one might question how the situation might differ if Zondi was for example solely reliant on an interpreter. Would the level of accuracy displayed by the interpreter be a mastery of legalese, or would the interpreter take it upon him/herself to explain to the witnesses in their own terms? The later could result in an unintended answer being provided, bringing into question the credibility of the witness and her testimony. Gibbons (1994: 197) summarises this point by stating that second language speakers are placed at a further disadvantage, with trying to understand the legal language and through an interpreter nonetheless. Therefore, there is nothing simple about determining a language of record, one which only caters for one group of speakers and marginalises the rest this is not what justice about nor should it be. It must be about providing the same treatment for everyone within the legal system (Gibbons, 1994: 196). The language of record is pivotal in this instance, an important role that is downplayed. Gibbons (1994: 197) summarises the language situation in courts by stating the following:

> The complex, power laden and adversarial language of the courtroom is archetypically male, middle class, adult and high proficiency.

This excerpt by Gibbons (1994: 197) must be borne in mind as this thesis progresses, with specific reference to the language demographics presented in chapter five of this thesis, coupled with the 2016 language survey by Legal Aid South Africa and de Vries's language survey (2018).

This part of the chapter, located the language of record within the area of forensic linguistics. This discussion has also illustrated that forensic linguistics is a broad field one, which is premised on ensuring that forensic linguists assist in ensuring that justice is accessible and attainable for all.

Forensic linguistics is not only relevant in contextualising the language of record, but also influences language policy and planning. This is evident from the discussion thus far, where a language of record policy and other language policies regulating the use of language in courts and the legal system more broadly falls within the ambit of forensic linguistics. This point becomes clearer with the discussion on language planning and policy below. According to Wei (2013), language planning and forensic linguistics are common branches of applied linguistics. The International Association of Applied Linguistics classifies forensic linguistics as part of applied linguistics where they state:

> Applied linguistics is an interdisciplinary field of research and practice dealing with practical problems of language and communication that can be identified, analysed or solved by applying available theories, methods or results of linguistics or by developing new theoretical and methodological frameworks in linguistics to work on these problems (Wei 2013:2).

Given the relationship between forensic linguistics and applied linguistics, the following language planning theoretical framework is advanced.

2.7 Defining language planning

What follows is a discussion in which language planning is defined and discussed. This discussion includes various authors' views on language planning and the stages thereof. This discussion is theoretical with the purpose of outlining what language planning is, how, when and where it is applied in practice and what has been learnt thus far that needs to be altered in South Africa. The seminal work on language planning is that of Cooper (1989). Cooper (1989: 3-28) begins with four examples of language planning that were found at different periods, illustrating the historical development of language planning. What is important that emerges from these four examples is that Cooper (1989: 29) uses these four examples of language planning to argue that there is no 'single universally accepted definition of language planning'. Cooper (1989: 29) traces the history of a definition of language planning to Einar Haugen whom in 1965 stated that Uriel Weinreich used the term language planning at a seminar. It was however, Haugen (1965: 188) that cited the term academically in 1965, and defined language planning as:

> … the activity of preparing a normative orthography, grammar, and dictionary for the guidance of writers and speakers in a non-homogeneous speech community.

Cooper (1989: 30) lists a further 12 definitions of language planning. There are three definitions from this list, which in my opinion are understandable, descriptive and practical in the context of this research, namely:

1. Language planning is a deliberate language change; that is changes in the systems of language code or speaking or both that are planned by organisations that are established for such purposes or given a mandate to fulfil such purposes. As such, language planning is focussed on problem-solving and is characterized by the formulation and evaluation of alternatives for solving language problems to find the best (or optimal, most efficient) decision;

2. We do not define language planning as an idealistic and exclusively linguistic activity but as a political and administrative activity for solving language problems in society;

3. The term language planning refers to the organised pursuit of solutions to language problems, typically at the national level.

A common thread through the three definitions is that language planning is focused on solving language problems of some sort. Interestingly the second and third definitions confine language planning to a political and administrative activity, which is taking place at national level. This point must be borne in mind as the discussion progresses, where Alexander's work (1993) is discussed and his argument for a bottom-up approach is put forward. It is not to say that language planning is undertaken by the people, but rather that language planners inform their planning and decision-making based on the opinions of the people that their planning process will affect. Language planning therefore has to be a careful process. Bamgbose (1999: 17) makes this point, stating that the language planner probably sees him/herself as merely formulating policy, the implications of which will not be of interest nor implication to the language planner.

Eastman (1992: 96) defines language planning as "… efforts in a socio-political context to solve language problems, preferably on a language term basis…". Eastman's (1992: 96) definition again classifies language planning, as a political activity. Similarly, McLean (1992: 151) argues that language planning and the end result of language policies contributes to socio-political and economic development. Baldauf (2004: 1) also states that language

planning is often undertaken on a large scale at national level, which is usually undertaken by government.

Busch *et al* (2014: 144) notes that most definitions of language planning are associated with government control, action and implementation. All processes are carried out through the legislature and the executive. Busch *et al* (2014:144) substantiates this point by looking at the work of Prinsloo, who also notes that government is central to language planning. The point is that Alexander (1993) has a valid argument that a bottom-up approach would give effective meaning to the actual problems the language planning process is trying to solve. On this note, the definition which in my opinion is workable and relevant in the context of this research is by Kaplan and Baldauf (1997:3) which reads as follows:

> Language planning is a body of ideas, laws, regulations (language policy), change rules, beliefs, and practices intended to achieve a planned change in the language use in one or more communities.

This definition by Kaplan and Baldauf (1997:3) speaks to language use in communities and this in my opinion is what language planning should be aimed at, creating ways in which communities can access the legal system in a language they understand, where language acts as a tool that will enable access to justice. I am by no means stating that language planning does not and should not be a government orientated process, but rather if this were the case, that the language planning process be driven by the people whom the planning will affect. This speaks to the process of meaningful engagement as advanced in chapter eight of this thesis. Recent academic voices have echoed these sentiments of a more inclusive approach to language planning. Kamwendo and Ndimande-Hlongwa (2017: 63) building on the work of Crystal (1992: 220) within a South African context explain that language planning:

> … entails a systematic and theory-based attempt to address the country's linguistic communication challenges.

More importantly, Kamwendo and Ndimande-Hlongwa (2017: 63) speak to the need of taking into consideration the language demographics of the country as a whole, where language policies following the language planning process are appropriately drafted for particular domains. This does not exclude the function of government in driving the language planning process, but it also allows for non-government institutions and individuals to serve as actors in language planning (Kamwendo and Ndimande-Hlongwa 2017: 64).

2.8 Status planning

With the definitions of language planning above, and the uncertainty that accompanies many definitions, the next logical step in the discussion is to explore the stages of language planning to better comprehend the process as a whole. There are four stages to language planning, namely, status, acquisition, corpus and opportunity planning. Each of the four will be explained.

Reverting to the seminal work, Cooper (1989: 99) defines status planning as "… deliberate efforts to influence the allocation of functions among a community's languages." There is a list of language functions concerning national multilingualism, which was advanced by Stewart (1968) for the purposes of this research, four are applicable. "The first is ***official*** function as a legally appropriate language for all politically and culturally representative purposes on a nationwide basis" (Cooper, 1989: 100). Official function according to Cooper (1989) is usually specified constitutionally, where the languages are identified by a government as being official or declared so by law. A further distinction can be made where official can be a language which a government either uses for its day to day running or as a medium of symbolic nature (Cooper, 1989: 100). Chapters six and seven of this thesis will see this theoretical explanation of official status of languages being applied to Section 6(1) of the Constitution as well in the discussion concerning what the implications are when a language is conferred with official status.

The second, is ***provincial*** function, "… where language(s) function as provincial or regional official languages" (Cooper, 1989: 103). The application of a provincial language is not for the entire country but rather for a province or provinces. This speaks to the point put forward by Kamwendo and Ndimande-Hlongwa (2017: 63) of taking into account language demographics. The point is also elaborated on in chapters six and seven of this thesis, specifically with reference to Section 6(3)(a) and (b) of the Constitution; the sliding scale formula, when limiting language rights (Currie and de Waal, 2013); and language statistics from the national census with reference to the work of Docrat (2017a).

The third is ***wider communication***, which according to Stewart (1968) the function is of a linguistic system other than the official or provincial functions, operating as a medium of communication across language boundaries within the country (Cooper, 1989: 104). Cooper argues that a language of wider communication may be an official language, depending on the country and the respective Constitution. This is contrasted to the fourth function namely,

international, the function of which is for a medium of communication internationally for example "… diplomatic relations, foreign trade and tourism" (Cooper, 1989: 106). The fourth function is of relevance with the language of record directive, in particular the reasoning behind the directive, discussed in chapter six of this thesis.

Kamwendo and Ndimande-Hlongwa (2017: 64) also include the mention of functions while defining status planning as "… choices made in allocating functions or roles to a language." Baldauf and Kaplan (1997: 30) went into further depth with their definition of status planning, defining it as: "… those aspects of language planning which reflect primarily social issues and concerns and hence are external to the languages being planned". According to Baldauf and Kaplan, (1997:30) language selection and language implementation are the two status issues which make up the model. The second status issue is discussed with regards to the policy developments in the legal system, highlighting implementation as well as implementation failures.

Language selection is similar to the four functions identified by Cooper (1989) and comprises the following five components:

1. [language selection] involves the choice of a language by/ for a society through its political leaders;

2. A state must have a language in which it can communicate with its citizens;

3. The state must recognise its need for a language of communication, and subsequently it must select one or more languages for official purposes;

4. Leaders of a polity should have basic social and linguistic information about the language situation in the polity to make language selection decisions; and

5. Language choice cannot be made in a vacuum, but rather needs to be made in light of linguistic information (Baldauf and Kaplan, 1997: 30-32).

The correlation between Cooper's (1989) language functions and Baldauf and Kaplan's (1997) language selection is present, where the later identifies official language usage, language for wider communication; language for communication by the government with the people; and taking into account the language demographics before selecting a language.

The next step in the language-planning model is to discuss how to perform the functions; this takes place through corpus planning.

2.9 Corpus planning

Corpus planning is the second tier of language planning. Baldauf and Kaplan (1997:38) define corpus planning as "… those aspects of language planning which are primarily linguistic and hence internal to language". Kamwendo and Ndimande-Hlongwa (2017: 64) elaborate further on the activities undertaken with corpus planning these include and are not limited to "… language standardisation, lexicography and terminology development".

Although this thesis is not located within the area of language development, it is relevant to this research for two interrelated reasons. Developed languages need to be selected as languages of record and languages of tuition. For example, one cannot have a language that has a limited corpus base and expect to use this language in domains such as law. There needs to be sufficient terminology. The second is that in order for terminology to be developed and consequently the language, these languages need to be taught at university level and at this high status function, terminology can be developed. This will be illustrated with reference to a discussion concerning language policies at universities in chapter six of this thesis, in addition to the discussion on the need to graduate linguistically competent LLB students from universities through vocation specific courses, discussed in chapter six of this thesis. Cooper's (1989: 154) sentiments are important for this aspect of the thesis, stating corpus planning is a "… delicate balancing act between the old and the new, traditionalism and rationality". This is applicable to language planners in determining the language of record policy in South African courts. There should be no knee-jerk reaction to a particular language in the case of South Africa; this is what has and is continuously taking place with Afrikaans, given its historical development as a language of power and dominance in South Africa during Apartheid. This can be guarded against "where corpus planning requires sensitivity to what the target population will like, learn, and use" (Cooper, 1989: 154). Moreover, "the public must be told why what is being offered to it is desirable, admirable and exemplary" (Cooper, 1989: 154-155). The latter will be of utmost relevance where I critique the 2017 language of record directive in chapter seven of this thesis.

2.10 Acquisition planning

Acquisition planning is the third tier of language planning. It is self-explanatory from its name 'acquisition'. Cooper (1989: 159) explains that there are three types of acquisition goals:

> those designed primarily to create or to improve the opportunity to learn, those designed primarily to create or to improve the incentive to learn, and those designed to create or improve both opportunity and incentive simultaneously.

Acquisition planning is essentially part of the language policy, as it speaks to the acquiring the goals set out in the language policy. Thus, language-planning process results in a language policy. The policy relates to language usage or acquiring a language. Important for the research at hand is the fact that acquisition planning encompasses opportunity and incentive. These are important components in ensuring people who the policy is aimed at implement the policy and comply with the provisions therein. Incentive and opportunity are therefore motivators securing successful implementation of the language policy. This gives rise to the fourth tier of language planning, namely opportunity planning.

2.11 Opportunity planning

Opportunity planning, although a new addition to the three tiers of language planning, was initially termed and developed as an 'econo-language plan' by Kaschula (2004), building on the work of Grin (2010). The term was developed, as a result of what Kaschula (2004) identified as constant language policy implementation failures. This chapter addresses these implementation failures, suffice to say for the purposes of discussing econo-language planning, I briefly provide a background here. Kaschula (2004: 13-14) holds that the problem does not lie with the policy itself but rather with the implementation plan, which he describes as "… elaborate and ambitious, if not somewhat clumsy". Kaschula (2004: 14) explains that language policies need to be drafted with a broader framework in mind, that of the country as a whole. Simply put what difference or contribution will the language policy make to South Africa's economy? Kaschula (2004: 14) explains that the macro-economic position, which is a global one favours English in South Africa, however this is at the expense of the micro-economy where employment is created (Kaschula, 2004: 14). The micro-economy affects the macro-economy as does the macro-economy influence the micro-economy. By employing language planning strategies and language policies in the micro-economy that could facilitate

job creation through persons having access to education in their mother tongues, this would stimulate the economy as a whole (Kaschula, 2004: 14). It also makes South Africa more economically viable as a country of potential investment to global investors where people are educated and skilled.

Kaschula (2004: 16) quotes Heugh (1995) who in 1995 already spoke to the point of language policies having an economic effect on a country as a whole. Heugh (1995: 23) argues for the maintenance of African languages in South Africa, where these languages are mastered by the South African with the primary purpose of educating them and then growing the linguistic repertoires by acquiring languages spoken on the African content such as Kiswahili and French in order to strengthen the economic ties with neighbouring countries. The point of extraction however is the important link between the economy and language.

The relationship between language and the economy is a well-established one, according to Alexander (1992), who states "… language policy and language practice can either stimulate or impede economic efficiency, labour productivity, economic growth and development". Alexander (1992) elaborates further, stating that communication is key to a labour force, where linguistic markets are developed. Those who control the wealth production determine language practices in the workplace. These persons according to Alexander (1992) are convinced that their 'tried-and-tested' language policies and practices are best suited for the workplace, without assessing the situation. This form of language planning is counter-productive and ill conceived. In the case of South Africa, Alexander (1992) argues that everything in the workplace is packaged in English and this excludes the majority of people who are integral participants in the economic development of our country.

Coulmas (1992) talks to the point of language and the economy in greater depth. Coulmas (1992) argues that language can be seen as a negative aspect of the economy with regard to implementing language policies. The argument in this instance is where the beneficiaries of the system argue that a change in language policy and practices will only benefit the micro-economy and that this is a cost waste, as it has no benefit to the macro-economy (Coulmas, 1992: 148-149). This line of thinking according to Coulmas (1992: 148-189) is counter-productive and again misconceived. This point is important for the discussion that follows concerning the costs involved in having a multilingual language of record policy in South Africa. In South Africa's case, it has been and remains a political choice of including an African language. Alexander (1999: 3) said, by doing so, the political elite were of the

opinion that it would "… unleash a separatist dynamic…" resulting in the destabilisation of the country. English was therefore seen as the best option, and in their opinion would not result in any disruption and discontinuity resulting in the language of unity and liberation, as opposed to being the language of the oppressor (Alexander, 1999: 7). The work of Grin (2010) on language as an economic tool at universities is discussed under the subheading concerning language planning and policies at universities.

Building on Kaschula's (2004) econo-language planning model, Antia (2017:166) holds that issues of finance, the economy more broadly, infrastructure and support services are all subsumed under opportunity planning. As mentioned before opportunity planning is a fourth component of language planning. It is primarily focussed on the implementation failures of language policies and the need to rethink the implementation plan. Baker (2006), who rather used the terms usage and opportunity as part of the language planning process, did not refer to Opportunity planning directly as such. What is opportunity planning then? In answering this question, Antia (2017: 166) states the following:

> Opportunity planning is understood and offered as a framework that foregrounds implementation in language policy and planning. It engages with the requirements for the adoption of language policies.

Opportunity planning is dependent on the other three tiers of language planning. In saying so opportunity planning goes a step further by addressing "sites of use, incentives, directives, infrastructure, training and values" (Antia, 2017: 166).

The relevance of opportunity planning to this thesis is three fold. I will list each of the three briefly given that they are all discussed as the thesis progresses in chapters four, five, six and seven. In the first instance, opportunity planning is of relevance in creating job opportunities, where forensic linguists are employed not only to assist in the drafting of language policies for the legal system, but to act as experts in assisting the courts with interpreting the constitutional language provisions and determining the parameters of language rights. Secondly, opportunity planning can assist in ensuring that employment is created not only for forensic linguists in the legal system, but for LLB graduates who would be linguistically competent in an African language. This would be with the purpose of making them more employable so that they in turn can communicate effectively with litigants in their mother tongue. This will enable access to justice and guard against linguistic oversights that have the potential of negatively affecting a litigants corresponding right for example their Section

35(3) constitutional right to a fair trial. Thirdly, where opportunity planning creates employment for all persons regardless of race, where such persons acquire an additional official language or languages. This in itself contributes to decolonisation at universities and transformation in the legal system. Linguistic decolonisation and transformation is advanced in this chapter as well as in chapters six and seven of this thesis.

2.12 Ideologies underpinning language planning in South Africa

The language planning process described thus far is premised on the three-tier system with the addition of opportunity planning as a fourth tier. Mclean (1992) relying on the work of Reagan (1986) proposes that there are four ideologies underpinning language planning, namely, assimilation, pluralism, vernacularisation and internationalisation.

Pluralism can be understood to entail "… the acceptance of the presence of linguistic diversity in the society and the commitment by the polity to allow for the maintenance and cultivation of the different languages on a reasonable and equitable basis" (Reagan, 1986: 94). Applying this ideology to South Africa, it would be visible in the constitutional provisions specifically Section 6(5) which calls for the promotion and creation of conditions for the development of all eleven official languages. Section 6(5) of the Constitution can be read together with Section 6(4), which calls for parity of esteem and the equitable treatment of all official languages.

The second ideology, vernacularisation is the "… centrality of an indigenous language in the language policies of a society, and involves either the restoration or elaboration of an indigenous language" (Reagan, 1986: 94). Again, the focus in South Africa would be the constitutional provisions. In this instance Section 6(1) and (2) which recognise the previously marginalised African languages as official languages and call for the elevation in status and use of these languages. As it will become evident with the progression of the discussions in this thesis, African languages do not assume centre stage in language policies. As seen from the historical discussion thus far, African languages have been marginalised from mainstream society.

The third ideology, internationalisation is most applicable to what is happening presently in South Africa with the language question. It is defined by Reagan (1986: 95) as the "… adoption of a non-indigenous language of wider communication". In South Africa's case, it would be English, except that English is being used as the sole official language in all

domains and replacing the use of and potential use of African languages under the guise of it being a global language. This can be juxtaposed to the discussions concerning language and the economy and how at a macro level, the economics benefit those pushing the policy agenda, but in the long run, the underdevelopment of skills in the micro-economy will eventually negatively impact the global markets. This correlates with Docrat and Kaschula's (2015) point of the need to be socially aware of the impact of language in the workplace and its broader function.

The third ideology is linked to the fourth ideology, assimilation, which presupposes "… that in a given society every person should be able to function effectively in the dominant language, regardless of individual language background" (Reagan, 1986: 94). In South Africa, this is the precise thinking of language planners. Indeed, it is important to communicate effectively, but in a language that you understand best while acquiring an international language such as English to ensure inclusion on an international scale. Balance is key in this regard. In South Africa, assimilation is taking place with English as the dominant language. The statistics, as presented in chapter six of this thesis, illustrate that English is not the dominant spoken language and is only spoken by 9.6 percent of the population (Statistics SA, 2011).

The four ideologies are all relatable to South Africa as a country, however they are either too theoretical as with the first two ideologies. This point is expanded upon in chapters six and seven of this thesis with reference to the constitutional provisions. The remaining two ideologies are indeed true of what is happening in South Africa, but this shows the dominance of English, a language with a colonial history and not the use and development of any of the nine African languages.

Eastman (1992) argues that the success of the language planning process is dependent on the language attitudes of people within a given society. It is nonsensical to think that one could include the use of African languages in a language policy where the attitudes of the people whom the policy affects are adverse to the use of the languages. The policy is then doomed to fail from the beginning. Eastman (1992: 108) proposes 'bottom-up' language planning which targets the people and their attitudes, through awareness campaigns. This can be linked to opportunity planning where language planners should be creating opportunities for people who language policies target that are beneficial to them. According to Docrat and Kaschula (2015), a meaningfully engaged process needs to be undertaken between all persons who are

affected by the prospective policy, language planners and in the instance of the legal system, forensic linguists. This will facilitate an open dialogue where the best possible policies are drafted and reviewed to ensure practicality.

2.13 Language planning and policies from 1993 to 2004

The chapter has thus far advanced the pre-Apartheid and Apartheid language planning models in the legal system, with specific reference to the language of record as well as the various tiers to language planning. Building on these advancements it is important to back track to the language planning developments before the Interim Constitution and post the final Constitution. From 1990 to the enacting of the final Constitution in 1996, South Africa was in a transitional political phase marked by the CODESA negotiations. During Apartheid, language was used as a decisive tool driven by what Heugh (2002: 450) identified as a two-pronged logic. Firstly, to counteract the hegemony of English and secondly, to pursue the principle of separate development (Heugh, 2002: 450). To this end, it was expected that the language question would be fiercely debated during the negotiations. The exclusion of African languages from mainstream society during Apartheid should have been the primary factor to address during the negotiations. Instead, what occurred was a persistent attempt from the National Party (NP) to ensure the maintenance of Afrikaans as an official language (Heugh, 2002: 456). The African National Congress (ANC) lacked the intensity displayed by the NP, instead failing to reclaim the space owed to the African languages. There was no political will by the ANC to advocate for the African languages to be treated equally to Afrikaans. The ANC instead of focusing on the language question was more concerned with the neutralisation and removal of Apartheid era symbols (Heugh, 2002: 456). This point will be contrasted to the present day protests by university students under the banner of decolonisation and how language has once again failed to be at the forefront of decolonisation. The students have instead opted to protest for the removal of colonial statues such as that of Cecil John Rhodes at the University of Cape Town. The semblance of the past is present through the current situation, where, dare one suggest that the ANC may have preferred an English-only-approach from 1994 and that this could explain the contemporary attitudes.

Orman (2014: 63) argued that the lack of political will on the language question displayed by the ANC during the negotiations was as a result of a political elitist agenda pursued at the expense of African languages. The NP walked out of the negotiations in the same favourable

position in which they entered, while the ANC walked out strengthening the position of English based on inclusion for all and not the elevation of the African languages.

It was expected that the ANC would represent the views of African language speakers, where clear statements would have been a commitment to multilingualism. Moreover, to have given meaning to the constitutional language provisions through a fully-fledged language policy with guidelines for national and provincial governments and parastatal institutions (Heugh, 2002: 461). The resultant effect is a *laissez-faire* approach omitting any policy guidelines and in the process neutralising language rights through the hegemony of English (Heugh, 2002: 461). The ANC's actions during the negotiations were contrary to the ANC's Reconstruction and Development Programme that proposed the development of all South African languages and particularly the African languages (Reagan, 1997: 426).

Reagan (1997: 426) proposes that contradictory policy decisions can be guarded against when applying a four-stepped test formulated by Kerr (1976) and read as follows:

1. The desirability test. Is the goal of the policy one that the community as a whole believes to be desirable?

2. The justness test. Is the policy just and fair? That is, does it treat all people in an equitable and appropriate manner?

3. The effectiveness test. Is the policy resource sensitive? Is it viable in the context in which it is to be effected?

Further to the tests Reagan (1997: 425) proposes that language policies in South Africa need to balanced, taking into account three factors, namely national and or political concerns; programmatic and pedagogical concerns and concerns of social justice.

Moving from the language planning and language policy guidelines presented by the authors, the two language policy developments at national level have been LANGTAG and South Africa's National Language Policy. In 1995 the then Minister of Arts, Culture, Science and technology as it was known, Ben Ngubane announced the establishment of the LANGTAG, to be chaired by Neville Alexander. The primary purpose of the establishment was to advise the Minister in preparation of devising the National Language Plan for South Africa. The Final LANGTAG Report (1996: 7) summarises the rationale for the need to develop a Language Plan for South Africa into the following:

A National Language Plan-, which would be a statement of South Africa's language-related needs and priorities-, should set out to achieve at least the following goals:

(1) All South Africans should have access to all spheres of South African society by developing and maintaining a level of spoken and written language, which is appropriate for a range of contexts in the official language(s) of their choice.

(2) All South Africans should have access to the learning of languages other than their mother tongue.

(3) The African languages, which have been disadvantaged by the linguistic policies of the past, should be developed and maintained.

(4) Equitable and widespread language services should be established.

The recommendations comprised short-term measures and long-term measures. Fifteen short-term measures are presented, which include: language awareness campaigns; the development of a language code of conduct for the public service; using African languages at prestigious occasions; pressuring the legislature to give all official language equitable space where appropriate; the use of incentives to encourage employers and employees in the public can private sectors to learn additional languages; promote languages other than English and Afrikaans in high status domains; commission and support research in the African languages; review the curricula at education institutions; creating a central language database; establishing educational language pilots (LANGTAG, 1996: 2-4). These are the short-term measures, which are relevant to the thesis at hand. The eight long-term measures relate mostly to government and the development of official language services at national level with the aim of promoting, developing and using the African language at national and provincial level.

The ministry was set to implement these recommendations, what emerged was the National Language Policy Framework (2002) followed by the Language Policy Implementation Plan (2003). Kaschula (2004) provided an in-depth critique based on the failure of the implementation. Kaschula (2004: 5) argued that the National Language Policy Framework yet again highlights the Apartheid historical context. Indeed, there is a need to acknowledge the historical past however, this must be done in a manner that paves the way to move forward and learn from the past and not to dwell on it. A further point of critique that Kaschula (2004: 5) noted was that implementation of the policy was shifted to the structures

it created. To this end the continued infighting at the time between the PanSALB and the Department of Arts and Culture hindered the implementation of the policy with the blame game at the forefront and whose responsibility it was to implement it (Kaschula, 2004: 7). The implementation measures needed to be revised in accordance with the failures, to avoid repeating the same mistakes and failing to give actual effect to people's language rights by enabling South African citizens to access services in an official language they understand. This would be an effective and well-run system with a functioning multilingual democracy that encourages and enables active participation and access to justice through high status domains such as higher education institutions and the legal system.

2.14 Administrative law as an enabling framework

The constitutional language rights presented in chapter six and critiqued in chapter seven of this thesis are to be applied practically and given meaning to through policy and legislative means. The application of rights is dealt with in Section 8 of the Constitution, which states the following:

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-

a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

b. may develop rules of the common law to limit the right provided that the limitation is in accordance with Section 36(1).

Subsection (3)(a) speaks to the role of both the legislation in giving meaning to the language rights as well as the court in developing the language rights where such interpretation and development exceeds the ambit of the legislation. This will become clearer in chapters six and seven of this thesis. Subsection (3) (b) speaks to the limitation of rights in accordance

with the limitations clause in Section 36 of the Constitution. The limitation of rights is advanced in chapter six of thesis with reference to the case law.

What I am concerned with at the current stage of the thesis is subsection (1), specifically the fact that the rights bind organs of state. An organ of state is defined in the definitions Section 239 of the Constitution and states the following:

> Organ of state means-
>
> (a) any department of state or administration in the national, provincial or local sphere of government; or
>
> (b) any other functionary or institution-
>
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;

The relevance of defining an organ of state is for the purposes of discussing the mandate that flows from legislation that enables organs of states to perform functions and powers. This is relevant to universities who are mandated through for example the Higher Education Act 101 of 1997, discussed fully in the proceeding sections of this chapter, to draft language policies for their respective institutions. In this instance, the university would be exercising a power or performing a public function in terms of legislation. Whether a university is an organ of state in terms of satisfying the definition in Section 239 of the Constitution, for purposes of drafting language policies, has been subject to much debate and varying viewpoints, which has resulted in litigation and the courts having the final say on the matter. This is evident from the case law concerning language policies at the Universities of the Free State, Pretoria and Stellenbosch University, as discussed in chapter six of this thesis.

The question then is how is this relevant to administrative law? In answering this question, the relevance of administrative law to this thesis will be apparent. Hoexter (2012: 2) who presents the current seminal work on administrative law states it is concerned with "… regulating the activities of bodies that exercise public powers or perform public functions, irrespective of whether those bodies are public in a strict sense". From this understanding of administrative law, one is able to see the linkage with the definition of an organ of state.

Administrative law in its broadest sense is "… a branch of public law that regulates the legal relations of public authorities whether with private individuals, organisations or with other public authorities" (Hoexter, 2012: 2).

Organs of state do not self-generate administrative power, law confers the power. Hoexter (2012: 30) explains that every administrative act performed by the organ of state "… must be justified by reference to some lawful authority for the act". The sources of administrative authority are also sources of constraint, given that the limitations of what administrators may do is included. Hoexter (2012: 31) explains that legislation is the most important source of administrative power in that most of the administrative power is derived from legislation.

There are varying types of administrative power. On the converse, a distinction is to be made between powers and duties. Hoexter (2012: 43) explains that:

> … powers enable things to be done, duties require them to be done. If an official has a duty, she is obliged to perform it. Where she has a power, a measure of discretion or choice is implied… public powers are always accompanied by duties of some kind, whether express or implied.

The nature of the power and the determination of whether there is a duty or obligation to perform the function will be evident from the language used in the legislation. Whether it be obligatory/mandatory will be dependent of instructive language such as the inclusion of the word 'must' or whether it be discretionary through for example the words 'may' and 'should'. Express powers would therefore use obligatory language while implied powers may be ancillary to express powers, however they may exist as a necessary result of the express power.

The determination and review of administrative action no longer takes place in terms of the common law but rather through the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which flows from Section 33 of the Constitution on just administrative action and reads as follows:

> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

(a) provide for the review of administrative action by a court or where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsection (1) and (2); and

(c) promote an efficient administration.

The PAJA (2000) is thus enacted in terms of subsection (3). Subsections (1) and (2) must be borne in mind with the discussion concerning the language policy cases advanced in chapter six of this thesis. The determination of administrative action through the PAJA (2000) and not via the common law was confirmed by O'Regan J in the case of *Bato Star Fishing (Pty) Ltd* v *Minister of Environmental Affairs and Others* (2004: para 22) who stated the following:

> The Courts' power to review administrative action no longer flows directly from the common law but from PAJA (2000) and the Constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of *ultra vires*, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of the PAJA (2000) and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative law review will have to be developed on a case-by-case basis as the Courts interpret and apply the provisions of the PAJA (2000) and the Constitution.

With the excerpt illustrating the instructive authority of the PAJA (2000), the focus turns to the provisions thereof. Section 1 of the PAJA (2000) unpacks how administrative action will be determined and reads accordingly:

1. In this Act, unless the context indicates otherwise-

(i) Administrative action means any decision taken, or any failure to take decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution or

(ii) exercising a public power or performing a public function in terms of any legislation or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

(aa) the executive powers or functions of the National Executive…

(bb) the executive powers or functions of the Provincial Executive…

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act no. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4(1);

The latter half of the extracts from the PAJA (2000) lists the exclusions, which are important in noting which decisions cannot be reviewed in terms of administrative law. Section 1(a) to (b) lists the requirements, which can be divided into seven elements. The elements tend to overlap with one another to a certain extent (Hoexter, 2012: 197). Furthermore, the elements cannot alone determine whether administrative action was taken, the application of the facts

in each case will give meaning to each of the elements in guiding the court in its determination (Hoexter, 2012: 197). The seven elements are:

1. A decision
2. by an organ of state (or a natural or juristic person)
3. exercising a public power or performing a public function
4. in terms of any legislation (or in terms of an empowering provision)
5. that adversely affects rights
6. that has a direct, external legal effect
7. and that does not fall under any of the listed exclusions.

These seven elements are applied to the case law, specifically the cases of *Afriforum and Another* v *University of the Free State* (2018); *Afriforum and Another* v *Chairperson of the Council of the University of Pretoria and Others* (2017); and *Gelyke Kanse and Another* v *The President of the Convocation of the Stellenbosch University* (2017), advanced in chapter six of this thesis and critiqued in chapter seven of this thesis. Chapter seven, also includes a full application and analysis of the cases from both a constitutional and administrative perspective, where I apply the seven elements in proposing a counter argument in critiquing the majority judgment by Chief Justice Mogoeng Mogoeng in the case of *Afriforum and Another* v *University of the Free State* (2018) as well as the judgment by Kollapen J in the case of *Afriforum and Another* v *Chairperson of the Council of the University of Pretoria and Others* (2017). The relevance of administrative law to the thesis at hand is now visibly relevant in that it applies to the legislation empowering the drafting of language policies and the nature of the language policies, when taken on review, in deciding whether an administrative decision should be reviewed and set aside.

2.15 Legislative drafting

The preceding section of this chapter, focussing on administrative law, brought to the fore the importance of legislation in conferring authority on natural, juristic persons and organs of state to perform functions which are critical to the effective practical application and implementation of constitutional provisions in domains such as the legal system and higher education in South Africa. What follows under this section is an explanation of the process of

legislative drafting followed by a discussion on the principles of drafting and enacting language legislation. Statutory interpretation and the various methods of interpretation are explained in chapter three of this thesis.

Legislation is a means through which government can invest itself in the rights and interests of the citizens (Burger, 2015: 6). In my opinion, legislation regulates the rights of citizens and gives meaning to the constitutional provisions. No statute may be enacted that is contrary to the provisions of the Constitution.

The legislative process commences with a Cabinet Minister who is head of a portfolio, deciding that a new statute is needed. The process is initiated with a green paper, a discussion document housing government's proposals. Comments are called for on the Green Paper from interested parties and civil society who are to respond by a specified date. The comments are then taken into account in producing what is referred to a White Paper, which can be open for further comment. Once all the comments are considered the legislative drafters in the department together with the Minister will produce a legislative proposal that will be introduced as a Bill to the Cabinet who if are in agreement with the proposal, the Minister has the authority to send it to Parliament for consideration (Burger, 2015: 7). Parliament sends the Bill to a portfolio committee of the National Assembly who meets to discuss the Bill (Burger, 2015: 7). The portfolio committee comprises members of various political parties as per the party representation in the National Assembly.

The portfolio committee discusses the content of the Bill (Burger, 2015: 7). The process is open to the public, however public submissions will be invited where the Bill is one that has garnered media attention. The Bill is then sent to the National Assembly where it is debated, where a vote to pass the Bill is undertaken, if passed by the majority in the National Assembly the Bill is sent to the National Council of Provinces (NCOP) (Burger, 2015: 7). As with the first committee, the same procedure is followed with a committee established by the NCOP. There is one of two things that happen with the Bill at the NCOP. The first is dependent on the nature of the Bill, if for example it directly affects the provinces, it is to be tabled at each provincial legislature and then returned to the NCOP with comments. The second option arises where the Bill does not concern the provinces and will proceed to a discussion by the NCOP's committee, where if the NCOP is in agreement with the National Assembly, the Bill will be sent to the President (Burger, 2015: 8). When a Bill is signed by the President and subsequently published in the *Government Gazette,* it is then an Act, which

has been, enacted (Burger, 2015: 8). The number and year attached to the full name of the Act is indicative of the number of the Act that has been passed in that given year. The point of publishing in the *Government Gazette* is to officialise the law coming into effect, is important for purposes of the 2017 language of record directive where I have advanced a critique in chapter seven of this thesis.

There are two broad types of legislation, primary and secondary. Primary legislation comprises Acts of Parliament. Secondary legislation also referred to as subordinate comprises four types. The first being provincial ordinances which according to Burger (2015: 13) have been published since 1985. The second is provincial proclamations, which provides for the substitution or amendment of provincial ordinances, by an administrator appointed by the President. The third category is provincial acts, those published after 1993 by any of the nine provincial legislatures. The fourth category is municipal law, which are essentially by laws that regulate the functioning of municipalities.

The aforementioned types of legislation are not the only sources of law. Other sources of law include the common law, customs and customary law, indigenous law, international law and foreign law. The primary focus of this discussion at hand is on legislation as a source of law, given the previous discussion on administrative law. The Constitution through Section 39(1), the interpretation of the Bill of Rights states the following:

> (1) When interpreting the Bill of Rights, a court, tribunal or forum-
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and free;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.

The point of extraction is that foreign law can be considered and applied by a court when for example interpreting the Section 35(3) (k) constitutional language right conferred upon accused persons. This point is relevant for the purposes of the international comparative study housed in chapter five of this thesis, where foreign jurisdiction will be presented that can be applied to the South African context.

Reverting to the discussion under administrative law, building on the work of Hoexter (2012: 197), I made the point that nature of the power and whether or not there is, a duty or an

obligation to perform a function emanates for legislation and more specifically the language of the legislation. What follows is the specific principles and theoretical underpinnings of language legislation.

2.16 Language legislation

With the legislative drafting process advanced in the preceding section of this thesis, the focus of my discussion turns to language legislation. In this section, I rely on the authoritative works, of Turi (1993 and 2012) and Du Plessis (2012), in the area of language legislation. This theoretical discussion provides a contextualised framework against which the language legislation is advanced in chapter six with reference to the work of Lourens (2012).

Language legislation was described by Turi (1993: 5-6) as legislation "… generally aimed at aimed at legally determining and establishing the status and use of designated languages by means of legal obligations and rights; in other words, legal regulations concerning language". Language legislation exists in two categories based on its application. There is language legislation that deals with official/ public usage and non-official/ private usage (Turi, 2012: 73). Official language legislation is legislation, which designates one or more language(s) as official in specific domains of legislation, justice, public administration and education (Turi, 1993: 7). The application of official language legislation is dependent on the circumstances with regard to which one of the two principles are to be applied. The first principle is linguistic territoriality, which prescribes the use of one or more languages in a specific territory. The second principle is linguistic personality, which amounts to the obligation or right to use one's own language or any other language of choice (Turi, 1993: 7).

Turi (1993: 8) speaking to the point of designating languages as official, notes that this does not mean that there are legal consequences attached to the official status. Instead official is a psychological status one, which will have practical bearing if there is effective legal treatment accorded to the official languages concerned. This point is important, for the critique I have advanced in chapter seven concerning Section 6(1) of the constitutional provisions and the work of Lourens (2012) and Perry (2004).

A further distinction can be sought based on the function of the language legislation. There are four categories namely, official, institutionalising, standardising and liberal. Where legislation fulfils all these functions it is regarded as exhaustive language legislation, while other language legislation would be regarded as non-exhaustive (Turi, 2012: 73).

With official, the sentiments noted above are applied with addition in the sense it is compulsory for the state to use the official languages or which the citizens of a country have the right to use (Turi, 2012: 73). Both of these functions are dependent on the circumstances as well as the application. Thus, either applying the principle of linguistic territoriality or linguistic personality (Turi, 2012: 73). Turi (2012: 73-74) explains that in multilingual state the official language of a state is the most commonly spoken language in the country. This is however not the case in African or Asian states, where the official language chosen for state purposes is in all probability one not spoken by the majority of citizens. Applying this to a country such as South Africa is evident with the language of record policy.

The second function, institutionalising linguistic legislation aims to make one or more languages the designated, usual or common languages for usage in non-official domains such as labour, communications, culture, commerce and business (Turi, 2012: 74). The third function is standardising linguistic legislation aimed at making one or more designated languages to adhere to certain language standards in highly technical domains (Turi, 2012: 74). The fourth and final function is liberal linguistic legislation, which is legislation that enshrines legal recognition of language rights (Turi, 2012: 75).

According to du Plessis (2012: 197) primary language legislation has the power to bring about a turning point in the language dispensation of a country. This however can only take place where the language act contains sanctions and penalisations which will ensure the implementation of the legislation (Shohamy, 2006: 59-60). These sanctions and penalisations are important in ensuring the language rights are given meaning to. A language act does not inhibit the enacting of further primary language legislation in other domains, for example in the legal system (du Plessis, 2012: 198). This language legislation cannot be in contradiction to the national primary language act.

Du Plessis (2012: 198) acknowledges that comparative language legislation is on the rise. There are three different disciplinary approaches to comparative language legislation, the legal, linguistic and sociolinguistic perspectives. Turi (1993) is the main proponent of the legal approach, which I have advanced above, Kibbee (1998) advances the linguistic perspective and Maurais (1991) advances the sociolinguistic perspective. Du Plessis (2012) unpacks Maurais's (1991) sociolinguistic principles, which will be advanced in this thesis. The reason why I have only advanced the legal and sociolinguistic principles of language

legislation, is based on the research areas in which this thesis has been conducted as espoused in chapter one.

Maurais's (1991) sociolinguistic approach to comparative language legislation entails the identification of five principles that underpin language legislation:

The proclamation of an official language;

The issue of the language of cohesion;

The language of communication with customers and citizens;

The language of education;

Linguistic aspects of immigration

Applying this to the South African model, the first principle would be Section 6 of the Constitution by conferring official status on eleven languages. English in South Africa is seen as the language of cohesion despite its colonial past. This is the point that constantly comes to the fore and will be more evident as I unpack the judgments in the cases of *Afriforum and Another v University of the Free State* (2018) and *State v Gordon* (2018) as well as the 2017 language of record directive to make English the sole official language of record on the basis of transformation. The third principle is guided by Section 6(3) (a) and (b) of the Constitution prescribing that national and provincial government must use at least two official languages while municipalities are to take into account the language usage and preferences of the residents within the municipality. The fourth principle applied in South Africa is English as the language of education. The fifth principle is accounted for in Section 6(5) of the Constitution as well as Section 30 and 31 recognising the need of persons to use languages other than the official languages for religious and cultural purposes individual purposes or as part of religious, cultural or linguistic communities.

The application of these principles all refer to the constitutional provisions and not to legislation. This does not mean that the primary language legislation in South Africa, the Languages Act (2012) does not address the principles. The Languages Act (2012) has however, come under immense criticism for being an Act for government by government, which fails to address the actual language issues and constitutional language provisions (Docrat and Kaschula, 2015). This discussion is presented in further depth in chapters six and seven of this thesis.

Maurais (1997) elaborated on his five principles with a further seven principles focussing on the context of language legislation these are:

The necessity for prior sociolinguistic description;

The necessity for state intervention;

The need for visible change;

Domains of non-intervention;

Special status of bilingualism;

The need to build consensus;

The role of the time factor in language planning.

The seven principles will become clearer with the critique of the Language Act (2012) in chapter seven of this thesis.

2.17 Language planning in higher education

The discussions thus far, have provided theoretical overviews of language planning, the formulation of legislation, language legislation and policy formulation as well as the policy developments in the broader South African landscape and the legal system more specifically. The administrative law discussion, illustrated the importance of these theoretical frameworks in giving meaning to language rights in practical situations, through legislation empowering a person or organ of state to perform a function or duty. Against the latter, I advance a discussion on language planning in the domain of higher education. This discussion forms the backdrop to the presentation of language policies in chapter six of this thesis, of selected universities as identified in chapter one of this thesis. The language policies will be critiqued in chapter seven of this thesis with reference to interviews with academic experts, juxtaposed against the proposal by the Parliamentary Justice and Corrections Oversight Committee chairperson, Mathole Motshekga in 2017 to graduate linguistically competent LLB graduates.

Elaborating on the administrative law discussion, the enabling legislation empowering universities to draft language policies for their respective institutions is the Higher Education Act 101 of 1997. Section 27(2) of the Higher Education Act (1997) empowers the drafting of language policies stating that:

> Subject to the policy determined by the Minister, the council, with the concurrence of the senate, must determine the language policy of a public higher education institution and must publish and make it available on request.

Further to Section 27(2), an institutions' language policy cannot be inconsistent with the Ministerial Policy. The institutions' language policy must conform to the Higher Education Language Policy (2002) read together with the National Language Policy Framework (2003). The National Language Policy for Higher Education (2002) was informed by a special committee chaired by the late Neville Alexander. The National Language Policy for Higher Education has since been amended and has seen a new one drafted in 2017. I present this policy in chapter six of this thesis and critique it in chapter seven of this thesis with reference to the litigation of the language policy cases. The initial Language Policy for Higher Education (2002) was informed by a special committee chaired by Alexander, appointed by the then Minister of Higher Education Kader Asmal. The special committee was established as a result of the failure by the National Commission on Higher Education (NCHE) to address the language question in higher education.

Maseko (2014) and Kamwendo and Ndimande-Hlongwa (2017) provide an all-inclusive overview of the policy and ministerial committee developments concerning language in higher education. The Language Policy for Higher Education (LPHE) (2002) makes allowance for the use of official languages other than English and Afrikaans. Maseko (2014: 29-30) summarises the main points of the LPHE:

(a) It acknowledges the current position of English and Afrikaans as languages of research and scholarship, but makes a point that it will be necessary to work within the confines of the *status quo* until such times as other South African languages have been developed to a level where they may be used in all higher education functions.

(b) It states that consideration should be given to the development of other South African languages for use in instruction, as part of a medium-to-long-term strategy to promote multilingualism.

(c) It recognises that the promotion of South African languages for use in higher education will require, among others, the development of multilingual dictionaries and other teaching and learning support materials.

(d) Language should not act as a barrier to equity of access and success. In this regard, the Ministry of Education encourages the all higher education institutions to develop strategies for promoting proficiency in the designated language(s) of tuition, including the provision of language and academic literacy development programmes.

These four points in my opinion are in no way giving effective meaning to placing the nine official African languages on an equal footing alongside English and Afrikaans. Instead, the LPHE (2002) maintains the status quo of English and Afrikaans while paying nothing more than lip service to the African languages. Indeed the African languages need to be developed as languages of science; however, the LPHE (2002) makes no attempt at providing practical ways in which universities are obligated to do this. This can be linked to opportunity planning, unfortunately, persons and institutions require incentives when dealing with language. If the system suits those empowered to make the changes, these changes will be either slow or not implemented at all. This also reaffirms the point of policies and legislation containing penalties and sanctions for those who fail to act. Thus, it can be question whether there is in fact a genuine intention by the Ministry through the LPHE to change the language situation where inclusivity, means African languages being used as languages of teaching and learning.

In 2003, the Ndebele Report (2003) was presented as part of the Ministerial Committee on the development of indigenous African languages as mediums of instruction in higher education (Kamwendo and Ndimande-Hlongwa, 2017: 71). This report speaks to African languages as languages of instruction in higher education institutions. The recommendations in this report appear more tangible than the provisions of the LPHE (2002), which Maseko (2014: 31-32) has summarised accordingly:

(a) Ensure the sustainability of all indigenous South African languages.

(b) Select, according to region, one or more indigenous languages to develop for use as medium of instruction in higher education, as well as short-, medium- and long-term implementation frameworks.

(c) Promote communicative competence of students in at least one indigenous language and encourage the labour market to make such competence an imperative, especially for civil service or state institutions.

(d) Promote partnerships between higher education institutions and the private sector in identifying and translating key texts into indigenous language/s selected for development by that institution.

(e) Ensure institutional collaborations, especially where languages selected are common, to ensure acceleration of work and non-replication of effort.

The recommendations correlate with Section 6(3) of the Constitution and applies a demographics based argument in selecting a language. This will enable at university level the equal development of each of the nine African languages in the geographical area in which the language is most spoken. This will in turn contribute to the graduation of students who are linguistically proficient in the language of the province. Another point of encouraging the labour market to make linguistic competence an imperative links with opportunity planning and the proposal by the Parliamentary Justice and Corrections Oversight Committee chairperson, Mathole Motshekga in 2017 to graduate linguistically competent LLB graduates.

In 2008, a Ministerial Committee report was released on the need for social cohesion and the end of discrimination in higher education institutions. Subsequent to this, a further repot of a Ministerial Advisory Panel in 2015 was presented on the use of African languages in Higher Education and addressed four areas (Kamwendo and Ndimande-Hlongwa, 2017: 71).

1. The language of instruction;
2. the future of South African languages as fields of the academic study and research;
3. the study of foreign languages; and
4. the promotion of multilingualism in the institutional policies and practices of higher education institutions.

The following development was the Soudien Report (2008), the result of the ministerial committee on transformation and social cohesion and the elimination of discrimination in public higher education institutions. The report fleetingly refers to the language question by acknowledging the history of South African higher education and how during this period the majority of persons were marginalised. This is a continued perpetuation, which the report takes stock of, in stating that students are not taught in a language they understand best, hindering their chances of success (Kamwendo and Ndimande-Hlongwa, 2017: 72).

The final development that Kamwendo and Ndimande-Hlongwa (2017: 73) note is the ministerial advisory panel on African languages in higher education (2015), with the purpose of advising the minister on the development of African languages as languages of scholarship. The panel was furthermore tasked with assessing the existing national and institutional language policies, and the implementation of the policies.

A common thread running through each of these ministerial task teams and panels is that there has been constant reports being produced and recommendation made, yet there is no sign of action and implementation being taken to address the identified issues. a similarity can be sought with what Kaschula (2004) referred to as a policy super highway, where we continue to draft policies, without stopping, taking a breath and assessing what the successes and failures are and how to address these. The last point of the previous paragraph regarding the ministerial advisory panel on African languages in higher education (2015) must be borne in mind with the presentation of the case law concerning university language policies and the move by higher institutions in South Africa to become monolingual English only institutions. Maseko (2014: 28) states that the main goal of language policies in higher education is to promote linguistic and cultural diversity. This is contrary to the current move of entrenching monolingualism at higher institutions. An important point which Maseko (2014: 28) makes concerns the important role higher education institutions play in preparing students to participate fully in a multilingual societies such as South Africa, 'multilingual proficiency is critical'. The Parliamentary Justice and Corrections Oversight Committee chairperson, Mathole Motshekga in 2017 stated that all LLB students pass one of the indigenous languages before being awarded a law degree, while the judgment by Mogoeng Mogoeng in the case of *Afriforum and Another v University of the Free State* (2018), will juxtapose this proposal.

Given that, academics and higher education institutions take for granted that English is and must be the language of tuition is ill conceived and needs to be rethought with the students' best interests in mind (Alexander, 2013: 75). Alexander (2013: 81) proposed a five dimensional argument for the use of African languages as languages in tertiary education. The five dimensions are: (bio-cultural) diversity; (economic) development, (political) democracy, (human) dignity and effective didactics.

The five dimensional argument includes economic development, which Mclean (1992) and Kaschula (2004) argue must form part of language planning for it to be viable and positively

affect the development of a society at both the micro and macro levels. Grin (2010) argued that higher education institutions are guided by the economic factors in selecting the language of tuition. An increase in student registrations entails and increase in revenue for the institution. This is coupled with a three-pronged argument (Grin, 2010: 11) in favour of selecting English as a language of tuition:

1. It is necessary to attract the best foreign students;
2. Others do it, so we must do it too;
3. A typical folk linguistics perception that English is the language of science.

The foreign students argument undermines the local students accessing higher education institutions and in a way prioritises the foreign student on the basis that the foreign student is likely to succeed while the local student will fail (Grin, 2010: 12). This is contrary to what Kaschula (2004) spoke of, strengthening the micro economy to give effective meaning and growth to the macro economy of a country. The second argument is one pinned on the notion of conformity. This will be seen with the case law, presented in chapter six of this thesis, where one by one universities who were previously bilingual are instead of becoming multilingual, have adopted English only language policies. The third argument can be linked to earlier discussions concerning the LPHE (2002), in addition to the argument that African languages lack the necessary terminology to be used in domains of high function such as science and law.

The authors' works indicate that language planning at higher education institutions is guided by economic factors and conforming to the norm at the time. The many ministerial reports have largely all repeated what each of the others say, the overlap fails to address the actual question of using African languages for tuition purposes. The Ndebele report, which addresses this, has not fully been implemented given the move by universities to make English the sole official language of tuition on grounds of access, equity, inclusivity and transformation. The actual language policies of the selected universities are presented in chapter six and critiqued in chapter seven of this thesis, where I have done so by reverting to this theoretical framework. What follows in the next section of this chapter is a discussion on language as part of transformation and decolonisation in the legal system and at universities.

2.18 Transformation and decolonisation

Transformation is relevant to this research on two grounds. The first is that the legal system is said to be undergoing a transformational period in which the profession as a whole is overhauled in accordance with the Legal Practice Act 28 of 2014, a full discussion of the Legal Practice Act (2014) can be found in Docrat (2017a). Suffice to say for the discussion at hand that the Legal Practice Act (2014) is aimed at transforming the South African legal system in order for it to be more representative of the racial demographics in South Africa, where diversity is key in accordance with the constitutional provisions. The second ground, is transformation of university curricula and campuses. The second point of curricula transformation has been couched under the banner of decolonisation with the onset of the hashtag fees must fall movement, which commenced in 2015 at South African universities countrywide. For the purposes of the research at hand, I discuss transformation with reference to the legal system and decolonisation with reference to higher education institutions in South Africa. The reason for this is that the concepts of transformation and decolonisation have become synonymous with each of the two domains.

According to Wesson and Du Plessis (2008: 2) transformation can be defined as "a change from a state of affairs that existed previously". De Vos (2010:1) explains that transformation or the process thereof is a "radical vision which has as yet not come to pass. It envisages a complete transformation of the legal system". There is no one definition of transformation and it is discipline specific where the context is important and affects the type and results of transformation. De Vos (2010) went further by explaining that transformation has no definitive meaning, as it is now an overused concept which dominants political speeches. The overuse of the concept is not a positive sign but rather indicates that government or the legal system are using the concept to try and legitimise their skewed understanding of what transformation actually is. This is a sweeping statement; however, it can be validated by examining the reasons given by the Chief Justice and heads of court to make English the sole language of record on ground of transformation, given that the removal of Afrikaans in the view of the heads of court is a reversal of past discrimination. This point is explored in greater depth in chapters six and seven of this thesis. The point is that transformation as a concept can be skewed to suit a specific agenda and in the process conceal actual transformation, such as South Africans having access to justice in their mother tongue and not via an interpreter through the medium of English, a language with a long colonial trajectory. The point of English as a colonially imposed language of record is an historical

fact as I discussed the history of the language of record predating the arrival of Jan Van Riebeck in the Cape. De Vos's (2010) outlook of the future of transformation as a concept in South Africa is dull yet true in every sense as he states that "transformation has become a hollow and empty word, devoid of any real meaning".

A search for literature on transformation in the legal system is flooded with articles on transformation of the judiciary in South Africa. The literature is written with specific reference to the legal system, and is thus applicable. Transformation of the legal system is about embracing and enforcing the principles of a new legal order (Wesson and Du Plessis, 2008: 5). Transformation of the judiciary is premised on racial and gender transformation and ensuring that the judiciary and legal profession more broadly is representative of the racial and gender demographics of South Africa (Wesson and Du Plessis, 2008: 11). By being representative, the legal system must facilitate the creation of a new inclusive society that the Constitution envisages (Wesson and Du Plessis, 2008: 12). This is in accordance with Section 174 of the Constitution, concerning the appointment of judicial officers, where racial and gender demographics are to be taken into account when making judicial appointments.

Moerane (2003: 716) viewed transformation as a process of change where language is included and not limited to race and gender. The issue however is that the judiciary does not recognise language as intrinsic to transformation. This was evident from Chief Justice Mogoeng Mogoeng's identified process of transforming the judiciary. Four of the five points are relevant to this thesis, namely: the importance of demographic representation; being aware of the injustices, which occurred under Apartheid; the inaccessibility of courts and the notion of real justice for black persons; and abiding by the constitutional values for an equal and just legal system (Ntlama, 2014:15). Although language is not directly mentioned, Docrat (2017a) argued that language is intrinsically linked to these points with specific mention to the inaccessibility of persons from accessing the courts and attaining justice. Docrat (2017a) went further and explained that there is no possible way in which an accessibility argument cannot include language playing a pivotal role. The legal system is accessed through a language, where you present your case, defend yourself or act as a witness in all three instances communication is key where language has the power to include or exclude you from proceedings. The language of the prosecutor and presiding officer influences how you answer the questions and present your *viva voce* evidence. According to Docrat (2017a) linguistic transformation is key for a functioning legal system.

Transformation has become a prevalently used concept for change in the legal system, it has also been used in the context of universities, where Badat (2010) commissioned by the Development Bank of Southern Africa submitted a report on the challenges of transformation in higher education institutions in South Africa. Badat (2010: 31) noted that the institutional cultures, specifically at historically white universities perpetuated a conscious and subconscious exclusion of students and younger academics who do not fit the stereotypical image of being white, from a privileged background, and where English was the medium of tuition and administration. According to Badat (2010: 31), this can be exclusionary and disempowering.

The institutional cultures at universities may well have an impact on prospective and current students enrolling for degrees in African languages. Badat (2010: 15) records, enrolments for language studies especially the African languages is declining at universities and this has a direct negative impact on the maintenance of multilingualism in South Africa. As a recommendation, Badat (2010: 16) states African languages should receive the concerted attention and protection of the Higher Education Ministry; this is vital for the promotion of multilingualism beyond the confines of universities and has a broader role in safeguarding the humanities and social sciences in South Africa.

Kaschula (2016: 199-200) identifies five points raised by Badat at a seminar on Africanisation and higher education, these are:

> Firstly, he asked whether a university can Africanise without transforming – in other words, what are we really talking about by using these terms? Secondly, how do we decolonise universities? This includes a de-gendering and de-masculinizing in building new academic cultures that embrace social inclusion and justice. Thirdly, one must debate the extent to which universities have critically analysed their traditions and cultures and engaged with pedagogic innovation at an epistemological level. Fourthly, university research and curricula need to engage with issues of transformation; lest universities simply remain in the mode of reproducing what already exists. Lastly, universities need to engage with producing students who show social accountability and who use their skills as instruments of the economy in an alternative manner to the neo-liberal globalisation epoch – students who produce fresh

ideas, rather than those who simply reproduce what they are taught. Essentially, this means finding an African voice in both the political and pedagogic sense of the word.

Kaschula (2016: 200) responds to these questions or points by arguing that they can be addressed by assessing the way in which language is used to teach and what is taught. Kaschula (2016) argued that a debate on decolonisation of the curriculum and transformation of higher education cannot take place, where language is not part of the discussion. It is noticeable how Kaschula (2016) uses the words decolonisation and transformation in different senses in one sentence, leading one to the conclusion that the two are different processes. Kaschula (2016) explains that decolonisation of the university curriculum is not the mere change of reading materials; it involves learning, teaching and expressing oneself in language of one's choice whether that be an African language or English. The point is that universities categorise language into confined boxes, such as the language of learning and teaching is English only, there is no reason why other languages cannot be used in a transforming and empowering way. This will encourage greater participation in lectures and tutorials while creating a culture of inclusivity, where a student is able to express themselves in a language they fully understand and the student or another or a lecturer is able to provide an English summary where necessary.

Kaschula (2016: 202) explains that decolonisation should rather be couched in the term Africanisation, which in itself represents a perspective through the medium of African languages. This will be a positive change as part of the transformational agenda. Africanisation will enable South African universities to move out of the racialized binary that has been created (Kaschula, 2016: 209). Kaschula (2016: 209) explained that intellectual domination is linked to English hegemony, and language thus has an important role to play in changing this domination, where knowledge is informed by African experiences. Kaschula (2016) holds that decolonisation and transformation need to be defined according to each institution and that specific context, where language forms part of the decolonisation and transformation debates.

2.19 Conclusion

This chapter has provided a contextual theoretical framework that foregrounds the presentation of the data presented in chapter six and critiqued in chapter seven. The chapter has progressed logically, by outlining the developments of the language of record, the primary focus of this research. By tracing the history of the language of record in South

Africa, it was evident that the source of control was the Cape Province, presently the Western Cape Province, where political decisions affected the determination of the language of record. This source of political influence affected the country as a whole. This chapter has illustrated the position of power enjoyed by English as a dominant language, which was won favour during and after Apartheid from the ANC as a language of a political elite. This power continues to be present in South Africa today given the 2017 language of record decision and the monolingual university language policies.

With the primary focus being advanced, the chapter locates the research in the area of forensic linguistics and builds on the definitional elements thereof as outlined in chapter one. Forensic linguistics as a discipline, highlights the interdisciplinary nature of this research and by doing so connects the language of record in courts to language planning and policies at universities. This chapter offers a significant addition to the traditional language planning model by introducing opportunity planning as a fourth tier. Opportunity planning serves as the linkage between the language of record and university language policies, through the need to graduate linguistically competent LLB students.

The language planning and policy formulations of South Africa generally and the specific language policy developments of higher education institutions, is illustrative of the sources of power in drafting policies and the need for legislation to enable the enactment of language policies. The legislative drafting process is also initiated, developed and enacted through political channels. The administrative law discussion, once again contributes to the interdisciplinary nature of this research advancing a specialised branch of law. Moreover, administrative law proves to be pivotal in enforcing persons' rights in these instances language rights, through the review of administrative action guided by the PAJA (2000). By challenging the administrative authority of an organ of state, the people have the right to hold those enabled to perform a function or exercise a public power, accountable and review such decisions. This proves central to ensuring language policies of universities are constitutionally sound, transformative and promote multilingualism.

The economic arguments coupled with the political influences has a bearing on the transformational and decolonisation processes of the legal system and South African universities, where the lines on real transformation and decolonisation are blurred and history repeats itself, where language is not identified as a central means of transforming and decolonising our courts and university lecture rooms.

The authors varying viewpoints provided in this chapter are applied throughout the remaining chapters of this thesis as an argument for inclusion of persons, regardless of which official language they speak. This is made with reference to the possibility of a linguistically inclusive legal system enabled and supported by universities, with the micro economy sustaining the macro economy. In the following chapter, the methodology that is used in the thesis is outlined.

CHAPTER THREE

METHODOLOGY

3.1 Introduction

This chapter identifies each research method, procedure and technique that was used in identifying the research question, formulating the theory, and collecting and analysing the data. The purpose of this chapter is to define each method, procedure and technique used from a theoretical perspective, relying on authors' works followed by the practical application where examples are provided in term of this research. The chapter concludes by identifying the methodological challenges arising from this research, how the challenges were dealt with and the effect thereof on the outcomes of this research.

3.2 A qualitative or quantitative approach

This research is of both a qualitative and quantitative nature, when applying the broad understanding by Huberman and Miles (2002: 9) that it contains words and numbers. As with the definitions concerning transformation in chapter two of this thesis, qualitative research is explained differently varying authors. The field of study within which the qualitative approach is adopted also influences this. Hartley (2004: 325) defined qualitative research as the analysis of the context of the theoretical issues in the study area. According to the Labuschagne (2003: 100), qualitative research is based on theoretical or empirical considerations. Hammarberg *et al* (2016: 499) explain that qualitative research is concerned with factual and textual sources that prove or disprove a hypothesis or provide greater understanding of a research question. In the scope of the research at hand the qualitative approach was employed in answering the 'why' rather than the 'how' question.

The qualitative research approach according to Labuschagne (2003: 101) comprises of three techniques, namely interviews, direct observations, and document analysis. I will return to discuss each of the techniques used in this research below in this chapter. Applying these understandings of the qualitative method to this thesis, I have analysed legislation and policies for both the legal system and higher education, presented a theoretical foundation in chapter two of this thesis in providing an understanding of why the research was undertaken. This was contextualised through the historical account of the language of record in South Africa pre-Apartheid to the present.

The qualitative approach was furthermore relevant given that this research is located in applied language studies. In chapters one and two of this thesis, I advanced the goals and objectives of the research, which besides being interdisciplinary in nature were located in the research area of forensic linguistics. In chapter two of this research, while defining forensic linguistics for the purpose of locating my research within this discipline, noted that language planning and forensic linguistics were branches of applied language studies (Wei, 2013). Looking carefully at the goals and objectives of this thesis through the qualitative approach Ritchie and Spencer (2002: 306) refer to four categories of applied social theory, namely contextual, diagnostic, evaluative and strategic that can be applied thereto.

I have already discussed the contextual category in relation to the history of the language of record in South African courts. Building on this discussion, I have included the views and experiences of legal practitioners, judicial officers, interpreters and academics. These views concerned the language of record in South African courts and the language question at universities, where language policies are not supportive of graduating multilingual law graduates. This is also discussed further in this chapter.

The diagnostic category comprises of why decisions have or have not been taken. This overlaps with the contextual category above and in the context of this research. It concerns the failure to implement the constitutional language provisions through purposive interpretation and the failure to take decisions where legislation and policies can be enacted in positively affecting the language rights of all South Africans.

The evaluative component, in this research, relates to what is currently hindering the successful implementation of the constitutional provisions, specifically Section 6, where all official languages ‘enjoy parity of esteem’ and are to be ‘treated equitably’. As seen in the case law, presented in chapter six of this thesis, scarcity of resources and a lack of terminology are cited as some of the reasons. The evaluative component in this regard is contained in chapters six and seven of this thesis.

The strategic component, comprising of the recommendations and the strategies proposed for the deficiencies found after undertaking the research, are provided in chapter eight of this thesis.

As I stated above, this research also uses the quantitative approach, which focusses on the case law and statistics, housed in chapter six of this thesis. The quantitative approach

concerns research of an empirical nature and that, which is measurable. Chapter six of this thesis contains a number of statistics in addition to the survey by de Vries and Docrat (2019) capturing the views of attorneys on the language question in the South African legal system.

Therefore this research in making use of both qualitative and quantitative methods results in the mixed-methods approach. Although Wisdom and Creswell (2013) wrote in terms of a medical study the theoretical aspects of the mixed-methods approach is relevant to this work. Wisdom and Creswell (2013: 1) provide an all-encompassing definition and explanation, which reads as follows:

> The term "mixed methods" refers to an emergent methodology of research that advances the systematic integration, or "mixing," of quantitative and qualitative data within a single investigation or sustained program of inquiry. The basic premise of this methodology is that such integration permits a more complete and synergistic utilization of data than do separate quantitative and qualitative data collection and analysis.

Wisdom and Creswell (2013) note that the mixed-methods approach originated in the social sciences and has featured prominently in the humanities before b applied being applied to the sciences. The significance of the mixed-methods approach comprises five core characteristics that Wisdom and Creswell (2013: 1-2) have identified in their respective research are but which is also applicable to this research:

1. Collecting and analysing both quantitative (closed-ended) and qualitative (open-ended) data.
2. Using rigorous procedures in collecting and analysing data appropriate to each method's tradition, such as ensuring the appropriate sample size for quantitative and qualitative analysis.
3. Integrating the data during data collection, analysis, or discussion.
4. Using procedures that implement qualitative and quantitative components either concurrently or sequentially, with the same sample or with different samples.

5. Framing the procedures within philosophical/theoretical models of research, such as within a social constructionist model that seeks to understand multiple perspectives on a single issue-

The five characteristics above are clearly visible in chapters two of this thesis, with the advancement of the appropriate theory against which the quantitative and qualitative data is presented in chapter six of this thesis and integrated into the entire thesis in chapter seven. By applying all these characteristics in a research study, Wisdom and Creswell (2013: 3) note the advantages of a mixed-methods approach, especially for multidisciplinary and interdisciplinary research. A mixed-methods approach allows for the use of qualitative and quantitative research to be incorporated and by doing so captures the opinions of persons working in the research area. Simply put, the two research methods support each other in elucidating the research captured in each.

3.3 Research techniques

Three research techniques were used in conducting this research, namely, interviews, document analysis and statutory interpretation.

3.3.1 Interviews

Interviews are a qualitative research technique that can be structured or semi-structured (Corbetta, 2003: 269). Corbetta (2003: 269) outlined the difference between structured interviews, comprising of the exact questions in the exact sequence applied to all the interviewees, while semi-structured interviews are non-standardised in nature. Semi-structured interviews affords the interviewer, the choice of the order of particular questions as well as the wording thereof (Corbetta, 2003: 270). In semi-structured interviews, the interviewer is able to conduct the interview without stringent guidelines, affording the interviewer the opportunity to provide examples when asking questions and to ask for clarification from the interviewee and further elucidation where necessary (Corbetta, 2003: 270). David and Sutton (2004: 87) advanced with the adoption of selecting semi-structured interviews as a research technique the interviewer is guided by a list of themes, issues and questions. These questions can then be changed based on the interviewees' responses where follow up questions are posed. In this research, I employed semi-structured interviews in order for the questions to be broad enough to gage the opinions of the interviewees. The

questions as seen in the appendices were grouped together in terms of theme. In instances, I used sub-questions to illustrate the connectivity between questions under a specific theme.

Whether adopting structured or semi-structured interviews, these can take the form of four techniques, namely face-to-face; telephone; and e-mail interviews (Opdenakker, 2006: 1). In this research, I employed the face-to-face and e-mail interview techniques. Opdenakker (2006: 3) credits face-to-face interviewing as the most preferred, especially when using semi-structured interviews. According to Opdenakker (2006: 3), there are advantages and disadvantages, depending on the context of the research, the type of questions and the responses of the interviewee. There is no time delay in receiving the responses and based on the interviewees' response to questions, the interviewer has the option of clarifying and asking follow up questions, which could provide further information. This can also be a disadvantage, where, for example the interviewee through body language and intonation is unwilling to provide further information and is limited in their responses to the questions (Opdenakker, 2006: 3). I will speak to the challenges encountered below in this chapter. Face-to-face interviews were easily conducted where the interviewee was located in the same town as myself or in the surrounding area. There were instances in which I was in other provinces, where interviewees resided and I was able to conduct face-to-face interviews.

The second interviewing technique I used was e-mail interviews where I was unable to conduct face-to-face interviews as a result of location and in certain instances interviewees requested e-mail interviews, to answer questions when time availed itself. Opdenakker (2006: 9) highlights the advantages with using e-mail that the interviewees can answer the questions at their own time and pace and may not be pressed for an immediate answer as with face-to-face interviews. Furthermore that the interviewer then has direct access to communicating with the interviewee after the conclusion of the interview. There, are however, numerous disadvantages to using e-mail interviews that include, interviewees forgetting to respond or providing minimalist answers to questions. Although this can also happen in a face-to-face interview, the interviewer has the option of asking a follow up question of a different kind.

The following paragraphs locate the research technique of interviewing within the context of this research. The interviewees were carefully selected before the interviews took place. These included a wide spectrum of people, legal practitioners, judges, academics and an interpreter. The same criteria was not applied to all during the selecting process. The intention was to cast the net as wide as possible especially with the views of academics from

the selected institutions. With the legal practitioners, I identified persons in my local surrounds, from the state, legal resources (public interest law) and private individuals. With the judges, again, I selected these individuals based on their expertise and their location.

After obtaining ethical clearance from my institution to conduct the research (Appendix B), each potential interviewee was sent an email, attached thereto was a letter from my supervisor (Appendix A) confirming my registration at Rhodes University and attesting to the nature of my research. Upon receiving responses from each interviewee, appointments were confirmed.

In all instances once, an appointment was confirmed I would email the respective interviewees a list of questions. I explained, at the onset, that the questions would be open ended in nature, and would follow a semi-structured interview, for discussion purposes. Each set of questions was applicable to the expertise of the interviewee and incorporated questions related to their own experiences. The interviews were conducted to gain insight on the practicalities of using languages other than English as languages of record in courts; the language issues plaguing the legal system from a point of practice; the positives and negatives concerning interpretation in courts and role university language policies play in affecting the legal profession. Further to this, questions were posed to gain further reasons and insights behind judgments, concerning African languages in the legal system, by the judges who had written such judgments.

The choice of semi-structured interviews as a research technique for the face-to-face interviews was strategic on my part, as it allowed me to ask probing follow up questions as well as raise additional questions. Gray (2004: 217) explains that probing, allows the interviewer to explore new research themes, which were not considered at the onset of the interview. I found that the semi-structured interviews, allowed the interviewees to speak freely and share examples with me of their own experiences and even raise new points, which I had previously not considered or included.

3.3.2 Document analysis

Document analysis is a qualitative research technique which according to Bowen (2009: 28) is most often selected by researchers pursuing a mixed-methods approach. Document analysis is often used as a technique alongside interviewing. Payne and Payne (2004) explained that the documentary analysis technique is used in categorising, investigating, interpreting and

identifying the limitations of physical sources. Data analysis is according to Bowen (2009: 27):

> … a systematic procedure for reviewing or evaluating documents-both printed and electronic (computer-based and Internet-transmitted) material. Like other analytical methods in qualitative research, document analysis requires that data be examined and interpreted in order to elicit meaning, gain understanding, and develop empirical knowledge.

Data analysis according to Labuschagne (2003: 101) "… yields excerpts, quotations, or entire passages from records, correspondence, official reports and open-ended surveys". This is clearly visible throughout this entire thesis, where reference is made to documents and the analysis thereof as seen more prominently in chapters four, five and seven of this thesis.

Document analysis is of particular assistance in the 'triangulation of data' as Bowen (2009: 29) explains:

> The rationale for document analysis lies in its role in methodological and data triangulation, the immense value of documents in case study research, and its usefulness as a standalone method for specialised forms of qualitative research. Understandably, documents may be the only necessary data source for studies designed within an interpretive paradigm

The interviews thus, supported the analysis of the various documents used, specifically the legislation and case law. Having said this there are five functions of utilising documents, namely to, "… provide background and context, additional questions to be asked, supplementary data, a means of tracking change and development, and verification of findings from other data sources" (Bowen, 2017: 30-31). Background and context was provided in chapters one and two this thesis, in identifying the research problem and locating it in the research area of forensic linguistics. The questions are raised through interviews in understanding the legislation and other policy documents, incorporated mainly in the analysis of the data, in chapter seven of this thesis. The statistics serve as supplementary data in providing practical statistics relating to the legislation and policies, as evidenced in chapter six of this thesis. This thesis traced the development of the language question from a historical perspective through to the present by analysing various documents. All this was

undertaken in an effort to provide a holistic view of the current situation and thereby addressing the research problem.

By undertaking the above functions using document analysis, processes of content analysis and thematic analysis (Bowen, 2017: 32) were included in this thesis. With content analysis in this thesis, I have highlighted and extracted relevant provisions and excerpts that contribute to investigating the research problem and formulating a discussion. With thematic analysis, I identified themes in the documents in explaining phenomena in the context of this research. This is also evident in the case studies in chapters four and five of this thesis.

3.3.3 Statutory interpretation

The legislative drafting process and types of legislation have been discussed in chapter two of this thesis and what follows is the identification of the approaches to statutory interpretation. Legislative interpretation is not simply the reading of the words contained in the statute. The methods acquired as part of course components, namely legal interpretation and constitutional litigation during my LLB degree (2014-2015) were applied when reading, interpreting and applying the provisions of legislation, in the context of this research. Thus in order to interpret legislation the interpreter requires an understanding of the legal principles and legal language in comprehending the meaning conveyed in the legislation.

The methods of statutory interpretation and more specifically the rules, overlap to a certain extent. The extent of the overlap, if any, is dependent on the facts and the interpreter's understanding. The latter has an element of subjectivity with interpretation occurring in real life contexts. This must be noted for the purposes of chapters four, five and seven of this thesis where I have, through my own interpretation, critiqued the interpretation of statutes in the relevant case law. In applying the methods and rules of statutory interpretation, the court's function is to interpret and not to make law, held in the Latin maxim *judicis est dicere non dare*. This is important to note in the context of the judgments in chapter six of this thesis and the critique thereof in chapter seven of this thesis.

Interpretation of legislation or what is referred to as statutory interpretation, consists of two main approaches, namely the literal and purposive approaches (Burger, 2015: 25). The literal approach also known as the orthodox text-based approach is where an interpreter focusses on the literal meaning of the provision. The meaning of the words in the statute would be clear and unambiguous in conveying the meaning and intention (Botha, 2004: 47). If the literal

approach results in what Botha (2004: 47) refers to as absurd results the court must then deviate from the literal meaning. Deviation in this instance is referred to as the golden rule of interpretation. The literal meaning is then sourced from secondary aids of interpretation, namely the long title of the statute, headings to chapters and sections and the text in the other official language (Botha, 2004: 47).

The second approach is the purposive or text-in-context approach focussing on the purpose or object of the legislation, which is the prevailing factor in interpretation. At the centre of the purposive approach is the mischief rule (Botha, 2004: 51). The mischief rule takes into account external aids, such as the common law prior to the enactment of the legislation, to assist in the interpretation of the statute (Botha, 2004: 51).

3.3.4 Constitutional interpretation

There is an overlap between the methods employed for statutory interpretation, explained above and constitutional interpretation discussed under this subheading. There are five constitutional interpretational techniques identified by Du Plessis and Corder (1994: 73-74). Grammatical interpretation is the first technique, acknowledging the importance of the language in the legislation and constitutional provisions. This will include taking careful account of words, phrases, sentences and other structural components of the text. According to Botha (2004: 58), this is different from the literal approach, as it is merely an acknowledgement of the text. The second technique is systematic or contextual interpretation, which reads the sentence in question within the context of the entire statute as well as the social and political context in which the legislation has been drafted and exists (Botha, 2004: 59). Third is teleological interpretation, which emphasises the constitutional values when interpreting the legislative provisions (Botha, 2004: 59).

The fourth is historical interpretation, taking historical account of the circumstances, which gave rise to the drafting of the legislation (Botha, 2004: 59). Historical interpretation cannot be the only technique used for interpretation; it must be coupled with one of the other techniques. Historical interpretation is however important in the context of this thesis where in chapters six and seven legislation is advanced and critiqued. Moreover the amended legislative texts in the form of the Attorneys Amendment Act (1993) and the Admission of Advocates Amendment Act (1994), which as seen in chapter one of this thesis was originally drafted and enacted during Apartheid and as such inherited the official languages at the time. What follows in chapters six and seven of this thesis is an argument that the historical factors

be taken into account in redressing the linguistic marginalisation and how this impacts on access to justice and the constitutional language rights. Historical interpretation is furthermore important with the discussion pertaining to the situation out of which the Languages Act (2012) was drafted and enacted and the implications of these factors on the contents and overall effect of the legislation, discussed in chapters six and seven of this thesis.

The fifth and final technique is comparative interpretation whereby the court who is interpreting the legislation or constitutional provisions looks at international or foreign courts interpretation of similar legislation (Botha, 2004: 59). As I have indicated foreign legislation and foreign courts interpretation of constitutional language provisions and legislation is discussed in chapters four and five of this thesis as well as foreign case law in which these techniques of interpretation have been employed. It is clear from the discussion above, that there are similarities between statutory and constitutional interpretation. This becomes more apparent in chapters, four, five, six and seven of this thesis.

3.4 Data collection techniques

In conducting face-to-face interviews, I used two data collection techniques, namely voice recording and note taking. At the beginning of each face-to-face interview, I asked each interviewee if they consented to the interview being digitally recorded and then transcribed. I explained that I would be the only person in possession of the audio recording and I was to transcribe the interview without the assistance a third party.

During the interviews, I would also take notes, where interviewees would raise additional points relevant to the research. A digital voice recorder (Dictaphone) was used as the primary recording device. Following the conclusion of each face-to-face interview, I would transfer the audio recording from the Dictaphone to my laptop. This voice recorder was easily accessible in terms of the transference of the recording to the laptop. The interviews were then transcribed from the laptop. The recordings in all instances were intelligible. I was able to pause and play back, to verify certain points during the transcription process. As a precautionary measure, I utilised the voice recording capabilities on my tablet to ensure that if the voice recorder may have a fault, I would have a backup recording.

3.5 Data Analysis

Throughout this chapter, I have referred to the analysis of the data, in explaining each method, approach and technique adopted. The data in this thesis is however, primarily analysed in chapter seven of this thesis. Yin (1984: 99) provided an explanation of data analysis, explaining that it consisted of "...examining, categorizing, tabulating or otherwise re-combining the evidence, to address the initial propositions of a study". The analysis undertaken in chapter seven of this thesis, underpins the conclusions and recommendations presented in chapter eight of this thesis.

3.6 Methodological challenges

There were challenges encountered while conducting this research. The challenges were confined to the interviews and sourcing of texts. Concerning challenges surrounding the interviews, the first and most common challenge encountered was the non-response from potential interviewees to e-mails requesting an interview. In one instance after several follow up e-mails spanning over three months, I received a response saying: "I cannot assist you". With no further directive to contact an alternative person or an explanation. This in my opinion was very untimely and unfortunate given that the referred to individual and Head of the Department of African Languages at UFS, had an opportunity to express his opinions on the use of African languages in higher education at UFS given their monolingual language policy.

There were also numerous time delays in the interview process regarding e-mail interviews, where several follow-ups were needed to remind interviewees to answer the questions, once they had committed to providing the interview. This had to be factored into the writing up of the data and the analysis thereof.

Other delaying factors included, having to comply with various procedures prior to being granted consent to conduct the interviews. This included an internal compulsory ethical clearance process, whereby my host institution, Rhodes University, requires candidates to submit ethical clearance applications, explaining the nature of the research and the prospective interviewees (whether vulnerable persons where part of the study). After obtaining ethical clearance (Appendix B) a further clearance processes needed to be followed with regards to the National Prosecuting Authority (NPA) in order to obtain consent to interview Advocate Turner. I have included the relevant document granting the consent

(Appendix C). Although the latter two processes were not challenges per se, both to an extent were time consuming in the research process.

The second challenge concerned the sourcing of texts. There was limited literature available on the language of record in South African courts and instead numerous texts in the South African context focussed on interpretation in courts. While sourcing literature on forensic linguistics, international books proved difficult to source from the Rhodes University Library and purchasing these books resulted in a four to six week time delay as the books were ordered. Fortunately, the books arrived in the prescribed time and I was able to proceed with the research.

3.7 Conclusion

This chapter has identified the methods, approaches and techniques adopted in conducting the research. Each method, approach and technique has been defined and explained using relevant authors' works. These methods, approaches and techniques have furthermore been explained in relation to the research at hand. The chapter concluded by highlighting the challenges and how they were overcome. The chapter that follows presents a comparative analysis of legal systems in selected African countries.

CHAPTER FOUR

AFRICAN COMPARATIVE ANALYSIS

4.1 Introduction

This chapter comprises a comparative African case study. The countries selected for this chapter are Kenya, Nigeria and Morocco. These three countries have been selected based on their geographical position of the west, east and north, in comparison to South Africa positioned in the South. Further to the geographical position, are the similarities between the legal systems of each country, with specific reference to the history of each of the African countries' legal systems. Each country has a colonial history, where colonial languages were imposed on the indigenous people of each country. This chapter explicates that colonial languages such as English and French have been conferred with official status, post-independence at the expense of promoting, developing and using the indigenous languages of each country in high status domains such as the legal systems and serve as languages of record in courts of law.

4.2 International jurisprudence

The United Nations instruments guide both, chapters four and five of this thesis, where countries are signatories to agreements. Four international documents are of relevance, namely the Universal Declaration of Human Rights; the Universal Declaration of Linguistic Rights (1996); the International Covenant on Civil and Political Rights and the Framework Conventions for the Protection of National Minorities. The international framework must be complied with through national constitutions and legislative means where countries are signatories to these agreements.

The Universal Declaration of Human Rights is an overarching document that is underpinned by human dignity, equality and social justice. The preamble of the Universal Declaration of Human Rights reads similar to that of the South African Constitution. It has an aspirational tone to it however, the prescripts prohibiting unfair discrimination and unfair treatment on grounds including language is clearly set out in Article 2. The International Covenant on Civil and Political Rights (1996) provides further protection for development of language rights. The following provisions from Article 14 are of relevance to the thesis at hand:

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

As with the preamble of the Universal Declaration of Human Rights, these provisions of Article 14 of the International Covenant of Civil and Political Rights (1996) are reflected in the South African Constitution. This will be evident in chapter six of this thesis where the South African constitutional language provisions are advanced in full and discussed in chapter seven of this thesis. Suffice to say at this stage of the discussion, semblance between Article 14 of the International Covenant of Civil and Political Rights (1996) is evident with

Section 35(3) and subsections (f), (g) and (k) and subsection (4) of the South African Constitution, which read as follows:

> (3) Every accused person has a right to a fair trial, which include the right-
>
> > (f) to choose, and to be represented by, a legal practitioner, and to be informed of this right promptly;
> >
> > (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
> >
> > (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
>
> (4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

The Framework Convention for the Protection of National Minorities (1995) also protects the rights of linguistic minorities in the legal sphere, ensuring all persons' language rights are protected, regardless of whether they are speakers of a minority or majority-spoken language. Article 10 subsection (3) is relevant and reads as follows:

> The Parties undertake to guarantee the right of every person belonging to a national minority to be informed promptly, in a language which he or she understands, of the reasons for his or her arrest, and of the nature and cause of any accusation against him or her, and to defend himself or herself in this language, if necessary with the free assistance of an interpreter.

This point will be of further relevance to the discussion in chapters six and seven of this thesis with reference to the demographics based arguments relying on South Africa's language statistics as recorded in the National Census (2011).

The Universal Declaration of Human Rights (1948), The International Covenant of Civil and Political Rights (1996) and the Framework Convention for the Protection of National Minorities (1995) all give effective meaning to the Universal Declaration of Linguistic Rights (1998). The Universal Declaration of Linguistic Rights (1998) cements the linguistic rights of citizens of countries who are signatories to the agreement. The Universal Declaration of

Linguistic Rights (1998) is a practical all-inclusive document, where signatories thereto are compelled to comply with the provisions. Failure to comply or infringe the provisions can result in a legal challenge being launched beyond the confines of the courts in the country. An example of this is the case of *Lourens* v *Speaker of the National Assembly and Others* (2015) which has now been taken to the United Nations International Human Rights Committee under the case name of *Lourens* v *State Party: Republic of South Africa* (2018). The application is currently before the committee and both the Applicant and Respondent have filed heads of argument in the matter. The case is discussed in further detail in chapters six and seven of this thesis. I have specifically referred to it at this stage of the discussion in the thesis, given the relevance of the international documents presently being discussed. Furthermore, the example illustrates that these international documents are relevant to South Africa given that the country is a signatory.

Reverting to the applicability of the Universal Declaration of Linguistic Rights (1998) to the thesis at hand, Article 20 subsections 1 and 2 are relevant and read as follows:

> Article 20
>
> > 1. Everyone has the right to use the language historically spoken in a territory, both orally and in writing, in the Courts of Justice located within that territory. The Courts of Justice must use the language proper to the territory in their internal actions and, if on account of the legal system in force within the state, the proceedings continue elsewhere, the use of the original language must be maintained.
> >
> > 2. Everyone has the right, in all cases, to be tried in a language which he/she understands and can speak and to obtain the services of an interpreter free of charge.

Once again, the similarities between the provisions of the Universal Declaration of Human Rights (1998) and the South African Constitution are identifiable, when taking account of Section 35(3) (f), (g), (k) and subsection (4) of the Constitution as explicated above. On this note, it can be said that the international jurisprudential model is applicable to South Africa and the thesis at hand. The relevance of these international documents extends beyond the

scope of South Africa and extends to the countries I discuss in both this chapter as well as in chapter five of this thesis. Reference is made to these documents as the discussions in this thesis progresses. What follows is the presentation and critical discussion of Kenya as a jurisprudential case study followed by Nigeria and Morocco. The language of record and language in the legal system more broadly is discussed in relation to South Africa with reference to each country's constitutional and legislative frameworks as well as the relevant case law.

4.3 Kenya's sociolinguistic landscape

As a signatory to the United Nations articles cited and discussed above, Kenya is obliged at a political and moral level to comply with the articles and to enforce them for enhanced democratic citizenship (Ogechi, 2003: 277). Dependent on the scholar's perspective, Kenya's linguistic landscape can be seen as complex or richly diverse, given that there are 42 languages in spoken in Kenya (Ogechi, 2003: 279). There is a divide between the exoglossic and endoglossic languages. A further distinction is made between a national language and an official language. English in Kenya is the official exoglossic language used in government for international business purposes and diplomacy amongst other high status domains (Ogechi, 2003: 279). The endoglossic language used as a national language in Kenya is Kiswahili (Ogechi, 2003: 279). Kiswahili is also used for government purposes but not to the extent of English, where Kiswahili is used more for casual governmental interactions and inter-ethnic communication. The remaining Kenyan languages are used in subordinated domains for intra-ethnic communication in homes and rural areas (Ogechi, 2003: 279).

Ogechi (2003: 279) explains that a large disparity between the languages exists. This disparity relates to the number of speakers per given language in Kenya. According to Ogechi (2003: 279), there are languages such as Gikuya, which have approximately 5.3 million mother tongue speakers while languages such as Elmolo have a minimal amount of mother tongue speakers. Ogechi (2003: 279) refers to the 2003 UNESCO report on endangered languages, which recorded that sixteen Kenyan languages are threatened with extinction or death. Elaborating on the point of possible extinction or death, Ogechi (2003: 279) claims that the languages in Kenya are not equal in status, given that there are majority and minority-spoken languages. The number of speakers of a given language in Kenya appears to

affect the status, which is conferred upon the language in terms of importance, and by importance, I mean the use of the language in high status domains. Having said this, it is concerning to see that in a multilingual country with approximately forty two languages English triumphs as the official language for all government purposes and in high status domains. The unequal treatment of the Kenyan indigenous languages results in the hegemonic rise of English. English as a single medium supposedly has the potential of unifying the country though one common language, which is also an international language and on this basis, the state is able to convince the citizenry that the use of English in high status domains will result in the creation of employment opportunities and access to the market. This point relates to the work of Grin (2010) I have advanced above in chapter two of this thesis, where language is linked to the economy.

According to Ogechi (2003: 279-281) the language situation in Kenya described above reasons the need to argue for a case of language rights to be recognised and enforced for speakers of the various languages and that these rights form part of their human rights. The language rights situation is more complicated than conferring language rights on persons and enforcing them. The reason being that there is no violation of a language right where the concentration of a homogeneous speech community is sparse and the state chooses to use a language of wider communication, such as English (Ogechi, 2003: 281). Kenya has chosen English as the language of wider communication a language that has been imposed upon the people of Kenya since the British occupation. Following independence from Britain, the dominance of English has risen and strengthened over time at the expense of the indigenous languages. The patterns of Kenya's history are similar to that of South Africa as evidenced in chapters one and two of thesis above. The discussions that follow concerning Kenya highlight the constitutional and legislative developments entrenching the dominance of English. The discussion is somewhat focussed on the constitutional and legislative developments concerning the legal system.

4.4 Kenya's constitutional and legislative frameworks

The constitutional and legislative frameworks of each country provides the blueprint on which language rights are protected. The Constitution of Kenya (2010) contains language

provisions conferring language rights on Kenyan citizens. Section 7 is the linguistic blueprint of Kenya, conferring official status on languages and reads as follows:

> (1) The national language of the Republic is Kiswahili.
>
> (2) The official languages of the Republic are Kiswahili and English.
>
> (3) The State shall—
>
> > (a) promote and protect the diversity of language of the people of Kenya; and
> >
> > (b) promote the development and use of indigenous languages, Kenyan Sign language, Braille and other communication formats and technologies accessible to persons with disabilities.

There is a distinct difference sought between the official and national languages, where Kiswahili is both a national and official language of Kenya. As with the South African Constitution specifically Section 6, Section 7 of Kenya's Constitution (2010) is aspirational in nature and does create language rights. A critique of the South African constitutional provisions is advanced in chapter seven of this thesis, however at this stage of the thesis it can be noted that Section 6(1) accords all eleven languages official status, while Section 6(2) elevates the nine indigenous African languages further. Section 7 of the Constitution of Kenya, on the other hand does the complete opposite by only conferring official status on Kiswahili and English, even though Kenya has forty two spoken languages. Other than Kiswahili, the other indigenous languages are relegated to subsection 3(b) speaking only to promoting the development and use of the indigenous languages. Although this may appear as a positive step towards inclusivity, it is by no means equality of status and use alongside the official languages. According to Lourens (2012) and the discussion by Docrat (2017b), when conferring official status on a language, the language in turn has to be used in high status domains and by government through all their formal communication channels. This point is discussed further as a point of contention with regard to the South African constitutional provisions in theory and what is actually happening in practice, as per chapters six and seven of this thesis. A further point worth noting is the actual language used in

Section 7 of the Constitution of Kenya (2010) specifically subsection (3) where the word 'shall' is used. The term is discretionary and does not convey an obligation on the state; rather the state has the discretion to do so. This further weakens the development and use of the indigenous languages. The word 'shall' calls into question the intention of the drafters of the Constitution of Kenya (2010) and whether this discretionary term is inserted purposefully to ensure the dominance of a colonial language, English at the expense of the indigenous languages.

As with Section 9 of the South African Constitution, Section 27 of the Constitution of Kenya (2010) includes provisions on the prohibition of direct and indirect discrimination against persons on grounds including language. Language, culture, and the rights of linguistic communities is also protected by Section 44 of the Constitution of Kenya (2010) similarly to Sections 30 and 31 of the South African Constitution.

The provisions in the Constitution of Kenya (2010), relevant to this thesis are Sections 49 and 50:

49. Rights of arrested persons

(1) An arrested person has the right—

(a) to be informed promptly, in a language that the person understands, of—

(i) the reason for the arrest;

(ii) the right to remain silent; and

(iii) the consequences of not remaining silent;

50. Fair hearing

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(3) If this Article requires information to be given to a person, the information shall be given in a language that the person understands.

Articles 49 and 50 of the Constitution of Kenya (2010) quoted above complies with the international framework discussed in the preceding section of this chapter. In both articles, the use of language is made explicit where accused persons have the right to receive information in a language they understand. This is similar to the provisions of Section 35 of the South African Constitution, advanced in chapter six and critiqued in chapter seven of this thesis. Suffice to say at this point, that the similarities are evident, where Article 40(1) (a) of the Constitution of Kenya (2010) refers to a language the accused person understands as does Section 35(3) (k) of the South African Constitution. Article 50 provides no definition or further built in test to determine what language the accused understands. This point may appear to be oversimplified and somewhat irrelevant, however as I discuss in chapter seven of this thesis, there have been instances in which accused persons have had a basic understanding of English, the language of record, however an African language is their mother tongue. In this instance, the courts proceeded to communicate in English with the accused regardless of their limited understanding of English. The case of *Mthethwa* v *De Bruin* (1998) is an example of this occurrence. Simply put where no yardstick exists or a test, the discretion in determining whether the accused understands a language lies with the judicial officer, who simply asks the accused if he or she understands English. The statistics in chapter six of this thesis illustrate that understanding, reading, writing and speaking a language vary in degree. Moreover the statistics illustrate that legal practitioners acknowledge the need to communicate in their client's mother tongue, however their language competencies often does not enable this communication (de Vries, 2018). It has been noted that communication in English is easier for the legal practitioners and saves time and money (de Vries and Docrat, 2019). This point can be linked to the role of forensic

linguists in assisting the legal system in determining a test to determine the linguistic competencies of accused persons or as experts provide further meaning to the language rights provisions of litigants.

As I have explained in chapter two of this thesis with reference to the work of Botha (2004), Burger (2015), du Plessis (2012) and Turi (1993 and 2012), amongst others, legislation provides practical meaning to the constitutional provisions. In the case of Kenya, three statutes are relevant to the thesis at hand, namely: the Criminal Procedure Act, the Criminal Procedure Code and the Judicature Act 16 of 1967.

Chapter 20 of the Criminal Procedure Act is relevant to the thesis at hand. The following provisions quoted below are relevant:

Part II Procedure Relating to Criminal Investigations

A.- Arrest, Escape and Recapture, Search Warrants and Seizure

> (3) Any police officer making an investigation may, subject to the other provisions of this Part, examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined. The whole of the statement, including any question in clarification asked by the police officer and the answer to it, shall be recorded in full in Kiswahili or in English or in any other language in which the person is examined, and the record shall be shown or read over to him or if he does not understand the language in which it is written it shall be interpreted to him in a language he understands and he shall be at liberty to explain or add to his statement. He shall then sign that statement immediately below the last line of the record of that statement and may call upon any person in attendance to sign as a witness to his signature. The police officer recording the statement shall append below each statement recorded by him the following certificate:
>
> "I....., hereby declare that I have faithfully and accurately recorded the statement of the above-named.....".

23.-

(1) A person who arrests another person shall, at the time of the arrest, inform that other person of the offence for which he is arrested.

(2) A person who arrests another person shall be taken to have complied with subsection (1) if he informs the other person of the substance of the offence for which he is arrested; and it is not necessary for him to do so in a language of a precise or technical nature.

53. Where a person is under restraint, a police officer shall not ask him any questions, or ask him to do anything, for a purpose connected with the investigation of an offence, unless–

(b) the person has been informed by a police officer, in a language in which he is fluent, in writing and, if practicable, orally, of the fact that he is under restraint and of the offence in respect of which he is under restraint;

(c) the person has been cautioned by a police officer in the following manner, namely, by informing him, or causing him to be informed, in a language in which he is fluent, in writing in accordance with the prescribed form and, if practicable, orally–

(i) that he is not obliged to answer any question asked of him by a police officer, other than a question seeking particulars of his name and address; and

(ii) that, subject to this Act, he may communicate with a lawyer, relative or friend.

135. The following provisions of this section shall apply to all charges and information and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section–

(ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without

necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;

(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary, save that where any rule of law limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required;

(c)

(i) the description of property in a charge or an information shall be in ordinary language and such as to indicate with reasonable clarity the property referred to, and, if the property is so described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property;

(f) subject to any other provision of this section, it shall be to describe any place, time, thing, matter, act or omission of any kind to which it is necessary to refer in any charge or information in ordinary language in such manner as to indicate with reasonable clarity the place, time, thing, matter, act or omission referred to;

C- Accelerated Trial and Disposal of Cases

192.- (3) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed.

C-Taking and Recording of Evidence

210.-(1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner–

(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record;

211.-(1) Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him in open court in a language understood by him.

(2) If he is represented by an advocate and the evidence is given in a language other than the language of the court, and not understood by the advocate, it shall be interpreted to such advocate in the language of the court.

237. Without prejudice to the generality of section 236, a subordinate court presided over by a resident magistrate may, subject to the provisions of this section, for the purpose of assessing the proper sentence to be passed, take into consideration any other offence committed by the accused–

(a) if it has been explained by the court to the accused person in ordinary language that the sentence to be passed upon him for the offence of which he has been convicted in those proceedings may be greater if the other offence is taken into consideration;

312.-(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.

313.-(1) On the application of the accused person a copy of the judgment or, when he so desires, a translation in his own language, if practicable, shall be given to him without delay and free of cost.

321.-(1) Without prejudice to the generality of section 320 the High Court may subject to the provisions of this section, for the purpose of assessing the proper

sentence to be passed, take into consideration any other offence committed by the accused person but of which he has not been convicted.

(2) The High Court shall not take any offence into consideration unless–

(a) it has been explained by the court to the accused person in ordinary language that the sentence to be passed upon him for the offence of which he has been convicted in those proceedings may be greater if the other offence is taken into consideration;

Prior to engaging with these quoted provisions of the Criminal Procedure Act, I advance the provisions of the Criminal Procedure Code. The Criminal Procedure Code's provisions overlap to a certain degree with the above quoted provisions and it is thus logical for purposes of discussion to advance and discuss these provisions simultaneously. The relevant provisions read as follows:

137E. Form of plea agreement

A plea agreement shall be in writing, and shall—

(a) be reviewed and accepted by the accused person, or explained to the accused person in a language that he understands;

(b) if the accused person has negotiated with the prosecutor through an interpreter, contain a certificate by the interpreter to the effect that the interpreter is proficient in that language and that he interpreted accurately during the negotiations and in respect of the contents of the agreement;

197. Manner of recording evidence before magistrate

(1) In trials by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner—

(a) the evidence of each witness shall be taken down in writing or on a typewriter in the language of the court by the magistrate, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the magistrate, and shall form part of the record;

198. Interpretation of evidence to accused or his advocate

(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.

(2) If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the court to interpret as much thereof as appears necessary.

(4) The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili.

Chapter 20 of the Criminal Procedure Act above includes extensive provisions on the use of language in Kenyan courts. There are several provisions providing for the use of plain language to be used during interaction with an accused person, in order to understand the charges, and the terms of the plea agreement, they may enter into. The provisions are Sections 23, 135, 192, 237 and 321(2). This is important in the context of a multilingual country with forty-two languages and only English is the language of record in high courts and English and Kiswahili in lower courts. Simply put besides accused persons being disadvantaged by the language of record where they are not proficient in English and / or Kiswahili, the problem is complicated further by the use of legalese and the technicality of the legal systems' legal language.

From the onset of the legal process, emphasis is placed on ensuring an accused is provided with all relevant information in a language they understand. Section 53 of Chapter 20 of the Criminal Procedure Act, quoted above, holds that a police officer must inform the accused of the reason for their restraint in a language in which the accused is fluent. Section 53 goes further to explain that by fluent, this is extended to include oral and written communication, where practicable. This is significant in the fact that 'fluency' is included as opposed to the South African constitutional provisions, which refers to language the accused understands.

Section 53 furthermore includes writing and oral fluency. The provision gives further meaning to the provisions in the Constitution of Kenya (2010).

The role of the police is outlined further in Section 3, Chapter 20 of the Criminal Procedure Act where police statements are concerned. A statement can be provided in Kiswahili, English or any other language. The statement must then be read back to the accused, if it has been recorded in a language the accused does not understand, it is to be interpreted into a language the accused understands. Once again, these provisions are more extensive than the provisions in the South African Police Service Language Policy (2015), discussed in full in chapters six and seven of this thesis. Section 3, however progressive, does rely largely on interpretation and translation. There is no indication that interpreters/ translators are employed to undertake this service and given that a statement is read back to the accused immediately after it has been written, a conclusion can be drawn that the police officer is in fact acting as an interpreter/translator. Moreover, the police officer would need to be proficient in the specific language and thus be linguistically competent and presumably bilingual. Theoretically, Section 3 provides an entirely new meaning to multilingualism in the workplace and the importance of language in high status domains where the implementation of peoples' language rights are at stake.

Progressing to the next stage in the course of a criminal case, if a plea agreement is entered into by the accused and recorded in writing, Section 137E (a) of the Criminal Procedure of Kenya, provides that the contents of the plea agreement be explained to an accused in a language he understands. As opposed to Section 3 of the Kenyan Criminal Procedure Act, subsection (b) ensures the reliability of the interpretation. Simply put, subsection (b) provides that if the plea is negotiated through an interpreter, the interpreter to the state must provide a certificate that the interpreter is proficient in that language and that the interpretation was accurate.

Both the Kenyan Criminal Procedure Act and Code include provisions on the use of language in the trial. Section 210(1)(a) of the Criminal Procedure Act and Section 197 of the Criminal Procedure Code mirror each other, by stating that a magistrate is to record the evidence of witnesses in the language of the court, as seen in the provisions quoted in full above. Once again, translation is in effect where a witness imparts evidence in a language other than the language of the court.

Further mirroring of provisions is evidenced from the sections quoted above, these include Section 211(1) and (2) of the Criminal Procedure Act and Section 198 (1) and (2) of the Criminal Procedure Code. All these provisions call for evidence to be interpreted for the accused should the accused be present and not understand the language in which witnesses are giving evidence. Section 198 of the Kenyan Criminal Procedure Act as opposed to the provisions in the South African constitutional and legislative frameworks makes specific reference to evidence being interpreted for the accused's advocate as well where necessary. The progressiveness of this provision is however limited by the fact that the threshold is English. The evidence will be interpreted for the advocate into English, thus the advocate is to be fully conversant in English. The entire legal system is therefore premised on understanding English. This is reinforced by Section 198(4) of the Criminal Procedure Code that explicitly states English is the language of the high court and English or Kiswahili in subordinate courts. As is evidenced in chapter two of this, the language of record in South African courts is guided by policy and directive means and not through legislation. This will become more evident in chapters six and seven of this thesis. Suffice to say at this point in the discussion that South Africa, as opposed to Kenya has no explicit provisions stating what the language of record is in South African courts.

In concluding the discussion on the legislative frameworks concerning language in Kenyan courts, it can be said that language is central in the process and the importance of the accused understanding proceedings is not hindered by language. Sentencing procedure is to be explained to an accused in a language he understands. Access to justice in Kenya is explicated further through the remaining provisions quoted in full above. The judgment must be recorded, by the judicial officer, in the language of the court. Upon application by the accused, the judgment must be translated free of cost and without delay, in the accused's own language as per Section 313(1) of the Criminal Procedure Act. This is not provided for in South Africa. A similarity can be drawn with Canada and the language in which the judgment is provided. This will be more evident in chapter five of this thesis.

4.5 Kenya's language of record and language usage in courts

Apart from the literature I have referred to pertaining to Kenya's sociolinguistic landscape, Odhiambo *et al* (2013) have written extensively on language usage in Kenyan courts in a multilingual setting. The work of Odhaimbo *et al* (2013) offers further insight on the

language situation in Kenyan courts with reference to the legislation quoted and discussed above. With reference to the language of record, it is noted as per the legislative provisions advanced above; English is the language of record in Kenyan High Courts, while English and Kiswahili are the languages of record in the lower courts. Odhaimbo *et al* (2013: 911) state that in lower courts the use of Kiswahili as a language of record is not guaranteed as with English as this is dependent on the linguistic competence of judicial officers. The courts assume a monolingual position, with English as the language of the courtroom (Odhaimbo *et al*, 2013: 911). Monolingualism in Kenyan courts is reinforced by the fact that all training of Advocates, Magistrates and Prosecutors takes place in English (Odhaimbo *et al*, 2013: 911). This point must be borne in mind in chapters six and seven of this thesis where I discuss the South African legislative position and the 2019 decision by the Legal Practice Council to make English the sole medium. Furthermore to bear in mind this point with reference to the university language polices and LLB degree.

Non-English speaking litigants are thus placed at a disadvantage in Kenyan courts, where they are solely reliant on an interpreter. The same applies to judicial officers. Odhaimbo *et al*, (2013: 911) explain the difficulty faced by non-English speaking litigants, where on the one hand litigants face a foreign system, which is intimidating and where they have limited or no knowledge of the legal system and its procedure or legal language. On the other hand, litigants do not understand English and this is the majority of Kenya (Odhaimbo *et al*, 2013: 911). The research conducted by Odhaimbo *et al* (2013: 915) saw an entire province in Kenya, indicating that litigants in the province said they preferred to use their regional mother-tongue Dhaluo in courtroom discourse. By participating through the medium of English they cannot fully participate in their own trials, it also adversely affects complainants where language barriers are in place (Odhaimbo *et al*, 2013: 911).

With the focus thus on interpretation in Kenyan courts, the linguistic competency and accuracy of interpretation comes to the fore. Interpreters need to be both bilingual and familiar with the legal terminology. Furthermore, where equivalents are not in existence in the language being interpreted into, the interpreter is to explain this (Odhaimbo *et al*, 2013: 911). Odhaimbo *et al* (2013: 913) reported in their study that eighty percent of interpreters confirmed they had not been trained, ten percent did not answer the question and the remaining ten percent who said they were trained, indicated this was not court interpreter

training but rather sign language training. Interpreters shed further light on the language dichotomy that exists between legal professionals, where interpreters explained they communicated in English with judicial officers and advocates and in Kiswahili with the prosecutors (Odhaimbo, 2013: 917). This point must be borne in mind with the discussion in chapters six and seven based on the language survey by de Vries (2017) and de Vries and Docrat (2019) who recorded the attitudes of legal practitioners towards multilingualism.

What follows is a discussion concerning the second comparative country, namely Nigeria.

4.6 Nigeria's sociolinguistic landscape

As with South Africa and Kenya, Nigeria is a multilingual country. The history of language usage in Nigeria dates back to the British colonial period. Nigeria became a British colony in the eighteenth century. It was initially the colony of Lagos, where the Northern and Southern protectorate became an entity called Nigeria (Olanrewaju, 2009: 105). According to Olanrewaju (2009: 154), Nigeria is a heterogeneous society in which multilingualism thrives. Geographically Nigeria is presently divided into three major areas comprising North, West and East. Each of these geographical divisions comprise of majority-spoken languages. In the North, Hausa is the majority spoken language; the West is majority speaking Yoruba; while the East is Igbo speaking (Olanrewaju, 2009: 154). These are only three languages, but these three are the language spoken by the majority of persons. There are however a further four hundred indigenous languages spoken in Nigeria. The indigenous languages are spoken among communities and linguistic cultural groups, but English remains the language used in high status domains such as the legal system.

4.7 The rise of English through Nigerian constitutional and legislative means

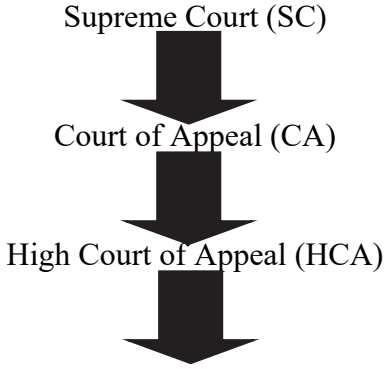
With English being the language of the coloniser, it was used historically as a language in high status domains. A number of Constitutions marked the dominance of the colonial authority. The Clifford Constitution followed the Constitution of the Colony and Protectorate of Nigeria in 1914 in 1922 (Abioye, 2011: 167). A further three Constitutions were enacted prior to independence. In 1946, the Macpherson Constitution of 1951 followed the Richards Constitution (Abioye, 2011: 167). In 1954, the Federation was formed on the basis of the

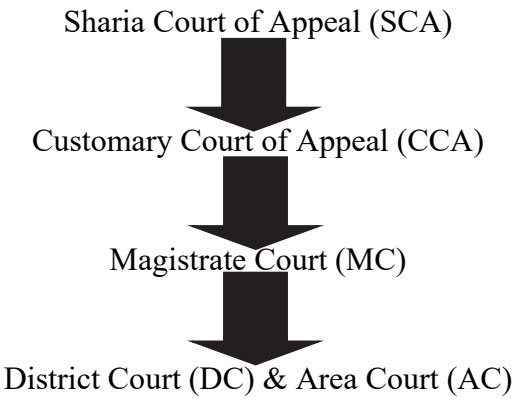
Lytleton Constitution. The 1957 and 1958 constitutional conferences resulted in the passing of the Independence Act of 1960 (Olanrewaju, 2009: 154). The 1979 Constitution of the Federal Republic of Nigeria, specifically Chapter 4, Part B, Section 51 confers official status on three indigenous Nigerian languages as well as English, namely Hausa, Igbo and Yoruba (Olanrewaju, 2009: 155).

Noteworthy is the inclusion of English as an official language post-independence. As indicated above, English trumps the three African official languages in Nigeria in high status domains, bringing to the fore the disjuncture between theory and practice, where theoretically African languages are conferred with official status, however practical implementation of the statutes favours an English only policy. Below I advance the courts function and geographical position in relation to the language demographics as well as what the legal legislative framework includes on the use of language in courts.

4.8 The hierarchical legal system: Nigerian courts

With reference to Kenya in the discussions above, there was an evident divide between higher and lower courts where language was concerned. The high courts had English as the sole official language of record while the lower courts have English and Kiswahili as languages of record but in reality English is the only language of record in lower courts as well. The hierarchical structure of the courts in Nigeria is divided further by the fact that there is a parallel Western legal system and an Islamic legal system. This is similar to South Africa where a customary legal system is in existence. Olanrewaju (2009) provides an overview of the courts, explaining, courts are graded hierarchically in order of the seriousness of the cases; this is how jurisdiction is determined. Relying on the text of Olanrewaju (2009: 106), I have organised it into a diagram below with brief explanations of each court's function.





The SC, being the highest court has the mandate and jurisdiction to settle disputes between the federal and state government or between states. The SC's jurisdiction stretches further to appeals on matters concerning questions of law, the interpretation of constitutional provisions as well as any breach of fundamental human rights, cases concerning the death penalty emerging from the CA (Olanrewaju, 2009: 106). The function and jurisdiction of the SC in Nigeria resembles that of the Constitutional Court in South Africa (Theophilopoulos *et al*, 2012).

The CA comprising fifteen judges is a court of appeal, which hears appeals from all lower courts whether state, or federal, including the HC, CCA and SCA. The CA in Kenya has a similar function to the Supreme Court (SCA) in South Africa. The judicial makeup of the CA differs from the SCA in South Africa not only in numbers but with expertise as well, where three judges are experts in Islamic law and a further three are experts in customary law (Olanrewaju, 2009: 107). In the SCA in South Africa, there are no such requirements for Judges, despite the fact that customary law is constitutionally recognised.

The above discussions refer to federal and state courts, this divide between federal and state exists at high court level. According to Olanrewaju (2009: 108) federal high courts are headed by a chief judge, as there is only one federal court geographically positioned in the Nigerian capital Abuja. The jurisdiction of the federal court extends to criminal and civil cases as well as cases concerning the revenue of the federation government of Nigeria (Olanrewaju, 2009: 108). The state high court as with the federal high court has a chief judge. There are however two differences between the two high courts, the first is that the state high court hears appeals of a civil and criminal nature regardless if it concerns the federal or state

government (Olanrewaju, 2009: 108). Secondly, the state court has the jurisdiction to hear all appeals from the lower magistrate courts (Olanrewaju, 2009: 108).

Parallel to the high courts described above, is the Sharia Court, which prescribes to the tenets of Islam (Olanrewaju, 2009: 109). The court is situated in the North of Nigeria, given that nineteen northern states have created Sharia Courts of Appeal (Olanrewaju, 2009: 109). The CCA is different from the SCA as it is concerned with appeals of a customary nature concerning civil litigation (Olanrewaju, 2009: 110). The difference between Sharia and customary law is not explained however, it appears to be determined along religious lines where the SCA in Nigeria is solely concerned with Sharia law, hence the geographical position and confinement to North of Nigeria, the majority of whom are Muslim. Customary law thus applies to disputes concerning customs, cultures and traditions outside of the realm of Sharia law.

A North, South divide, geographically determines the jurisdiction of the Nigerian magistrates' courts. In the South, magistrates' courts hear both civil and criminal cases (Olanrewaju, 2009: 110). In the North, magistrates' courts are confined to hearing only criminal trials while the civil cases need to be heard in the North of Nigeria are heard by the District Courts (Olanrewaju, 2009: 110). The District Courts only exist in the North with the primary purpose of hearing the civil cases (Olanrewaju, 2009: 111). The Area Courts in the North exists alongside the District Courts with the sole mandate of hearing criminal and civil cases of both Islamic Personal law and customary law (Olanrewaju, 2009: 112). On the point of customary law, Customary Courts are established with the precise hierarchical status as Nigerian magistrates' courts are in existence in Southern Nigeria with a limited jurisdiction focussing on customary law cases concerning inheritance of property according to customs, succession and marriage under customary law (Olanrewaju, 2009: 112).

4.9 Nigeria's legal language legislative framework

With the hierarchical structure of the courts advanced above, the language rights of persons need to be carefully established so as it protect their rights to access justice and ensure they are treated fairly regardless of their linguistic competencies. Language rights in the Nigerian

Constitution relevant to the legal system are housed in the following constitutional provisions:

Section 20

(2) Any person who is arrested or detained shall be promptly informed, in language that he understands, of the reasons for his arrest or detention.

(5) Every person who is charged with a criminal offence shall be entitled –

(a) to be informed promptly, in language that he understands and in detail, of the nature of the offence;

(e) to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence.

Prior to commentating on these provisions are I have advanced the relevant provisions emanating from the various statutes governing the legal processes and giving further meaning and practical implementation to the constitutional language rights. The Criminal Procedure Act of 1990 (Chapter 80 Laws of the Federation of Nigeria), advances the following provisions concerning language in legal proceedings and read as follows:

Section 60

(4) Every such complaint shall be for one offence only, but such complaint shall not be avoided by describing the offence or any material act relating thereto in alternative words according to the language of the enactment constituting such offence.

Section 152

(3) The particulars in the charge shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms.

Section 154

(1) The description of property in a charge shall be in ordinary language and such as to indicate with reasonable clearness the property referred to and if the property is so described it shall not be necessary, except when required for the purpose of describing

an offence depending on any special ownership of property or special value of property, to name the person to whom the property belongs or the value of the property.

(8) Subject to any other provisions of this Act, it shall be sufficient to describe any place, time, thing, matter, act, or omission whatsoever to which it is necessary to refer in any charge in ordinary language in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act, or omission referred to.

Section 314

(1) If at the close of the evidence for the prosecution a prima facie case has in the opinion of the magistrate been established against the accused, immediately after the last witness for the prosecution has been bound over to attend the trial, the magistrate shall again read the charge or read the amended or substituted charge to the accused and explain the nature thereof to him in ordinary language and inform him that he has the right to call witnesses and, if he so desires, to give evidence on his own behalf.

Section 338

(1) 0Where an information is exhibited to the High Court under the provisions of this Act-

(d) after the statement of offence, particulars of that offence shall be set out in ordinary language: Provided that where any written law limits the particulars of an offence which are required to be given in an information nothing in this paragraph shall require any more particulars to be given than those so required;

Section 441

Every male person, between the ages of twenty-one years and sixty years residing in Nigeria, who is able to speak the English language and understand the same shall be qualified to serve as an assessor: Provided that it shall not be an essential qualification for an assessor that he shall be able to speak the English language and understand the same when spoken.

As with the Kenyan hierarchical legislative framework, evidenced above, the Nigerian Constitution and primary legislation in the form of the Criminal Procedure Act (1990) is given further meaning through the provisions of the Criminal Procedure Code. The relevant provisions concerning the use of language in judicial proceedings read as follows:

> **232.** No person of the Moslem faith shall be required to take an oath in any court unless -
>
> (c) the oath is taken upon a copy of the Holy Qur'an printed in the Arabic language.
>
> **233.** The court shall prevent the putting of irrelevant questions to witnesses and shall protect them from any language, remarks or gestures likely to intimidate them; and it shall prevent the putting of any question of an indecent or offensive nature unless such question bears directly on facts which are materials to the proper appreciation of the facts of the case.
>
> **241.** When any evidence is given in a language not understood by the accused and the accused is present in court, it shall be interpreted to him in a language understood by him.
>
> **268.** (1) The judgment in every trial in a court shall be in writing and shall be pronounced, and the substance of it explained in a language understood by the accused in open court either on the day on which the hearing terminates or at some subsequent time of which due notice shall be given.
>
> **276.** On the application of the accused a copy of the judgment, or when he so desires a translation in his own language if practicable, shall be given to him without delay and such copy shall be given free of cost.

As with the Kenyan model, prosecutors in Nigeria's courts are police officers and thus their linguistic competencies need to be aligned with the language of record in courts and the legal language. The Police Act 23 of 1979 includes numerous provisions on the language competencies and linguistic requirements of police officers. I have quoted these below as per the statute:

46. Qualifications for appointment as ASP

(1) The qualifications required of a candidate for a probationary appointment as an assistant superintendent of police (works) are-

(b) education-must be in possession of the General Certificate of Education (Ordinary Level) with a pass in English language, plus advanced level passes in any two of the following subjects-

History, Geography, Mathematics, Economics, British Constitution, British Economic History, any non-Nigerian language, or any science subject.

52. Qualifications for appointment as cadet sub-inspectors

(1) The general qualifications required of a male or female candidate for appointment as a cadet sub-inspector of police are as follows-

(b) education-must be in possession of-

(i) a General Certificate of Education with passes at the Ordinary Level in at least four subjects including English language and mathematics; or

(ii) the West African School Certificate, with credits in at least four subjects, including English language and mathematics;

75. Entrance examination syllabus

(1) The entrance examination shall consist of a written examination in the following subjects-

(a) English;

(b) Simple arithmetic;

(c) Dictation;

(d) General knowledge.

(2) The entrance examination shall be conducted in the English Language.

110. Prescribed qualifications may be varied or dispensed with

(b) the Bureau of Investigation and Intelligence Branch or the Special Branch of the Force, if the candidate is especially qualified by a knowledge of

languages, or other special knowledge relating to the work of the Bureau of Investigation and Intelligence Department or the Force Special Branch;

168. Accelerated promotion to the rank of corporal

A constable who has passed the West African School Certificate Examination or the General Certificate of Education Examination (Ordinary Level) in English and mathematics, and in not less than two additional subjects, shall be eligible for consideration for promotion to the rank of corporal after he shall have served for not less than two years from the date of appointment as a recruit constable.

333. Duties of the Charge Room Officer

(v) the causing the Station Writer to enter, in concise language, into the Station Crime and Incidents Diary, the details of every complaint made and incident reported;

384. Conduct of summary investigation

(23) Any evidence given in any language not understood by the defaulter shall be interpreted to him.

A member of the Force who commits any of the following acts or omissions shall be guilty of an offence against discipline-

(l) INSUBORDINATE OR OPPRESSIVE CONDUCT, that is to say, if he-

(iii) uses obscene, abusive or insulting language to a member of the Force;

The starting point for the discussion pertaining to this extracted legislation is the Police Act 23 of 1979. The Police are the first port of call when encountering the justice system (Docrat, 2017). Both complainants and accused persons have their statements taken by police officers, and as explained above the police officers in Nigeria have a further role to play in terms of prosecution. The provisions I have advanced above are illustrative of two points. Firstly, appointments to the police service and promotions within the police service are guided by the linguistic competency of the individuals concerned. For example, Sections 46(1) (b), 52(1) (i) and 75(1) and subsection (2) expressively refer to a 'sound knowledge of English for appointment and promotion'. Section 46(1) (b) besides heightening the status of English by

prescribing that an assistant superintendent must have a pass in English, requires that a non-Nigerian language be studied as well. This is concerning given that the linguistic composition of the country favours a multilingual approach rather than a monolingual one, where the majority of the country cannot speak English, nor do they have access to the language. The undermining and blatant exclusion of Nigerian African languages, contributes to the exclusion of persons who are not fluent in English.

Section 75(1) (a) prescribes that one of the entrance examinations assesses the competency of police officers in the English language. Further to this Section 75(2) prescribes that all entrance examinations will be conducted in English. English is yet again prioritised and used as a threshold to determine entrance to the police service. Subsection (2) illustrates that there is a need to be proficient in speaking, reading and writing English. This point is elaborated on, upon examination of Section 168, which prescribes that promotion from constable to the rank of corporal is dependent on passing the English examination.

Section 333(v) brings into question whether an English police officer is linguistically competent to record a statement provided by a non-English speaking complainant in compiling the record as required in this provision? It is of further concern given that the police officer will effectively have a limited linguistic competency with regards to the African languages and thus rely on interpretation in court, where they act as prosecutors. This point can be cross-referenced with the case of *State v Sikhafungana* (2012). In critiquing the case, Docrat *et al* (2017d) explained that the police are central to the success of a prosecution and that the chain of evidence commencing with them needs to be watertight. Docrat *et al* (2017d) further explained that as evidenced in the case of *Sikhafungana* (2012) language is central to the police service operating effectively and this requires the police to communicate directly with complainants in a language they fully understand. In turn, the recording of the statement in a language in which it was provided ensures no meaning is lost in translation. It further enables the police officer at a later stage to be linguistically equipped to provide a statement with equivalence, where the literal meaning is captured and translated. I discuss the *Sikhafungana* (2012) case fully in chapters six and seven of this thesis.

Provision is made for information to be interpreted into a language understood by the "defaulter" through Section 384(23), but no mention is made of the need to communicate directly in any Nigerian African language with complainants. It is interesting to note that Section 110(b) dealing with prescribed qualifications refers to persons who are "… especially

qualified by a knowledge of languages". Although English is not referred to specifically, the only presumption that can be drawn is that English is implied given the context and content of the Police Act (1979). It does however leave room for an argument to be made that by referring to 'languages' the plural implies the inclusion of African languages other than English.

The Police Act (1979) as with the Criminal Procedure Act and Criminal Procedure Code are drafted within the framework of the Constitution. This being said the legislation needs to conform to the constitutional provisions and must not be contrary to the Constitution. As explained in chapter two of this thesis, primary legislation must give meaningful effect to the constitutional rights and provisions more broadly. Having said this, it can be questioned whether in fact English only speaking police officers give meaning to Section 20(2) of the Nigerian Constitution as quoted above. Section 20(2) by requiring that every arrested or detained person be informed of his or her rights in a language they understand; it is the responsibility and the police mandate to undertake this function, however the Police Act (1979) as I have explicated, promotes monolingual linguistic competency and thus has the potential of limiting detainees constitutional language rights. Furthermore, the Constitution through Section 20(5) (a) requires that the arrested person be informed of the nature of the offence in sufficient detail in a language they understand; again, this translates to the need to have multilingual police officers who can execute this constitutional mandate without limiting rights. As with all the legislation advanced thus far in this chapter, an emphasis is placed on interpretation. It is interesting to note that Section 20(5) (e) precludes the payment of interpreters if the accused does not understand the language used at the trial. The first point arising from this constitutional right is that as with South Africa (this will be discussed in further detail in chapter six of this thesis with reference to chapter two of this thesis), and Kenya the language of record is monolingual (English only), thus the majority of litigants require interpretational services. Simply put, in my opinion it is not an olive branch that the government of Nigeria is extending to litigants for free interpretational services, it is the complete opposite, as a language right is being watered down, where the majority of persons are not English speaking and thus have an interpretational right. A second point arising, concerns the absence of a standard built into the constitutional provisions with the phrase 'a language the person understands', no standard is inserted to determine the linguistic competency of litigants.

The Criminal Procedure Act (1990) provides no elucidation on the language for direct communication with litigants in the legal system. The provisions I have quoted above, namely Sections 60(4); 152; 154(1) and (8); 314(1); and Section 338 provide refer to the use of ordinary language, i.e. the preclusion of legalese or any technical language. No mention is made in either of these provisions the use of language and a language other than English such as an African language. The exclusion of any recognition ensuring an African language is used and the language of the accused is absent from Section 152 dealing with the charge sheet. This will be cross-referenced to the Canadian case study in chapter five of this thesis. Section 441 is the sole section in the Criminal Procedure Act (1990) that refers to linguistic competency. Section 441, however supports the English only position, where the extent is far reaching to assessors, who are appointed based on a criteria, which includes being proficient in speaking and understanding English. This monolingual approach supports the sole use of English as the language of record.

The Criminal Procedure Code offers more protection for litigants in comparison to the Criminal Procedure Act (1990). Section 232(C) is the only provision thus far in the Nigerian legislative framework that includes a language other than English. Given the court hierarchy I advanced above and the divide between the western and Islamic courts, where Muslims can take their oath in Arabic. The remaining provisions I have advanced from the Criminal Procedure Act, focus on interpretation and translation and not direct communication in a language the accused understands. Simply put English remains the language of record and the litigant is reliant on interpretation services.

Section 276 that I have quoted is of further relevance to the thesis at hand. Section 276, the translation of the judgment, free of charge can be cross-referenced with the Canadian case study in chapter five of this thesis. As I advance in chapter five of this thesis concerning the Canadian discussion, Section 276 in making allowance for the translation of the judgment permits the use of African languages as languages of record and an English translation where necessary. If the service is being offered in English, why can this not be done in a Nigerian African language, where the majority of people speak an African language? There is no literature that I have found supporting this view in Nigeria. From the discussion I have advanced on Nigeria, it is evident that English consumes all literature and legislation.

4.10 The language of record in Nigerian Courts

The Nigerian court structure advanced above, illustrates the integral role of both customary and Sharia law. Simply put, the indigenous traditions of the country are recognised in the legal system. With customs recognised by law it would follow that the indigenous languages are inherent in the legal system. The sociolinguistic landscape presented earlier, suggests otherwise, that the indigenous languages are excluded from high status domains in Nigeria.

The language of record in Nigerian courts is English. The selection of English as the language of record is justified on grounds of neutrality, whereby choosing English precludes the engenderment of ethnic hostility between the African languages. Olanrewaju (2009: 116) explains that English as a sole language of record ensures the peaceful co-existence of the indigenous languages in Nigeria and preserves linguistic diversity. This point can be countered through the works of Alexander (2013) and Crystal (2003). Alexander spoke to the point of language and ethnicity and how the use of an African language or languages does not result in tribalism or ethnic divisions. Crystal (2003) spoke to the point of English as a global language and how as a result of selecting English as the primary language of communication in multilingual countries at the expense of the African languages, results in the eventual death and extinction of the indigenous languages. The point being espoused is that Nigeria, a multilingual country, by selecting English as the primary language of communication contributes to the rise of English as a global language and the further marginalisation and extinction of the indigenous languages.

The legal system regulates the functioning of a country, it holds the government to account, ensures that person's rights are enforced and protected. With this function the legal system and in particular, the courts and all legal professionals should be accessible to the public. Accessibility in my opinion is facilitated through language. The literature on Nigeria, suggests that English is the chosen language of communication as it is said to be the key to success and to employment opportunities, given that it is the language of all three arms of the state (Olanrewaju, 2009: 116). Defendants and witnesses are permitted to choose any of the three Nigerian official languages, Hausa, Yoruba and Igbo. This right is however qualified by the fact that English is the language of record, the law is written in English and all legal professionals are trained in English. Once again, only three of the African languages are

recognised on paper, practically however their status and use is diminished by the fact that English is the language of record, meaning only evidence will be imparted in one of the three languages and then interpreted into English. The interpretational system is thus still in effect with the threshold being English. Olanrewaju (2009: 116) acknowledges that English as the language of record alienates the majority of the Nigerian populace.

The complexity of the language of record is further complicated by the fact that English is used as a tool by lawyers, who exploit their knowledge of English to the detriment of witnesses who in most instances are illiterate and have no knowledge of both English and the legalese used in cross-examination (Olanrewaju, 2009: 117).

4.11 English in Nigerian legal system: Legal education and training

With the legal system premised on English only in reality and the fact that Olanrewaju (2009: 117) makes no qualms about the exploitation of witnesses by lawyers through the medium of English, it follows that legal professionals need to be linguistically trained. The legal education of lawyers in Nigeria as with the entire legal system has been based on the legal system of England, this includes the legal training. From a historical perspective on completion of their law degree, graduates required further minimum qualifications for practice. This included either a call to the English, Irish or Scottish Bar or a qualification as a solicitor in any of these three countries (Fabunmi and Popoola, 1990: 34-37). Essentially Nigerian lawyers were products of the English legal system and were in actuality foreigners in Nigeria upon their return, yet the majority of the country are African language speaking whose cultures and traditions are different to those of the Western countries in which the lawyers have trained. There was no exposure to any form of Nigerian law to equip the lawyers to deal with issues of a legal nature in a non-western system (Fabunmi and Popoola, 1990: 37).

The legal education programme in Nigeria was in place until the enactment of the Legal Education Act 12 of 1962. The Legal Education Act (1962) made provision for the establishment of the Nigerian Law School (Fabunmi and Popoola, 1990: 38). The Nigerian Law School remains in operation for practical training following the completion of a university degree. An oversight body exists in regulating the legal education in Nigeria,

namely, the Council of Legal Education, which indirectly has the power to affect the legal education programming by rejecting a law degree from a university as a basic qualification for admission to the Nigerian Law School (Fabunmi and Popoola, 1990: 39). The Law School thus has an important role to play in monitoring the law faculties' courses. The Council of Legal Education from 1985 onwards established an Accreditation Panel to inspect the material used for teaching law students at universities (Fabunmi and Popoola, 1990: 39).

Upon entering the Nigerian Law School, the second phase of training commences for prospective students. At the Nigerian Law School, the Council for Legal Education controls the programme, where students are trained on the practicalities of the law. According to Fabunmi and Popoola (1990: 39):

> The programme there aims at providing for practical training in the work of a barrister and of a solicitor. The main subjects are therefore concerned with practice and procedure and the preparation of legal documents, all to the end that the student acquires the necessary skills requires in practice.

There are further gaps that can be identified at both university level and at the level of practical training. As part of the law degree students are required to complete non-legal courses, which include other social sciences subjects as well as English (Fabunmi and Popoola, 1990: 44). No African languages are listed as part of the subjects that law students are permitted to enrol for, however English is listed as one. The exclusion of African languages is extended to the Law School training as well, where no vocation specific course is included. The training includes a range of other practical courses such as legal drafting, conveyancing, civil and criminal procedure and professional, with the exclusion of all language based practical training (Fabunmi and Popoola, 1990: 44-45).

There appears to be a lack of development of African languages in the legal system concerning legal terminology. Furthermore, there is no recognition of the importance of language in the legal system and the need to ensure lawyers and judicial officers are linguistically competent and equipped to grapple with the language barriers that exist in a multilingual country such as Nigeria. This deficiency may be attributed to the fact that there remains a minimal amount of literature on the research area of language and law or forensic

linguistics in Nigeria (Olanrewaju, 2009: 118). According to Olanrewaju (2009: 119-129) the problem in Nigeria is threefold: one, the absence of research in the area of forensic linguistics and language and the law is a result of the continued focus of research efforts on lexical and syntactic aspects. Secondly, the Nigerian legal system based on the British system, adopts a pro-English approach to communication in the courtroom as well as the language of record (Olanrewaju, 2009: 119-129). Thirdly, the influence of the English legal system has unfortunately failed to result in the establishment of a forensic linguistics association in Nigeria, that could contribute to the development of research in the field (Olanrewaju, 2009: 119- 129).

As with Kenya, English is prioritised in Nigeria across all domains including the legal system. Theoretically, African languages are recognised, practically English is used. What follows is a discussion of the third and final African case study, namely Morocco.

4.12 Morocco's sociolinguistic landscape

Morocco's sociolinguistic landscape has been influenced from its geographical position on the African continent, however bordering Europe and the Middle East (Marley, 2005: 1487). As a result of this geographical positioning Morocco has had a wide range of linguistic and cultural influencers (Marley, 2005: 1487). Berber, Arabic and French are the dominate language groups in Morocco.

Marely (2005: 1488) explains that Berber is a European name given to the indigenous languages of Maghreb. Maghreb is spoken in Morocco, Algeria, parts of Tunisia and adjoining sub-Saharan countries. The term Berber refers to a number of mutually intelligible languages, in the case of Morocco Berber speakers belong to three language groups namely, Tashelhit, Tamazight and Tarifit (Marley, 2005: 1488). The term Berber is not used in Morocco, where persons instead refer to Tamazight, the origins of which date back approximately five thousand years ago, when the Berbers in Morocco embraced Islam brought to Morocco by the Arabs. Tamazight eventually became known as the language of the 'peasants' and as a result the status and use of the language diminished significantly (Marley, 2005: 1488).

The fate of Arabic is not being threatened, as with Tamazight, it remains a language of prestige to the extent that an educated elite have developed a new dialect named intermediate, utilised in formal and semi-formal domains (Marley, 2005: 1488). Arabic remains a language used for official, educational and religious purposes.

French was introduced in Morocco during the Protectorate of the twentieth century between 1912 and 1956. During this period, French was associated with power and the elite of the country learnt the language as a sign of power and dominance. Many citizens began learning French despite its lack of official status. Presently, French is widely spoken and used in certain domains such as commerce, finance, science, technology and the media (Marley, 2005: 1488). French is said to be a language of social and professional success that maintains a privileged position socially and professionally as well as in the state education and the private sector of Morocco.

Morocco's linguistic make-up favours a multilingual inclusive approach that needed to be pursued and reflected in legislation and policy frameworks, the complete opposite occurred instead. Moroccan independence saw the government pursuing a monolingual agenda with the purpose of achieving a linguistically united country (Marley, 2005: 1488). It was a policy of Arabicisation similar to Algeria and Tunisia, where English, the coloniser's language was replaced with Arabic, a traditional language (Marley, 2005: 1488). Arabicisation was not only a language change rather, a broader social and political change. The majority of Moroccans supported the move with the belief that it would create opportunities of employment and equality for all. The use of Arabic was not pivotal to the majority as the elite minority where those who had access to French and English, linguistically it was therefore an insignificant change in their lives. The hope was that everyone would speak the national language, Arabic, and all vernaculars would become obsolete as was the case with the French. Arabicisation resulted in a further polarisation where Arabic became the language associated with power and religion and a religious Islamic state translated into a closer relationship with the Arab world. Berber language and culture became synonymous with inferiority and ignorance, relegated to a regional language rather than a national language (Marley, 2005: 1489). Arabicisation was intended to restore Morocco's traditions and national identity. Linguistically, Arabicisation favoured monolingualism regardless of the multilingual reality of the country. From 1980, onward changes were seen as a result of

Arabicisation, these changes were summarised in the following except from Marley (2005: 1489):

> I will simply resume the situation until 2000 by saying that the government has put in place a legislative and operational framework to enable Arabization to take place, and that by the end of the 1980s the state education system was completely arabized, as were large sections of the administration. Despite this, French continued to be used in many important domains, and the Tamazight speakers, although nearly all bilingual by now, were becoming increasingly vocal in their demands for linguistic rights. It was thus apparent that the goals of Arabization were not being met, and a change was needed.

4.13 Moroccan Constitution

The period of Arabicisation saw significant changes in all domains of Moroccan society, with a definitive need to change as explicated in the excerpt above. A new era commenced with the enactment of Morocco's Constitution of 2011. There are several provisions in the Constitution (2011) that refer to language and that house language rights and read as follows:

> Preamble:
>
> Founded on these values and these immutable principles, and strong in its firm will to reaffirm the bonds of fraternity, or cooperation, or solidarity and of constructive partnership with all other States, and to work for common progress, the Kingdom of Morocco, [a] united State, totally sovereign, belonging the Grand Maghreb, reaffirm that which follows and commits itself:
>
> - To ban and combat all discrimination whenever it encounters it, for reason of sex, or colour, of beliefs, of culture, of social or regional origin, of language, of handicap or whatever personal circumstance that may be;
>
> Article 5

Arabic is the official language of the State. The State works for the protection and for the development of the Arabic language, as well as the promotion of its use. Likewise, Tamazight [Berber/amazighe] constitutes an official language of the State, being common patrimony of all Moroccans without exception.

An organic law defines the process of implementation of the official character of this language, as well as the modalities of its integration into teaching and into the priority domains of public life, so that it may be permitted in time to fulfil its function as an official language.

The State works for the preservation of Hassani, as an integral component of the Moroccan cultural unity, as well as the protection of the speakers [of it] and of the practical cultural expression of Morocco. Likewise, it sees to the coherence of linguistic policy and national culture and to the learning and mastery of the foreign languages of greatest use in the world, as tools of communication, of integration and of interaction [by which] society [may] know, and to be open to different cultures and to contemporary civilizations.

A National Council of Languages and of Moroccan Culture [Conseil national des langues et de la culture marocaine] is created, charged with[,] notably[,] the protection and the development of the Arabic and Tamazight languages and of the diverse Moroccan cultural expressions, which constitute one authentic patrimony and one source of contemporary inspiration. It brings together the institutions concerned in these domains. An organic law determines its attributions, composition and the modalities of [its] functioning.

Article 7

The political parties may not be founded on a religious, linguistic, ethnic or regional basis, or, in a general manner, on any discriminatory basis or [basis] contrary to the Rights of Man.

Article 28

> The law establishes the rules of organization and of control of the means of public communication. It guarantees access to these means respecting the linguistic, cultural and political pluralism of the Moroccan society.

There are similarities and differences that can be drawn between the Moroccan constitutional provisions above and the South African constitutional provisions advanced fully in chapter six of this thesis. The first similarity is between the Preamble of the Moroccan Constitution (2011) and Section 9 of the South African Constitution. The preamble precludes discrimination on a number of grounds including language, the South African Constitution does precisely the same except for the fact that an entrenched right in the BOR exists and is not aspirational as with the provisions of a Preamble. A full discussion of Section 9 of the South African Constitution can be found in Docrat (2017b) with reference to the case of *Lourens* v *Speaker of the National Assembly and Others* (2015). Suffice to say at this point in the discussion, the gravitas of language rights and provisions more broadly although informed by the Constitution in theory are only determined in practice when applied.

Article 5, above confers official status on both Arabic and Tamazight, however Arabic appears from the provisions to be heightened in status, where the state must protect, promote and develop Arabic. This protection is not accorded to Tamazight, which in my opinion appears to be conferred with official status as an indigenous language inherent to the people of Morocco. Article 5 in my opinion confers further protection to Tamazight through the second paragraph where it refers to 'this' language, that needs to be used in for educational purposes and in high status domains. Equal protection is accorded to both Arabic and Tamazight through the establishment of a National Council of Languages and of Moroccan Culture, tasked with the development of both languages.

There are similarities between the provisions of Article 5 above and Section 6 of the South African Constitution, where official status is conferred on all languages and constitutionally an established organisation is tasked with the protection, promotion and development of the official languages as with Section 6(5) of the South African Constitution establishing PanSALB. The provisions of Section 6(2) of the South African Constitution appear to provide further protection for the nine African languages on paper (see the discussion in

chapters six and seven of this thesis regarding the practical limitations when implementing Section 6).

Articles 7 and 28 are insertions that the South African Constitution does not include, regarding political parties being founded, on amongst others, linguistic grounds. Thus, no one language can be used as a basis to form the party, ensuring equality. Article 28 can be cross-referenced to Mclean's (1992) four ideologies I presented in chapter two of this thesis, one of which was pluralism. This quote defining pluralism, by Reagan (1986: 94) that I advanced in chapter two above is relevant and reads: "… the acceptance of the presence of linguistic diversity in the society and the commitment by the polity to allow for the maintenance and cultivation of the different languages on a reasonable and equitable basis". This indicates that the Moroccan Constitution (2011) through Article 28 acknowledges the linguistic diversity of the country and permits the development and maintenance thereof.

4.14 History of language usage in Moroccan courts

Although this chapter in my thesis does not concern the methodology, it must be noted at this stage of the discussion that literature and statutes have proved difficult to obtain with regards to the topic of language and law or language usage in Moroccan courts of law. Having said this, an article by Saadoun (2015) serves as the basis of the discussion that follows.

Above, I differentiated between provisions in theory and the practical implementation thereof with reference to the South African constitutional provisions, discussed fully in chapters six and seven of this thesis, the same now applies with Morocco. Saadoun (2015) acknowledges that the Moroccan Constitution of 2011 although conferring official status on Tamazight theoretically, practical implementation is dependent on the legislation. Moroccan legislation does not correlate with the constitutional provisions I have cited above, currently the legislative position permits only the use of Arabic for litigation in accordance with the Arabization, Moroccorization and Unification Law of 1965.

Prior to 1965, and Morocco's independence, French and Spanish amongst other languages were used in courts. Until 1965 Arabic was limited in courts, confined mainly to the Islamic courts and the judiciary thereof whom where Arabic speaking (Saadoun, 2015). There was

ongoing activism for the inclusion of Tamazight in courts prior to and after 1965, with the basis of the argument that more than half of the Moroccan population speak Amazigh (Saadoun, 2015).

1965 failed to herald in a new era for the speakers of Amazigh, instead Arabic became the official language of litigation across all courts at all levels. One exception for French was made for contracts written in French and registered in court under the business record (Saadoun, 2015). The Arabization, Moroccorization and Unification Law of 1965 had the unwavering support of the then Minister of Justice, who ensured the implementation of the Act.

4.15 Language of record as opposed to a language of interpretation

With Arabic being the sole official language of record in all Moroccan courts, interpretation plays an important role in ensuring that the right to a fair trial is not unfairly limited. There is however a professional difference between the level of interpretation for foreign language speakers and indigenous language speakers. The divide is evident, where professional translation is available with the cohort of competent translators with a degree from institutes specialised in the field (Saadoun, 2015). A similar service to and from Amazigh is not available as there are no sworn translators who have specialised in Amazigh (Saadoun, 2015). This marginalises more than half of the population who speak Amazigh, from accessing the legal system and enjoying their right to a fair trial. The Moroccan legal rights activists have argued for adequate legal requirements for translators/ interpreters as well as the adoption of Amazigh as a language of record for the benefit of litigants who can only speak this language (Saadoun, 2015). They have argued that the sole official language of record constitutes a flaw adversely affecting the right to a fair trial.

The use of language, specifically Amazigh was inadvertently dealt with before a Court of Cassation. The court dealt with a question: “are pleadings in a language incomprehensible by the litigant, a violation of defence?” (Saadoun, 2015). In answering the question, the court held the following (2010) primary point communicated in the judgment:

> With regard to the argument on violation of the defence's rights, given that the appellant speaks Amazigh, not Arabic, and the court did not enable them to get a law, nor did it ask them whether they are proficient in Arabic or ask about the reason for their appeal, the decision may be challenged. However, since the appellant did not request a translator at any stage of the proceedings and did not seek a lawyer, and the court verified their identity, stated the charge, and discussed the case in which the appellant defended themselves, the argument is unfounded."

The courts' decision was thus based a technicality. The first half of the courts' reasoning must be noted, where argument was made for the use of Amazigh in proceedings as part of the right to a fair trial. This would ensure the litigant's rights are not breached. This case can be cross-referenced to the South African case of *State* v *Pienaar* (2000) in which the court held that the right to legal representation includes the right to communicate directly with the legal representative in the accused's own language of choice, and that indirect communication may only occur indirectly through interpretation in exceptional cases. In this instance, the court in *S v Pienaar* (2000) found that the right in Section 35(3)(k) did not confer a default interpretational right, but rather a language right where the accused should be tried directly in his or her own language (De Vries and Docrat, 2019: 7).

There have been instances where judges have communicated directly with litigants in Amazigh. There was one widely publicised case in Morocco heard in the Southern Court, where a judge permitted litigants to communicate in Amazigh (Saadoun, 2015). Trial proceedings were conducted in Amazigh, where the judge, himself communicated directly in the litigants' mother tongue (Saadoun, 2015). The judge, being fluent in Amazigh was able to communicate with the interpreter who was used in the case for the remaining judicial officers who were unable to speak Amazigh fluently (Saadoun, 2015). This would be possible if there were linguistically competent judicial officers, in courts, located in geographical positions where the majority of citizens speak Amazigh (Saadoun, 2015). Docrat (2017a) advanced this argument for the South African legal system. Important for the discussion at hand is the need for linguistically competent judicial officers. This point is discussed in further detail below and in chapters five, six and seven of this thesis.

What remains in place is an exclusionary monolingual language of record policy in all Moroccan courts that excludes the majority of the population who speak Amazigh and have

no, or limited understanding of Arabic. There is thus an inherent call for linguistically competent judicial officers that can positively affect the use of language in courts and ultimately the language of record to reflect the language demographics of the country, where the languages are equally represented.

4.16 Language in Moroccan higher education

With the need to have linguistically competent judicial officers in Morocco, the focus of the discussion turns to language in higher education. Saadoun (2015) explained that the Minister of Justice observed that there was a need for judges to be linguistically proficient in Amazigh. Having said this, the Minister explicated further that proficiency in Amazigh should be a criterion in the transference and appointment of new judges (Saadoun, 2015). No implementation to date has resulted in the continued marginalisation of Amazigh, the indigenous language and the rise of foreign languages such as English alongside French. English, as an international language has seen the Moroccan education system promote the use of English in higher education. El Allame and Laaraj (2016: 44) state that adopting English as the medium of instruction will improve the quality of higher education and simultaneously enhance students' employability and professional success.

Three sets of reform, 2003, 2007 and 2009 saw Moroccan education authorities grappling with the language question and the growing need to master foreign languages such as English (El Allame and Laaraj, 2016: 44). No decision was taken until the fourth reform in 2014, as a result of the need to have linguistically qualified teachers (El Allame and Laaraj 2016: 44). In 2014, it was said that English was recognised for professional mobility and international research purposes (El Allame and Laaraj, 2016: 45). The use of English in higher education was promoted, with the production of documents, Ministerial notes and official speeches in English.

El Allame and Laaraj (2016) reported that a survey conducted across state higher education institutions, concluded that students wanted to learn English and increased numbers of students were majoring in English with the view that English creates employment opportunities in formal sectors of Moroccan society (El Allame and Laaraj, 2016: 54). What will emerge in Moroccan society is predicted to be a tussle between English and French, the

latter being the language of science and technology and English being seen as an empowering international language.

The article by El Allame and Laaraj (2016) forming the basis of the discussion in this section of chapter four of this thesis, presents an overwhelming view that English is growing in dominance resulting in further marginalising indigenous languages such as Amazigh. Furthermore, what emerges is the association between English language competency, employability and success. Juxtapose this to the Minister's observance that Amazigh be a requirement for judicial officers; it would render Amazigh irrelevant besides the disjuncture between the language policies of the legal system and those of the higher education department. The language policy for higher education is thus contrary to the Moroccan constitutional (2011) provisions I advanced above promoting the development and usage of Arabic and Amazigh. It also brings into question the intentions of government in promoting monolingualism in a foreign language, namely English; opposed to promoting, developing and using Amazigh and Arabic, adopting a bilingual/multilingual approach that favours the linguistic diversity that should be celebrated and not seen as problem which English can solve.

4.17 Conclusion

Each of the three case studies I have presented above have common threads that influence the language of record policy in each of the three countries' courts. Each country's sociolinguistic landscape was influenced from colonial rule or in the case of Morocco an additional aspect of geographical positioning, bordering Africa and Europe. The indigenous languages were synonymous with inferiority in comparison to English and French. Although attempts have been made through constitutional and legislative means in each of the three countries, English emerges as the preferred language in practice, bringing to the fore the failures during implementation. A monolingual position is preferred to a bilingual or multilingual position on the basis that English is a unifying language, one that creates access to opportunities, results in employability and economic access on an international stage. This reasoning of each countries' government speaks to the social, political and economic aspects of language policies, finding resonance with the views of Cooper (1989) and Grin (2010), advanced in chapter two of this thesis. All three of these aspects can be subsumed under the

discussion of opportunity planning, presented in chapter two. There is a misconception that has been created in each of the three countries that English has to be developed, promoted and used in high status domains to ensure employability. Each government has failed to take account of the need to develop a micro-economy before contributing to the macro-economy as explicated by Kaschula (2004). It must be questioned whether each government is not pursuing an elitist agenda of disguising their quest for power under the misconceived banner that English only is the best way forward. These views find resonance with South Africa and the language policies determined during the CODESA talks, where the African languages remained marginalised. There is no reason why the indigenous languages of each of three countries cannot be used as languages of record, a case in point was the use of Amazigh in Morocco, where the entire trial was conducted in a language everyone spoke and understood. In all three instances, there are no more than three African languages that are spoken by the majority of the people. Furthermore, in Nigeria the country is divide along linguistic lines, it thus makes sense to use each of the three languages in the areas in which the majority speaks the languages. This creates access to justice and inclusion for all. Political independence might have been achieved, however linguistically each of these countries are abandoning their mandate of equality for all, with regards to language. The entire system needs to be rethought beginning with the legal education of each country, Nigeria being a case in point that is still premised on the English legal system, whereas Morocco has failed to produce anything tangible on language requirements for legal practitioners besides the Ministers sentiments that tantamount to nothing in practice.

This chapter, has however advanced points that South Africa could benefit from, which I have explicated in text above and discussed in further detail in chapters six and seven below. At the conclusion of this chapter, one is left with a feeling of despair for the future of African languages on the African continent and the need to continuously motivate for the inclusion of African languages in high status domains. The continued growth of English and the decline of African languages in the three countries is cause for concern and will eventually result in a larger gap between the rich and poor. What is needed is an economy that builds on the strength of an education system that educates people in their mother tongue and provides access to English and a legal system that upholds language rights. The structures are in place, what is needed is a change in mind-set on the basis of linguistic inclusion and equality of languages. The chapter that follows provides an international comparative perspective.

CHAPTER FIVE

INTERNATIONAL COMPARATIVE ANALYSIS OF LANGUAGE AND LAW IN SELECTED COUNTRIES

5.1 Introduction

This chapter in a sense mirrors chapter four in that I present comparative case studies of language and law in four countries beyond the African continent. As stated in the chapter summaries of chapter one of this thesis, the four countries are Australia, Belgium, Canada and India. The purpose of this chapter is to provide an overview of the use of language in each of the four-selected country's legal systems. I specifically focus on the language of record in courts of law for each country and examine the relationship between, legal professionals and litigants. Furthermore, to assess whether linkages can be drawn between the linguistic competencies of legal professionals and the language of record and if this affects the litigant's right to a fair trial and their language rights. For each country, discussed below, I have engaged with the constitutional, legislative and policy developments in relation to the sociolinguistic make-up and how on a broader level the country functions, socially, politically, economically and most importantly for the thesis at hand, linguistically. I will draw parallels between the international countries presented in this chapter in relation to the main model, which is the core of my thesis, South Africa. The purpose of chapters four and five are to serve as jurisprudential case studies that South Africa, with regard to language and law could emulate and steer clear from. Chapters four and five will be relied upon in chapters six, seven and eight of this thesis, nonetheless I will continuously cross-reference in the chapter for ease of discussion.

5.2 Australia's sociolinguistic landscape

Australia, only became one country by 1900, up until this point, it was just a group of unfederated states or colonies (Cooke, 2019 Interview: Appendix H). Cooke (2019 Interview: Appendix H) makes this point as the sociolinguistic make-up of Australia was influenced by the geographical positioning of the country. For example, when referring to the indigenous languages of Australia, these are not limited to the Aboriginal languages, but also include the languages of the Torres Strait Islanders (Cooke, 2019 Interview: Appendix H). The reason

the Torres Strait Islanders languages are included is a result of their geographical positioning, where they occupy a number of islands at the tip of Queensland (Cooke, 2019 Interview: Appendix H). The Australian Institute of Aboriginal and Torres Strait Islanders Studies (AIATSIS) as part of the 2019 International Year of Indigenous Languages has outlined the history of Aboriginal languages and the current plight of these languages. The AIATSIS reports that since the European settlement in 1788, more than two hundred and fifty indigenous languages were spoken and an additional 800 dialectal varieties existed at the time. Although one hundred of these indigenous languages are spoken presently, the languages are only spoken by elders in the communities and risk extinction with the death of the elders (AIATSIS, 2019). The number of languages to be extinct is determined on the basis that a mere thirteen indigenous languages are acquired by children (AIATSIS, 2019). That leaves the status of the remaining indigenous languages unknown and in all probability also facing extinction. Historically the value of indigenous languages was low and emphasis was placed on English.

Language was used as a tool by the Australian government from the Federation in 1901 up until 1959 to prohibit access to immigrants. This was in the form of the White Australian Policy enforced through the Immigration Restriction Act of 1901. The purpose of the Immigration Restriction Act (1901) was to prohibit immigrants from entering Australia due to the fact that they were unsuitable as a result of being Asian or of non-European race (Robertson *et al*, 2005: 241). A key element of the Immigration Restriction Act (1901) was the dictation test (Robertson *et al*, 2005: 241). The test was administered to non-European immigrants and was an oral test to examine their suitability to enter Australia (Robertson *et al*, 2005: 242). Simply put, it was a racial test to prohibit non-white persons from entering. This racial test was administered in a language they did not understand, to ensure the test was failed (Robertson *et al*, 2005: 242). Section 3(a) of the Immigration Restriction Act (1901) defines a prohibited immigrant and in doing so highlights how language was used to discriminate against people. Section 3(a) defines prohibited immigrant as follows:

> Any person who when asked to do so by an officer fails to write out a dictation and sign in the presence of the officer a passage of fifty words in length a European language directed by the officer.

According to Robertson *et al* (2005), the referral to a European language was in actuality English. In applying this to the scope of the thesis at hand, I make the point of highlighting the dominance of English to exclude persons on race, culture and grounds of language. Language was used to exclude people through a racial test, where the standard was English, further undermining and marginalising the indigenous languages.

According to Meakins (2015), there is also a culture of obliviousness in Australia with reference to the existence of Aboriginal languages. Meakins (2015) explains that she often asks her linguistics students to name an Australian indigenous language and is met with mainly silence, as they cannot manage to name a single indigenous language. In a few instances, she points out that the students would name Warlpiri, Yolngu Matha or Arrente. The point being that from two hundred and fifty indigenous languages, linguistics students are only able to identity three. Meakins (2015) further states that if she were to ask the students about indigenous American languages, they were able to identify these with ease, given the visibility through media forums. According to Meakins (2015) the visibility of Australian indigenous languages are not realised, in Australian English, where the word kangaroo emanates from Guugu Yimidhirr, a language of north Queensland; also the words dingo, wombat and boomerang all come from indigenous languages in the Sydney area. Meakins (2015) explained that many of these words carried via the English-based pidgin, which the indigenous people communicated with the colonists in from 1788 onwards. Pidgin was a simpler version of English and later developed into Kriol, now spoken across northern Australia (Meakins, 2015). The later points speak to Crystal's (1997: 20) sentiments of English as a global language and its effect on the indigenous languages. Crystal (1997: 20) explained that by introducing English or in the case of Australia, a simpler version (Pidgin) was not as a means to communicate with the indigenous people but as a means of conquest and assimilation. This had disastrous effects on the use and development of indigenous languages over time, hence the point I made earlier that hundreds of indigenous languages in Australia will soon be extinct.

Meakins (2015) advances that there are initiatives in place to revitalise the indigenous languages through organisations; universities, specifically Adelaide University tasked with the revitalisation of Kaurna Warra Pintyanthi; the Victorian Aboriginal Corporation for Languages in Melbourne; signage in cities and in the media and movies. While attending the

14th Biennial Conference of the International Association of Forensic Linguists in July 2019, the NAIDOC week 2019 was taking place. NAIDOC stands for the National Aborigines and Islanders Day Observance Committee, which celebrates the history, culture and achievements of Aboriginal and Torres Strait Islander people. The weeklong festivities are held annually in July across Australia. This year (2019), I observed there was a distinct emphasis placed on using indigenous languages in public spaces in Australia. At Darling Harbour in Sydney, I captured the following images (see Appendix F) in which indigenous languages were used as part of an art display. The time I spent at the display reading the various languages represented, it was concerning to see that many persons were instead concerned with taking photographs of themselves and family and friends in front of the artwork. There was no interest shown in what the artwork actually represented. This speaks to the point of how self-subsumed people are in their own culture and language, something that is happening in South Africa, with the focus on English in all domains and public spaces. There is an unawareness of the importance of other languages, the speakers thereof and the disastrous consequences of an indigenous language becoming extinct strengthening global languages.

This historical view illustrates that the English colonisers imposed power extended beyond the confines of politics and affected the indigenous languages as well, to the extent that a 'new form' of Australian English emerged.

5.3 Language of record: Australian English

According to Cooke (2019 Interview: Appendix H), there is no specific constitutional or legislative provision that states what the language of record is in Australian courts. As with South Africa, and many of the African case studies presented in chapter four above a hierarchical court structure exists in Australia, comprising of criminal and civil courts in each territory followed by Australia's Federal court and High Court (the apex court of Australia), hearing appeals from the state courts (Cooke, 2019 Interview: Appendix H). Regardless of the fact that there are state courts in each territory the language of record across all courts is English. Also in existence in Australia are Bush courts. These courts are circuit courts operating in remote areas to which Magistrates in major centres travel to hear cases in remote areas of Australia. For the purposes of the research at hand I will advance the following, firstly discuss what Australian English is and how it is used in courts of law, and in doing so

outline the advantages and disadvantages of using Australian English. Secondly, to discuss the disadvantage before the law for Aboriginal litigants and then discuss fully the system of interpretation for Aboriginal litigants. Thirdly, I discuss the Bush courts and the linguistic difficulties experienced therein.

Cooke (2009: 27) advances that an Aboriginal learner's English differs from Standard Australian English and that this difference contributes to miscommunication. With Aboriginal learners' English, their first language heavily influences the acquiring of English. The differences in language are in pronunciation, grammar, semantics and pragmatics (Cooke, 2009: 27). Communication confusion is more prevalent with temporal reference, distance and other quantitative matters (Cooke, 2009: 27). This can be disastrous for a complainant, witness or accused, as time, facts and distance can be central to proving or disproving a charge. Cooke (2009: 27) provides numerous extracts of examination in chief and cross-examination where the witness is an Aboriginal speaker of Australian English and miscommunication results as per the example below:

> Counsel: None of those men were searching for him on the Thursday, were they?
> Witness: Yes.
> Counsel: They weren't, were they?
> Coroner: He says none of them were.
> Counsel: And none of them were searching for him on the Friday either, were they?
> Witness: Yes.
> Counsel: And none of them were searching for him on the Saturday, were they?
> Witness: Yes.

Cooke (2009: 27) explains the excerpt as follows:

> The witness here is responding to the proposition ("none of them were searching") rather than the tag ("were they"). This is what he would do in his language. This was well into the case and the coroner had become accustomed to this feature of Aboriginal Learner's English, but counsel had not.

Most indigenous people from communities in remote areas of Northern Australia do not speak English as their mother tongue (Cooke, 2009: 26). A few indigenous people have a full command of English and many possess a minimal level of proficiency for basic communication skills in social settings (Cooke, 2009: 26). This is important to note for the proceeding sections of this discussion on Australia, where Aboriginal speakers are disadvantaged by a legal system with an English language of record policy. This is also important to note in relation to chapter six of this thesis, which comprises language surveys on the English language proficiencies of both litigants and attorneys in South Africa (de Vries and Docrat, 2019).

The discussion on the difference between Aboriginal English and Standard Australian English has been investigated for a number of years. Eades (1994) discusses the differences between Aboriginal English and Standard Australian English in the Australian legal system. Eades (1994) makes several points correlating with the work by Cooke (2009) presented above. Eades (1994: 237) defines Aboriginal English as a name given to varieties of English spoken by Aboriginal people. The difference is not solely linguistic, but more socio-cultural (Eades, 1994: 240). Aboriginal people are not direct in communication and through their indirectness avoid prying or asking direct personal questions. Thus, a difference in their social and cultural patterns that influence how they ask and answer questions. As Eades (1994: 234) points out this is disastrous in the legal setting, where she provides a simple example similar to that of Cooke's (2009: 27); an Aboriginal speaker would ask "you were at the pub" as opposed to being asked "were you at the pub?". In Aboriginal English, an Aboriginal speaker's linguistic form is usually a statement with a rising intonation (Eades, 1994: 240).

Aboriginal English makes no gender distinction in the third person pronoun; therefore, 'he' is used to mean him or her (Eades, 1994: 204). The same applies with isiXhosa in South Africa, where there is no distinction between him and her and isiXhosa mother tongue speakers, who have limited English language competency, often refer to the incorrect gender. This can have serious consequences in the legal setting commencing with the police statement recording and then in court when providing evidence. Furthermore, Eades (1994) points out that with Aboriginal English speakers quantitative questions, such as when, where, who, how and what time are not responded to directly by Aboriginal English speakers. If asked how many people

were present, names will be provided rather than numbers; what time did you witness the crime taking place may result in different answers of before dark will be provided which can be any time in the afternoon (Eades, 1994). Eades (1994) makes the important point, that every person who does not have a legal background or some familiarity with the legal system and specifically police interviews and courtroom questioning are disadvantaged before the law. For speakers of Aboriginal English this disadvantage is even greater as language is a barrier and miscommunication is present in most instances. The work of Eades (1994) and Cooke (2009) will be drawn upon in chapters six and seven of this thesis with the South African context; specifically drawing parallels with the language survey by Legal Aid South Africa (2017) and the language survey conducted with attorneys in South Africa on their communication with clients (de Vries and Docrat, 2019).

What can be deduced from the discussion thus far is the disadvantage that exists in the legal system and how the indigenous people are placed at this disadvantage due to their language competency and how everything is measured according to Standard English, essentially a foreign language before the colonisers arrived. This speaks to the relationship between, language, law and power, to which my focus now turns.

5.4 Disadvantage before the law: Language and power

The previous section of this chapter comprising the discussion on the language of record, bring into focus the disadvantage faced by Aboriginal people in the Australian legal system. Language can be a barrier to accessing justice and language can be used as a powerful tool to exclude people. Gibbons (1994: 196) makes this profound assertion:

> Simply providing the same treatment for everyone within the legal system may not ensure true justice, particularly if that treatment has emerged from the culture and interests of a power elite. Within the language sphere it may be important to recognise that there are people who are disadvantaged by their lack of mastery of the language through which the law is accessed and applied and/or by the discourse conventions of legal proceedings.

This extract from Gibbons (1994: 196) must be borne in mind in chapters six and seven of this thesis, where I present the reasons provided by Chief Justice Mogoeng Mogoeng to make English the sole official language of record for all South African courts on the basis of equal treatment. This is an important assertion that brings into focus the difference between equal treatment and 'true justice'. It also speaks to the power relations when drafting these policies and how an elitist agenda is propelled, which I discussed in chapter two of this thesis concerning the CODESA talks. Gibbons (1994: 196) furthermore highlights that language can be a barrier when accessing the law, and through court proceedings. Gibbons (2003: 201) points out that in courtrooms, the power vests with legal professionals and that this power is linguistic in nature. Gibbons (2003: 205) makes specific mention of the Aboriginal people and acknowledges the academic contribution Eades has made on the subject in highlighting the plight of Aboriginal people. The injustices suffered by Aboriginal people in courts was acknowledged in the year 2000 when the Magistrates Courts of Victoria made a public apology (Gibbons, 2003: 205).

The power relations embedded in language within the courtroom are also highlighted by Gibbons (2003: 207) who explains that Aboriginal witnesses are more inclined to answer 'yes' when asked a question. Aboriginal witnesses agree in an effort to halt the line of further questioning (Gibbons, 2003: 208). This in a legal context disadvantages the witness and brings into question the witnesses reliability, and in effect admissibility of the evidence. These points relate to the extracts in the previous section of this chapter by Cooke (2009: 27) and Eades (1994). Gibbons (2003: 227) holds that it is the way in which language is used that disadvantages people. This form of disadvantage is exacerbated where people are already less powerful or disadvantaged in other ways such as ethnic groups including the indigenous people (Gibbons, 2003: 227). Gibbons succinctly summarises in the following excerpt:

> These types of disadvantage, which have deep social roots, cannot be remedied only by linguistic means. However there are measures that can be taken to improve the situation… just treatment does not mean the same treatment, but rather recognising difference, and developing measures to cope with these difference.

This excerpt must also be applied to the South African context, where it is arguable that a monolingual language of record policy for courts, does not address the disadvantages faced

by African language speakers in South Africa, but rather attempts to apply a general Band-Aid that furthers the advantage of the English-speaking minority and socio-political elite. One measure, which Gibbons (2003: 221) recommends for Australia is "the additional resource - the interpreter and translator". Legal interpreting and translating for Aboriginal people in courts is the focus of the next part of this discussion.

5.5 History and development of interpretation in Australia

Thus far, the discussion on Australia has highlighted the issues of miscommunication in courts, where the problem is three fold. Firstly, the differences between Aboriginal English and Standard Australian English; secondly, social and cultural norms of Aboriginal people that affects demeanour and ultimately the admissibility of evidence; and lastly the power relations that favours persons familiar with the legal context, specifically courtroom discourse, where language is used to exclude or mislead. These issues lead to one solution or possible way in which these issues can at least be minimalised, legal interpretation. I am specifically using the term legal interpretation, as there is a general understanding that a mother tongue speaker of a language can act as an interpreter.

In chapter four of this thesis, I advanced Article 14(3) of the International Covenant on Civil and Political Rights (1996) where persons are permitted:

> (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 14(3) (f) according to Gibbons (2003: 238) relates directly to court interpreting and that this service be free of charge. It is extended to include the translation of all documents for court proceedings Gibbons (2003: 238). One aspect of Article 14(3)(f) leaves open for determination on a case by case basis, the level of comprehension and speaking ability necessary for an interpreter to be used (Gibbons, 2003: 238). According to Cooke (2009: 29), it is questionable whether a judge or a magistrate is qualified to reliably determine the witness's English proficiency and that guidance is needed from an appropriately qualified linguist.

According to Goldflam (2012: 2), the first recorded case in which an interpreter was used was in 1885 in Queensland. The judge dismissed the case in which four men were charged with murder. The case was dismissed as no interpreter could be found to enable them to hear and understand what they had been charged with (Goldflam, 2012: 2). With this case, justice had not run its course, especially for the victim's family. Goldflam (2012: 2) explains that Australia does not have legislation addressing the use of interpretation; however, the country is a signatory to the International Covenant on Civil and Political Rights and thus needs to comply with the provisions of Article 14, advanced above.

Authors such as Gibbons (1994 and 2003), Eades (1994) and Cooke (2007 and 2009) have documented instances in which interpreters have not been supplied for Aboriginal witnesses and accused persons and this remains an ongoing problem. MacFarlane *et al* (2019: 51) argue that the provision of interpreters in Australian courts remains inadequate for both quantity and quality. There are instances in which qualified interpreters are available but are not used. The non-use of interpreters is indicative of the ideology that privileges English monolingualism and supresses the language rights and preferences of indigenous minorities (MacFarlane *et al*, 2019: 51).

There are instances in which legal representatives decline the use of an interpreter for their clients, where a judge suggests this (Cooke, 2009: 29). This is done in some instances as a matter of strategy, so the judge is unable to understand the witness/ accused. It is a dangerous strategy if employed and fails to work. Again, this speaks to Gibbon's (2003) point earlier of understanding what 'true justice is. Cooke (2009: 29) engages with Goldflam's (1995) earlier work that brings into question how the client communicates with the lawyer if the interpretational services are declined and how the attorney received instructions from the client if there is a communication barrier. Some lawyers argue that interpreters complicate matters and that judges are then able to understand the proceedings (Cooke, 2009: 30). This must be borne in mind in the South African context and the comments by Turner (2019 Interview, Appendix R), that the use of an interpreter during cross-examination and the time pauses between interpretation allows her to re-strategize in proving her case. This appears to be subjective and decided on a case by case basis, where McConnachie (2019 Interview, Appendix N) and Bloem (2019 Interview, Appendix G) explains that interpretation is key to

understanding witnesses and that quality interpretation is often a challenge in South African courts (this point is discussed in further detail in chapter seven of this thesis).

The use of interpreters in Australian courts has been an ongoing debate as evidenced thus far. In almost all the literature, I have read concerning language in the Australian legal system, the use of interpretation features prominently. In saying so, the Anunga Rules are engaged with. The Anunga Rules were developed by Justice Forster in the case of *R* v *Anunga* (1976) and comprise of nine guidelines for police interviewing of Aboriginal suspects. Cooke (2009: 96) advances the following reasoning by Justice Forster on the need to develop the Anunga rules:

> Aboriginal people do not understand English very well and ... even if they understand the words; they may not understand the concepts, which English phrases and sentences express. Even with the use of interpreters, this problem is by no means solved. Police and legal English is sometimes not translatable into the Aboriginal language [sic] at all ... English concepts of time, number and distance are imperfectly understood...
>
> Another matter, which needs to be understood, is that most Aboriginal people are courteous and polite and will answer questions by white people in the way in which the questioner wants. Even if they are not courteous and polite, there is the same reaction when they are dealing with an authority figure such as a policeman. ... Some Aboriginal people find the standard caution quite bewildering, even if they understand that they do not have to answer questions, because if they do not have to answer questions, then why are the questions being asked?

With this reasoning Justice Forster (Cooke, 2009: 96-97) identified the nine rules as:

1. interpreters;
2. the prisoner's friend;
3. administration of the police caution;
4. leading questions;

5. attempt to corroborate any confession
6. provide refreshment and toilet facilities;
7. avoid questioning a suspect whose mental alertness is affected by fatigue, illness or drunkenness;
8. attempt to provide legal assistance if requested; and
9. to replace any clothing that is removed for forensic examination.

Applying this to the thesis at hand, it is evident that the intention was ensure the equal treatment of Aboriginal suspects and witnesses, and thus remove the disadvantage created by the language barrier. According to Eades (1994: 251), the Anunga Rules are not obligatory but in principle, they seek to protect Aboriginal clients from being disadvantaged through language. The Anunga Rules cast the spotlight on the need to have interpreters present, where Aboriginal speakers are part of any investigative procedures or the courtroom discourse.

Gibbons (2003) advances the development of the use of interpreters in judicial proceedings, explaining that there is no standard practice to use an interpreter. Furthermore, that the use of an interpreter is influenced by whether the court is seated in a Federal state in Australia or follows the common law. The Common Law doctrine does not guarantee the right to an interpreter, however an interpreter may be provided at the discretion of the judicial officer (Gibbons, 2003: 238). In Australia at Federal level, the 1995 Federal Evidence Act is applicable, although this statute does not entrench the right to an interpreter for second language speakers, the judicial officer is compel to justify why an interpreter was not employed in the proceedings (Gibbons, 2003: 238). The onus is thus reversed and no longer falls on the witness to prove the need for an interpreter (Gibbons, 2003: 238). This in my opinion is not necessarily advantageous, as there can be an instance in which the judicial officer does not recognise the need for an interpreter on the basis that the witness can speak English. Simply put, this relates to previous points in this discussion, where judicial officers fail to recognise the disadvantage Aboriginal speakers have when communicating in English.

In South Australia, a right to an interpreter is conferred through the Evidence Act Amendment Act 1986, which states the following:

> 14(1) Where-

(a) the native language of a witness who is to give oral evidence in any proceeding is not English; and

(b) the witness is not reasonably fluent in English,

the witness is entitled to give that evidence through an interpreter.

Gibbons (2003: 239) focusses on the word 'entitled' in the above provision. This form of language in the provision is obligatory and guarantees the right to an interpreter for a second language English speaker. Having said this, Gibbons (2003: 239) also highlights the phrasing 'reasonably fluent in English', as problematic as it is discretionary. It is problematic as the determination of fluency is undertaken by the judicial officer, who according to Gibbons (2003: 239) is most likely to be a monolingual English speaker and have minimal or no knowledge of second language comprehension problems. This speaks to the importance of having linguists who can assess the competency of witnesses and the need for a more linguistically transformed legal system, not only in Australia but also in South Africa. In chapters, six and seven of this thesis this point will be of relevance to the language of record directive issued by Hlophe JP (2018).

5.6 Legal interpreting and translation in Australia

In this section of the thesis, I discuss legal interpreting, translation as opposed to interpreting, and translation in other spheres of society. This overlaps with the qualification of interpreters, which I discuss in the following section of this chapter. This discussion on legal interpreting and translation must be borne in mind in chapters six and seven of this thesis where I have critiqued the South African language of record policy (2017) that promotes the sole use of interpreters in court proceedings as opposed to having bilingual language of record policies for each province. The following extract by Gibbons (2003: 241) is of relevance and summarises the two issues of legal interpretation:

There are two issues in the supply of interpreters/ translators. First the availability of bilinguals who have the potential to act as courtroom interpreters. The second issue is the quality of translators/ interpreters- adequate legal interpreting demands the

> following special knowledge and abilities: a high level of proficiency in both languages; knowledge of regional variants of these languages used in local communities; good general knowledge; and knowledge of the following: professional ethics; the legal process and legal language; and courtroom/ police discourse conventions.

Legal translators have more time to find equivalents that best describe concepts that are not directly translatable from English into the Aboriginal languages. Legal translators are given the text beforehand and are able to grapple with and find solutions to language non-equivalence. Legal interpreters do not have this luxury in court, especially with cross-examination. In courtroom interpreting, two forms of interpreting can be identified namely: consecutive interpreting and simultaneous interpreting. Consecutive interpreting is "… where the interpreter waits until the speaker has finished a stretch of speech, usually a small number of sentences, then during a silent period left by the speaker, the interpreting takes place (Gibbons, 2003: 245). Simultaneous interpreting "is a specialised skill in which the interpreter interprets at the same time as the speaker is speaking, usually producing an interpreted version a few words behind the speaker." (Gibbons, 2003: 245). Again, this is important for the purposes of the discussion in chapters six and seven of this thesis where I critique the language of record directive by Hlophe JP (2018) that states simultaneous interpretation must take place in courts. Judge Belinda Hartle (2019 Interview: Appendix L) refers to issues of consecutive interpretation, where interpreters in her experience tend to summarise what the judicial officer is saying. A further point picked up from McConnachie (2019 Interview: Appendix N) is the issue of dialect of a language in court interpreting (see also Mbangi, 2019 Interview: Appendix O). These points are discussed fully in chapters six and seven of this thesis. The point of departure is the important function of interpreters and translators in the legal system, especially within courtrooms where the judicial officer weighs the admissibility of evidence and a discrepancy between a police statement and *viva voce* evidence may have disastrous consequences for either the accused or the complainant.

5.7 Interpreter qualifications in Australia

The previous section highlights the importance of quality interpretation by qualified legal interpreters. From the onset, it must be noted that interpretation services for criminal and civil matters in Australian courts differ, as does the availability of interpreters depending on the jurisdiction of the court. Cooke (2019 Interview: Appendix H) explained that in civil cases in the State of Queensland, the litigants are to engage an interpreter and pay for such services rendered. This is similar to South Africa where in civil cases regardless of the court's jurisdiction litigants are to engage an interpreter and pay such costs (Hartle, 2019 Interview: Appendix L; Mbangi, 2019 Interview: Appendix O).

There is in some Aboriginal communities in Australia an urgent need of interpreters in the legal system; however, obstacles are encountered where bilingual proficiency is not of a high level and educational levels are below what is required from standard certification of interpreters and translators (Gibbons, 2003: 242). Gibbons (2003: 242) questions then what level of justice is the legal system rendering to Aboriginal people and that these indigenous people are once again disadvantaged before the law. It is important for the interpreters to also have a sound knowledge of the two cultures through which the interpretation is taking place, as often-cultural terms are difficult to transport through interpretation into another language whose speakers have their own culture. It was therefore a positive step by the Aboriginal Legal Service in 1970 to offer a legal aid service specifically for Aboriginal people who were essentially field officers that were competent cross-cultural interpreters (Eades, 1994: 249-250). These services were employed for communication between Aboriginal clients and their legal practitioners (Eades, 1994: 249-250). A parallel can be drawn with South Africa, as I explain in chapters six and seven in relation to the case of *State* v *Pienaar* (2000) an interpreter must be provided for by the state where a client is relying on legal aid services and the legal professional cannot communicate directly with the accused.

A recommendation from the Commonwealth Attorney-General's Report (1991) was a professional level of interpreter accreditation be a minimum standard for legal interpreters in any language (Cooke, 2009: 32). The National Accreditation Authority mostly accredits indigenous language interpreters for Translators and Interpreters (NAATI) at the level of paraprofessional, which is described as:

- [Paraprofessional accreditation] represents a level of competence in interpreting for the purpose of general conversations, generally in the form of non-specialist dialogues. Related tasks [include]:

- Interpreting in general conversations;

- Interpreting in situations where specialised terminology or more sophisticated conceptual information is not required;

- Interpreting in situations where a depth of linguistic ability is not required.

Accreditation is achieved through individual testing where the pass mark is 70 percent. Cooke (2009: 32) who identifies himself as having conducted these tests explains that there is a difference between the quality of interpreter who obtains the minimum threshold pass of 70 percent and the other interpreters who achieve a test mark of 85 percent and above. Cooke (2009: 32-33) advances both sides of the coin, explaining that in some instances the interpreters with minimum pass mark or who have failed their accreditation are used as legal interpreters in courts. The other side of the coin is that in some instances there are accredited interpreters who are exceptionally competent and highly proficient in both languages and are used as court interpreters (Cooke, 2009: 32-33). This links to an earlier argument by Gibbons (2003) in which he explained the need for skilled interpreters in courts who can interpret simultaneously and or consecutively.

Cooke (2009: 33) goes on to explain that by the end of 2009 for the first time three indigenous interpreters were accredited by NAATI as professional level interpreters. This is a positive sign of growing the primary service of interpretation for high status domains such as the legal system. There is again a difference of interpretation accreditation in different Australian states. The Northern Territory Aboriginal Interpreter Service had 300 interpreters registered, of whom one quarter were accredited (Cooke, 2009: 33). According to Cooke, (2009: 33) accreditation through the Northern Territory Aboriginal Interpreter Service could have been obtained through the completion of a Diploma in Interpreting, which comprises a course of 300 hours offered through Batchelor Institute. The majority however have passed

by completing short test preparation workshops over the course of a few days or week, followed by taking NAATI's oral test.

A new development by the Judicial Council on Cultural Diversity is the Recommended National Standards for Working with Interpreters in Courts and Tribunals, in the form of a 132-page document. Given that, my thesis is not focussed in the research area of interpretation and translation I will not engage with the document in its entirety for the purposes of the discussion at hand but rather extract the relevant sections of the document. Part of the preamble summarises the intention of the Recommended National Standards for Working with Interpreters in Courts and Tribunals document and reads as follows:

> The interpreter's role is to remove the language barrier so that the party can be made linguistically present at the proceedings and thereby be placed in the same position as an English-speaking person. This means that a party is entitled to participate in the proceedings in their own language. As such, the work of interpreters is essential to ensuring access to justice and procedural fairness for people with limited or no English proficiency in Australia's courts. Further, in the case of criminal proceedings, if an accused is unable to afford an interpreter and an appropriate interpreter is not provided at the expense of the court or an agency of government, the trial cannot proceed unless and until an interpreter is provided.

This extract attempts to preclude any form of disadvantage before the law relating to language and prioritises the rights of indigenous people to ensure equal treatment as English speakers. There is also the commitment of providing interpretational services at the state's expense for criminal proceedings. Recommended standards for interpreters are clearly set out and are as follows:

> Standard 18 — Interpreters as officers of the court
>
> 18.1 Interpreters are officers of the court in the sense that they owe to the court paramount duties of accuracy and impartiality in the office of interpreter, which override any duty that person, may have to any party to the proceedings, even if that person is engaged directly by that party.

Standard 19 — Court Interpreters' Code of Conduct

19.1 Interpreters must ensure that they are familiar with, and comply with, the Court Interpreters' Code of Conduct.

Standard 20 — Duties of interpreters

20.1 Interpreters must diligently and impartially interpret communications in connection with a court proceeding as accurately and completely as possible.

20.2 Interpreters must comply with any direction of the court.

20.3 Where the interpreter becomes aware that she or he may have a conflict of interest, the interpreter must alert the court to the possible conflict of interest immediately, and if necessary withdraw from the assignment or proceed as directed by the court.

20.4 Requests by the interpreter for repetition, clarification and explanation should be addressed to the judicial officer rather than to the questioning counsel, witness or party.

20.5 There may be occasions when the interpreter needs to correct a mistake. All corrections should be addressed to the judicial officer rather than to the questioning counsel, witness or party.

20.6 If the interpreter recognises a potential cross–cultural misunderstanding, or comprehension or cognitive difficulties on the part of the person for whom the interpreter is interpreting, the interpreter should seek leave from the judicial officer to raise the issue.

20.7 Interpreters must keep confidential all information acquired, in any form whatsoever, in the course of their engagement or appointment in the office of interpreter (including any communication subject to client legal privilege) unless:

a. that information is or comes into the public domain; or

b. the beneficiary of the client legal privilege has waived that privilege.

These provisions are important in regulating the practice of interpreters in Australian courts. An emphasis is placed on accurate interpretation, speaking to the issue of quality of interpretation that I have raised above. Section 18.1 is strengthened in Sections 20.1; 20.4 and 20.5 that speaks to diligence and the ability of an interpreter to ask for repetition, clarification and explanation where necessary in order to avoid a mistake and correct where necessary. This is important in ensuring quality interpretation and procedural fairness for all parties concerned. With reference to procedural fairness, the interpreter is to be impartial and where there is a conflict of interest this must be made known and the interpreter removed where necessary. This is important for the following discussion in which I explain that Aboriginal interpreters are often drawn from the communities in which the court is seated and may be aquatinted with the witness or another party to court.

An interesting inclusion was Section 20.6 concerning cross-cultural communication and its effect on cognition and comprehension. As is seen thus far with the Australian case study, there are dialectal differences that are embedded in cultural communities amongst the Aboriginal people, and a miscommunication could have disastrous effects. As I mentioned the Recommended National Standards for Working with Interpreters in Courts and Tribunals document is extensive in its mandate, and is a positive step towards regulating the profession of interpreters in Australia. The Recommended National Standards for Working with Interpreters in Courts and Tribunals document will also be important in the context of South Africa. Such a comprehensive document is absent, yet the Heads of Court through the monolingual language of record policy have directly elected to operate a legal system where the majority of litigants and witnesses cannot speak, understand, read or write English (see statistics in chapter six of this thesis).

MacFarlane *et al* (2019) have argued that although attempts have been made to regulate interpretation services in Australia, it remains an unequal system whereby Aboriginal people are subjected to either low levels of interpretation or the non-availability of an interpreter. The former relates to the low levels of qualifications where no tertiary qualification is needed to be a legal interpreter (MacFarlane *et al*, 2019: 56-57). The later relating to the fact that there is no guaranteed right to an interpreter. This is compounded by the judicial view of the lack of importance of interpreters for Aboriginal people. MacFarlane *et al* (2019: 56) substantiate this point by drawing on the statement made by then Chief Minister Dennis Burke before the introduction of the Aboriginal Interpreter Service in the Northern Territory in 2000, who said: "providing Aborigines with interpreters was like giving a wheelchair to someone who should be walking". This harrowing statement lays bare the treatment of indigenous people by a justice system tasked with impartiality, procedural fairness and equality before the law. It must be questioned in the South African context if this is not the thinking and reasoning behind a monolingual language of record policy that excludes the majority of people on grounds of language. I attempt to grapple with this in chapters six and seven of this thesis.

5.8 An Aboriginal interpreter's perspective of language in the courts

An online news article (Joyner, 2018) provides practical examples of the difficulties Aboriginal people face in the Australian legal system. The article focusses on the area of Kalgoorlie, where surrounding remote areas have magistrates flying in to the Bush Courts. The level of justice is always questionable, given that a Magistrate can hear up to one hundred cases in a day (Joyner, 2018). One can question how much interpreting if any takes place in these courts, where interpreting is often time consuming. Joyner (2018) reports that interpreters have a difficult time with interpretation as accused persons are always frightened by the daunting legal processes and appear to agree with everything or speak in hushed tones. This according to Stubbs who acts as a guide for Aboriginal people navigating their way through the system. Although Stubbs has no formal training as an interpreter, he has become accustomed to interpretation through his thirty years' experience where he works for the Aboriginal Legal Service in Kalgoorie, a Legal Aid organisation based in Perth and fourteen surrounding towns (Joyner, 2018). Stubbs, who interprets for Wongatha Aboriginal speakers, does not charge Aboriginal people and is one of many offering this service free of charge (Joyner, 2018). Stubbs has assumed the title of court officer, comprising the roles of

interpreter, advisor, negotiator and fixer, given that interpretation in these areas are more than merely acting as a third party communicator (Joyner, 2018). The news article (Joyner, 2018) alerts us to the actual plight of indigenous speakers and their marginalisation from Australia's courts in which linguistic discrimination is a daily occurrence. Deanne Lightfoot the Chief Executive Officer of the Aboriginal Legal Service in Kalgoorie has reported that there is an Indigenous Interpreters Project underway in the Goldfields region of Australia, to increase the numbers of interpreters and train them to effectively deal with these cases in ensuring equal access to justice and procedural fairness (Joyner, 2018).

5.9 Final remarks

This comparative Australian case study has brought many issues to the fore that are relatable to the South African context. As with South Africa, through the sociolinguistic discussion, Australia has a rich language history of many indigenous languages. As with many countries across the globe, these indigenous languages are dying and many more face extinction. The death of languages lies with the fact that languages are not used in high status domains and are therefore not developed by the state and used as languages of learning and teaching. The Australian case study illustrates through the work of Meakins (2015) that younger generations are unable to speak or identify their indigenous languages. A culture has been created which Crystal (2003) describes as the global rise of English and the death of all other languages.

Language has served as a tool of politicization, marginalisation and discrimination commencing with the colonisers arrival in Australia. This politicization has resulted in the further distinction and growing inequality between Aboriginal people and white Australians through Standard Australian English and Aboriginal English. I have advanced the issues that this has brought for Aboriginal people within the context of courtrooms. Throughout the chapter thus far, the theme of power and language is evident where Aboriginal people are seen as less powerful and ultimately disadvantaged in courts as a result of language barriers. By drawing on the works of Eades (1994) and Gibbons (1994 and 2003) the cross-cultural communication impasses are overlooked in many instances resulting in innocent persons being found guilty and sentenced or the guilty being acquitted. The cross-cultural communication problems are not unique to the courtroom as the discussion above proves, but commences at the beginning with the police services.

Cooke (2002; 2007; 2009) has presented the many issues facing interpretation in Australian courts, compounded by the fact that there is no guaranteed right to interpretation in courts. In a multilingual country such as Australia where the language of record is English, it is problematic not to have interpretation services that are of high quality and readily available. The matter is further compounded by the fact that the 'legal system' does not inherently recognise the importance of interpretation. This was substantiated through the work of MacFarlane *et al* (2019) who quoted the horrendous remarks by the Chief Minister in 2000 who equated providing interpreters for Aboriginal people to providing wheelchairs for people who can walk. Sentiments such as these point to the divided state of Australia, politically, legally, socially and culturally and how language is intrinsic in all of these spheres. The Australian case study also highlights through the work of Joyner (2018) that the problems are practical and that there are not effective policies and initiatives addressing the continued disadvantage and discrimination endured by Aboriginal persons in the legal system.

In applying the Australian case study to the research topic at hand, themes of language and power; language and disadvantage are not confined to South Africa alone. Furthermore that when opting for a monolingual language of record policy in a multilingual country, interpretation services have to be of a high quality and available free of charge, especially for indigent persons. The service has to be regulated and universities have to have established degrees and other qualifications on form to support this type of policy for the legal system. What follows in the next chapter of this thesis is a presentation of the current legal system and the use of language in this system and how many parallels can be drawn with this Australian case study. For the remaining part of this chapter, three other international case studies are presented.

5.10 Belgium's sociolinguistic landscape

Belgian linguistic history has been influenced by cultural, nationalist, political and economic power battles between the Dutch and the French. Although the Dutch were the majority in Belgium, they felt threatened by the French and the dominance of French as a language. The Dutch thus opted to support legal provisions that constrained the use of language rather than opting for freedom of language use (Wynants, 2001: 43). This favoured the adoption of the principle of territoriality, which was discussed fully in chapter two of this thesis with

reference to the work of Turi (1993). With the principle of territoriality in Belgium, one language is only officially recognised within a given territory (Wynants, 2001: 43).

In 1840, the Dutch realised that there was not exclusive use of Dutch only as was anticipated with the principle of territoriality. A petition was launched to denounce the language discrimination in Belgium (Wynants, 2001: 45). In 1859, a Commission of Grievances took up the same protests and demands recorded in 1840 (Wynants, 2001: 45). The Commission failed to recommend the exclusive use of Dutch in the Flemish provinces, and ordered instead that official documents be translated and be made available in both languages (Wynants, 2001: 45).

Belgium is divided into four language areas namely: Dutch linguistic area; French linguistic area; German linguistic area; and the bilingual capital of Brussels (Boes and Deridder, 2001: 49). Within each area, the regional language is the sole official language, with the exception of Brussels, where French and Dutch are equally treated as official languages (Boes and Deridder, 2001: 49). In chapters two and four of this thesis I referred to the economic underpinnings of language policies and in chapter one, the political ideologies pertaining to language planning in South Africa during the CODESA talks. When choosing between the principle of territoriality and personality, a socio-political consideration determines the outcome. Wynants (2001: 47) explains that the principle of personality implies greater freedom of individual choices and is therefore considered democratically sound. The principle of territoriality constricts freedom and imposes constraint and forced assimilation (Wynants, 2001: 47). Selecting between either of the two principles is determined by material and financial factors relevant to the country or the area in which the language policy is to be applied (Wynants, 2001: 47).

The current Belgian sociolinguistic landscape has been influenced and regulated by a number of constitutional and legislative enactments. These developments are identified and discussed in the following sections of this this chapter.

5.11 Constitutional and legislative language enactments

The Belgium Constitution provided that the use of the official languages in Belgium was optional and that only legislation could regulate the use of the official languages for public authorities and legal matters (Boes and Deridder, 2001: 49). In accordance with this provision, the law of June 15, 1935 was enacted. The law of June 15, 1935 was comprehensive in that it replaced a number of previous statutes governing the use of language in the judiciary during the period of 1889 to 1908 (Wynants, 2001: 46). The replaced legislation included and not limited to the first language legislation in Belgium, namely the Law of August 17, 1873, *Moniteur Belge*, 43, 238 and the Law of August 26, 1873. The *Moniteur Belge*, 43, 238 legislation dealt with language use in the judiciary and conferred a right upon Flemish accused persons to use Dutch in criminal proceedings (Wynants, 2001: 45). The *Moniteur Belge*, 43, 238 was a significant victory for the Flemish in Belgium, given that in 1860 Flemish workers had minimal knowledge of French and were subsequently tried in French for Murder, found guilty and executed (Wynants, 2001: 45). It later transpired that the Flemish workers were innocent, proving that language barriers were the cause of the execution (Wynants, 2001: 45).

The Law of June 15, 1935 therefore needed to address the linguistic deficiencies in creating a more linguistically just and equal legal system. The Law of June 15, 1935 is directly applicable to this thesis at hand in that its scope is twofold:

1. The law applies for judgments and procedural acts; and

2. The law sets out rules to determine the language used by the court, as well as before the court.

It is evident that the Law of June 15, 1935 regulates proceedings in terms of the language competencies of judges and the language(s) to be used in delivering judgments. Moreover, the Law of June 15, 1935 determines the language in which proceedings be conducted in and the subsequent language of record. The use of language in court is determined through different criminal and civil procedures as outlined by the Law of June 15, 1935. Boes and Deridder (2001: 51) explain that through the implementation of the provisions in the Law of

June 15, 1935, there might be an implication of derogation from the territorial linguistic competence of courts.

5.12 Language of Record in the Belgian criminal justice system

Criminal proceedings can only initiated following the conclusion of a criminal investigation that commences with a charge/ complaint laid with the police. Thus, the criminal investigation is an important process in capturing the relevant information/ evidence needed to prosecute the accused person. Language is instrumental in this process where communication between the complainant and police officer provides the foreground to the investigation as is the questioning of the arrested person by the police. The linguistic issues plaguing the South African Police Service (SAPS) and in some cases directly affecting the outcome of a criminal trial has been discussed by Docrat *et al* (2017d). The South African perspective is discussed further in chapters six and seven of this thesis. Reverting to the Belgian context, Article 12 of the Law of June 15, 1935, provides that "members of the Public Prosecutor's Department and the investigating officers must use the language of the court". With the territoriality principle implemented in Belgium, Dutch will be used in a Dutch speaking area and French will be used in French speaking area. In Brussels, either French or Dutch can be used dependent on the language of the suspect. Article 12 clearly states that the police officer must record the complainant's statement in the language of the said complainant / witness where the police officer has sufficient knowledge of this language. Where the police officer has insufficient knowledge, an interpreter has to be called to record the statement.

Article 12 ensures that complainants and suspects have access to linguistically competent police officers who can record their statements without any issues of linguistic barriers and if so interpreters are available to assist. This point will be juxtaposed to the South African context in chapters six and seven, where the SAPS draft language policy (2015) is advanced and critiqued and practical examples are provided. What is significant of Article 12 is that the importance of language is outlined from the beginning and that professional interpreters are available for both the police and Public Prosecutor's Department. This will be contrasted to the South African model in chapter seven with reference to the sentiments expressed by Judge Hartle and Advocate Turner (2019 Interviews, Appendices L and R).

At trial stage, it must be noted that only in exceptional cases will the language law assign a case to a specific court. Nonetheless, according to Boes and Deridder (2001: 52) in criminal proceedings territorial competence of criminal courts is determined through the following criteria:

the location where the crime was perpetrated;

the usual residence of the accused, if he or she is a natural person; and

the present location of the accused.

These three factors resemble those of the South African model when determining jurisdiction for prosecution as advanced in chapter six of this thesis as well as in chapter four with reference to the African models.

In criminal courts of first instance, trials are conducted in either, Dutch, French or German, dependent on the area in which the court is seated. The judgment is then also written and delivered in the language the trial was conducted in. Article 23 of the Law of June 15, 1935 holds that where an accused person can only express him or herself in one of the three languages, and as such does not understand the language of the court, can request to be tried in the nearest court in a language of their preference (Boes and Deridder, 2001: 53). The judge can refuse the request where he or she is of the view that the accused has sufficient linguistic competency or it would be harmful to the proceedings. In instances of refusal, an interpreter will be provided for the accused (Boes and Deridder, 2001: 53). As with Article 12 being contrasted to the South African model in chapters six and seven, Article 23 will be compared to Section 35(3)(k) of the South African Constitution. Moreover, as evidenced in chapters six and seven of this thesis, South African accused persons will be solely reliant on an interpreter where they do not understand or speak English. There is no recourse for a request for another court to hear the trial as all courts have an English only language of record policy in place.

5.13 Language of Record in the Belgian civil system

The civil system mirrors the criminal justice system with regards to language and similarities are thus evident. Commencing civil litigation requires a summons to be filed and served on the defendant. According to Articles 7 and 38 of the Law of June 15, 1935, the writ of summons has to be drawn up in the language of the area (Boes and Deridder, 2001: 54). There is no alternative to these provisions where the defendant is not able to ask for the writ of summons to be produced in another language. In the bilingual case of Brussels, the writ of summons can be drawn up in either Dutch or French, with the plaintiff choosing between the two.

The defendant has the option of requesting that the language of proceedings be changed, where he or she has insufficient knowledge of the language (Boes and Deridder, 2001: 54). There is also the option of both parties to litigation changing the language of proceedings through common agreement (Boes and Deridder, 2001: 54). Individuals appearing before a judicial officer are not restricted to using one of the three national languages, as an interpreter can be provided (Boes and Deridder, 2001: 54). Judicial officers and lawyers however are bound to the language of the proceedings (Boes and Deridder, 2001: 54).

As with criminal cases, civil cases are assigned on the basis of territorial competence determined according to Article 624 of the Code of Civil Procedure. The court is chosen by the plaintiff from among the following four possibilities (Boes and Deridder, 2001: 54):

> the court in the municipal area of the residence of the defendant or one of the defendants;
>
> the court where the legal obligations arose or were executed;
>
> the court mentioned in the contract;
>
> the court where the bailiff met the defendant in person if the defendant has no residence in Belgium.

The Belgian Court of Appeal and Supreme Court conduct proceedings in the same language used in the court of first instance ((Boes and Deridder, 2001: 54) (Boes and Deridder, 2001: 54).

In chapters six and seven of this thesis, I advance the relevant provisions of the Magistrates' Courts Act (1944) and Superior Courts Act (2013). Suffice to say at this stage of the discussion in relation to Belgium, South African legislation fails to confer language rights or any language protection on civil litigants and by default, all proceedings must be conducted in English. Furthermore, unlike the Belgian model civil litigants in South Africa have to draw up the summons in English and cannot collectively decide to change the language of proceedings. Belgium goes as far as providing interpreters for those who do not have sufficient knowledge of the language of proceedings. In South Africa in civil cases, the state provides no such service at their expense and private interpreters can be hired and the costs be borne by the litigant or witness. In chapter seven of this thesis, with reference to Judge Hartle's (2019, Interview: Appendix L) sentiments, I discuss the limitations thereof in a multilingual country such as South Africa and the effect this has on the principles of access to justice and fairness before the law.

5.14 Language competency of Belgian judicial officers

By adopting the territorial principle, there would need to be courts and public offices in each area that were fully functional on one of the three national languages. This in turn required persons who were linguistically competent in the language(s) to staff these offices and courts. There was a need to establish Dutch universities in order to heed the requirement of having courts operating through the medium of Dutch (Wynants, 2001: 46). Lawyers, magistrates and judges all received their education in French and therefore had minimal knowledge of Dutch in legal matters (Wynants, 2001: 46). The problem was deep-rooted in that there was no professional literature in Dutch, nor was there any jurisprudence, textbooks, codes, law commentaries or teaching material in Dutch. Dutch terminology and other material was available from the Netherlands however, there remained the problem of staffing the Dutch universities (Wynants, 2001: 46). A few Flemish lawyers and private individuals began with translation, interpretation, and teaching on a part time basis. In 1923, the Belgian government established an official commission tasked with translation. First Dutch speaking University

was established in Ghent in 1930 and the establishment of training schools for translators and interpreters (Wynants, 2001: 47). The Belgium model follows the principle that the basic priority of a judiciary must be equality between all parties to litigation (Wynants, 2001: 47). What is important is that each party to court must at least be able to understand the judges and magistrates and to be understood by them, as far as possible with the support of translators and interpreters (Wynants, 2001: 47).

Following the inherent principles of understanding, judicial officers and being understood by judicial officers is now regulated by the appointments to the bench. Simply put, a person cannot be appointed to the bench as a judge in a specific language area if he or she does not have sufficient knowledge of the language in the area (Boes and Deridder, 2001: 54). This knowledge is determined independently from the candidate's mother tongue and is rather determined by the language of his or her law degree (Boes and Deridder, 2001: 54). For example if a candidate is French mother tongue speaking, but obtained their law degree in Dutch (Boes and Deridder, 2001: 54), they will be appointed to a court in a Dutch speaking area or in Brussels since they are bilingual. The candidate thus has the requisite legal and academic proficiency in the language in which they graduated. A university degree in a specific language is not the requirement to attest to knowledge in that language but rather an additional examination to test their linguistic knowledge (Boes and Deridder, 2001: 55). This is especially the case for German mother tongue speakers as there is no German university in Belgium and therefore proficiency is tested through an examination (Boes and Deridder, 2001: 54).

In Brussels, judgeships are allotted to French and Dutch speaking judges according to the various caseloads in the courts. There are minimum requirements for the composition of the bench in Brussels comprising: one third of the bench must hold a diploma in Dutch and one third must hold a diploma in French while two thirds of the bench must have a proven knowledge of their second language (Boes and Deridder, 2001: 55). In the court of Cassation, an equal fifty-fifty representation be between Dutch and French-speaking judges is required with all having a knowledge of German as a requirement (Boes and Deridder, 2001: 55).

5.15 Final remarks

The Belgian model has illustrated the inherent emphasis placed on language and the human and financial support made towards the attainment of linguistic equality for all in Belgium. It is interesting to note the language requirements conferred on judges prior to being appointed to the bench. This will be contrasted with the legislation relevant to attorneys, advocates, magistrates and judges in South Africa, advanced in chapter six of this thesis, where there is an absence of language requirements. Furthermore in chapter seven of this thesis where I rely on literature and interviews (Appendices G - R) where judges and legal practitioners in South Africa have argued that judges cannot be shopped for on the basis of language (Thulare, 2018) as this amounts to unfair discrimination. The foregoing discussion on Belgium also brings to the fore the important role universities have in educating legal professionals and not in the sense of only acquiring legal knowledge, but rather the language in which this knowledge is acquired and separate linguistic communicative skills in a language that may not necessarily be the students' mother tongue. This talks to the bilingual proficiency students leave with at Belgian universities. This will be juxtaposed to the growing trend of South African universities adopting English only language policies and the endorsement by the South African judiciary that these monolingual language policies are transformative and all inclusive.

The Belgian model illustrates that with human investment, commitment and financial capital a system can be transformed to ensure an inclusive legal system that provides meaningful effect to litigants' language rights. From the onset of accessing the criminal justice, system with police a complainant nor an accused is not disadvantaged by language. The Belgian model also importantly illustrates the role of universities in giving effective meaning to courts' language policies. Interesting to note how universities and individuals are committed to the lexical development of each of the three languages in Belgium to ensure that academic texts are produced and that translation of documents and sources of law are available in all three languages. This point will be juxtaposed to the South African context in chapter seven with reference to the work of Murray (2019) who advocates for universities to teach all content in English and only offer degrees through the medium of English, where acquiring a second language, namely an African language is seen as time wasted. The recognition conferred on language and understanding of proceedings in the civil system is one that can be

emulated and will be discussed in chapters six and seven of this thesis with reference to the South African model. The territoriality approach in Belgian is not without its problems as outlined from the historical sociolinguistic perspective; however, the model is inclusive and does not problematize language in the legal system, rather viewing it as a right and a resource where practical problems are dealt with as they arise. What follows in the next section of this chapter is a discussion of Canada's model and the use of language therein.

5.16 Canadian sociolinguistic landscape

Canada represents itself as a bilingual state comprising French and English speakers as established through the Founding Constitution Act of 1867. It has however been noted that many citizens are monolingual and can only speak one of the two languages. Williams (2012: 47) stated that these monolingual citizens are primarily French speakers in the country. From a historical perspective, the Canadian State's Founding Constitution Act of 1867 conferred upon all persons the right to: "... use English and or French in courts and Legislative Assemblies of the Federal government and the province of Quebec". Essentially the Founding Constitution Act of 1867 created a bilingual state. Doucet (2012: 162) explained that Section 133 of the Constitution Act of 1867 was the only provision therein which dealt exclusively with language rights. Doucet (2012: 162) states further that Section 133 was never intended to establish two official languages in Canada, but rather create what he termed an "... embryonic form of official bilingualism...". A parallel can be drawn with the South African model, discussed in chapters six and seven where Lourens (2012) has referred to Section 6(4) of the Constitution as the 'unborn' language legislation and the effects of a 'delayed' birth. French assumed a subordinate position in government and parliamentary processes.

In the 1960s, Prime Minister Trudeau established a Royal Commission on Bilingualism and Biculturalism. The Commission's report in 1969 included a 'blueprint' for a bilingual language policy. The central theme of the report and more specifically the policy was the 'strengthening' and reaffirmation of bilingualism (Williams, 2012: 47). It housed the objectives and principles upon which the Official Languages Act of 1968 was drafted and later enacted in 1969 (Williams, 2012: 47).

Another parallel can be drawn between the Belgian commission established in 1923, as I advanced earlier, tasked with translation of texts, legislation and other sources into Dutch. Although both commissions had different objectives, they are both illustrative of the investment both countries made into the development of their languages and for citizens to access a legal system in their mother tongue. This can be countered to the South African historical perspective as outlined in chapter one of this thesis, where there was no government initiative following the CODESSA talks to establish and follow through with the development of the nine African languages nor the commitment of resources for the translation of important texts and legislation. This remains a contentious issue in South Africa, given the ongoing litigation (*Lourens v Speaker of the National Assembly and Others*, 2015; *Lourens v State Party: Republic of South Africa*, 2018) in which parliament has inherently argued that the Constitution does not compel that all legislation be translated into all eleven official languages.

The Canadian Official Languages Act of 1969 took significant linguistic strides providing for the establishment of language rights for both official languages (Williams, 2012: 47). The relationship between citizens and the state more broadly, was explicated with pronouncements on rights and duties of both the citizens exercising their language rights and the state as well as state institutions in responding thereto (Williams, 2012: 47). The Canadian Official Languages Act of 1969 must be borne in mind in chapter six and seven of this thesis, where I have advanced the objectives of the Languages Act (2012), and comment on the provisions thereof in chapter seven. The Languages Act (2012) unlike the Canadian Official Languages Act of 1969 provides no further interpretation or protection of rights beyond the skeletal framework of Section 6 of the Constitution.

In reality however, the provisions of the Canadian Official Languages Act of 1969 were not implemented and the languages and speakers thereof were not treated equally. Williams (2012: 48) advanced that clarification needed to be sought on the parameters of the language rights and in establishing these parameters the obligation of the state in ensuring the realisation of the language rights was to be outlined. In heeding this call, there was a proclamation of the Canadian Charter of Rights and Freedoms in 1982. The Canadian Charter of Rights and Freedoms (1982) is the reaffirmation of the core principle of linguistic duality (Williams, 2012: 48). Linguistic duality refers to the equal status and treatment of the languages. This again can be countered with the provisions in Section 6 of the Constitution. The term linguistic duality is absent and instead Section 6(2) which calls for the elevation of

the nine African languages. Section 6(2) is qualified through Section 6(3) obligating the state to use at least two languages; the minimum standard built in does not guarantee the elevation of the African languages. This point of discussion is picked up in chapter seven of this thesis. There are many sections in the Canadian Charter of Rights and Freedoms (1982) dealing primarily with language and read according:

> 16. (1) English and French are the official languages of Canada and equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.
>
> (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government in New Brunswick.
>
> (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.
>
> 16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.
>
> (2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is reaffirmed.
>
> 17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.
>
> (2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.
>
> 18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.
>
> (2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19.(1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

20.(1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with the services from that office in such a language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

21. Nothing in Sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

22. Nothing in Sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

As seen from the excerpts above, the Canadian Charter of Rights and Freedoms (1982) is progressive and according to Doucet (2012: 162) heralded in a new era for the recognition of linguistic constitutional rights. Section 16(1) above, speaks to the principle of linguistic duality by stating that both French and English enjoy equality of status and equal rights and privileges. This speaks to the earlier point I made with reference to the case of *Lourens* v *Speaker of the National Assembly and Others* (2015) where Parliament argued that the South African constitutional provisions do not explicitly state nor imply that the languages enjoy equality, but should rather be treated equitably and used where practicable. Thus, Section 18(1) of the Canadian Charter of Rights and Freedoms (1982), advanced above, by stating

that statutes and other relevant texts be made available in both languages is foreign to the mind-set in South Africa, where this is seen as impractical. Section 18(1) resembles the Belgian model presented in this chapter above, where statutes and texts were all translated to ensure all speakers of the national languages have equal access. A further similarity with the Belgian model can be found through Section 16.1(1) where speakers of both French and English have the right to their own distinct universities; in Belgium, universities were established and law degrees are offered through the medium of one of the national languages. Again, different to South Africa, where in chapters six and seven I advanced the language policies of universities and the relevant litigation reaffirming English only policies of teaching and learning (*Afriforum and Another* v *University of the Free State*, 2018). One point of critique though is that the Canadian Charter of Rights and Freedoms (1982) focusses on the Province of New Brunswick, this focus will also be apparent in the legislation advanced below. Simply put, the other Canadian provinces are not as advanced from a language rights perspective and Canada still has to ensure implementation takes place across all its provinces. The foundation is already established in the form of a working model and this is discussed in relation to South Africa's shortcomings in chapters six and seven.

5.17 Legislation: Official Languages Act of Canada

As with any constitutional framework, legislation is required to provide elucidation and practical effect to the constitutional provisions. The Official Languages Act of Canada (1988) is the primary language legislation of Canada. According to Williams (2012: 48), the Official Languages Act of Canada (1988) reaffirms the importance of linguistic duality and in doing so emphasises the importance of language equality. Linguistic equality is thus entrenched through the Official Languages Act of Canada (1988) in "... Parliament; within the government of Canada; the federal administration and all institutions subject to the Act" (Williams, 2012: 48).

The Official Languages Act of Canada (1988) provides that both English and French speaking citizens can access all government services in a national language of their choice. According to Williams (2012: 50), the Official Languages Act of Canada (1988) comprises three main objectives:

1. The equality of English and French in Parliament within the government of Canada, the Federal administration and institutions subject to the Act;

2. The preservation and development of official language communities in Canada;

3. The equality of English and French in Canadian society.

It is my opinion that the Official Languages Act of Canada (1988) gives practical meaning to the Canadian Charter of Rights and Freedoms, by obligating government and all state entities to provide services to citizens in the national language of their choice. By doing so, the languages are treated and use equally. The objectives of Official Languages Act of Canada (1988) must be borne in mind in chapters six and seven where the Languages Act (2012) is advanced and critiqued as stated in chapter two of this thesis.

Thus far the Canadian constitutional and legislative frameworks have not made mention of the legal system, to this end what follows is a presentation of the New Brunswick Official Languages Act (2002) regulating the use of language in the legal system and the language of record.

5.18 Language of Record in Canadian courts: The New Brunswick Official Languages Act

The New Brunswick Official Languages Act (1988), focussing specifically on the legal system, was enacted in accordance with the provisions of the Canadian Charter of Rights and Freedoms (1982), this is evident from the Preamble. Sections 16 to 26 of the New Brunswick Official Languages Act (2002) comprise provisions dealing with the language of record and language use more generally in courts. These provisions read as follows:

> 16 English and French are the official languages of the courts.
>
> 17 Every person has the right to use the official language of his or her choice in any matter before the courts, including all proceedings, or in any pleading or process issuing from a court.
>
> 18 No person shall be placed at a disadvantage by reason of the choice made under section 17.
>
> 19(1) A court before which a matter is pending must understand, without the assistance of an interpreter or any process of simultaneous translation or consecutive interpretation, the official language chosen under section 17 by a party to the matter.

19(2) A court before which a matter is pending must understand both official languages, without the assistance of an interpreter or any process of simultaneous translation or consecutive interpretation, if both English and French are the languages chosen by the parties to the proceedings.

20(1) A person who has alleged to have committed an offence under an Act or a regulation of the Province or under a municipal by-law has the right to have the proceedings conducted in the language of his or her choice and shall be informed of that right by the presiding judge before entering a plea.

20(2) A person who is alleged to have committed an offence within the meaning of subsection (1), has the right to be understood by the court, without the assistance of an interpreter or any process of simultaneous translation or consecutive interpretation, in the official language chosen by the person.

21 Every court has the duty to ensure that any witness appearing before it can be heard in the official language of his her choice and upon the request of one of the parties or the witness, the court has the duty to ensure that services of simultaneous translation or consecutive interpretation are available to the person who made the request.

22 Where Her Majesty in her right of the Province or institution is a party to civil proceedings before a court, Her Majesty or the institution concerned shall use, in any oral or written pleadings or any process issuing from a court, the official language chosen by the other party.

23 Where the parties to civil proceedings, other than Her Majesty in right of the Province or any institution, do not choose or fail to agree on the official language to be used in proceedings, Her Majesty or the institution concerned shall use such official language as is reasonable, having regard to the circumstances.

24(1) Any final decision, order or judgment of any court, including any reasons given therefore and summaries, shall be published in both official languages where

(a) it determines a question of law of interest or importance to the general public, or

(b) the proceedings leading to its issuance were conducted in whole or in part in both official languages.

24(2) Where a final decision, order or judgment is required to be published under subsection (1), but is determined that to do so would result in a delay or injustice or hardship to a party to the proceedings, the decision, order or judgment, including any reasons given, shall be published in the first instance in one official language and, thereafter, at the earliest possible time, in the other official language.

25 All decisions of the Court of Appeal are deemed to fall within the scope of Section 24.

26 Sections 24 and 25 shall not be construed so as to prevent the pronouncement of a judgment, in either official language and in such a case, the judgment is not invalid by reason only that it was pronounced in one official language.

Section 16 pronounces both English and French as the languages of record in Brunswick courts. From the onset it is clear that the languages of record for courts is in line with the Canadian official languages. Thus, both languages are treated equally for practical purposes.

Section 17 of the New Brunswick Official Languages Act (2002) is more advanced than Section 35(3) (k) of the South African Constitution in that litigants have a language right of choice in any matter (see chapters six and seven for a full discussion of the South African context). Emphasis is on the language used in the provision referring to a language of choice as a opposed to the South African context using the phrase ‘a language the accused understands’. This is extended to civil cases as well where Section 22 provides that her Majesty (the state) use the language chosen by the other party when communicating in any oral or written pleadings. Where parties excluding her Majesty (the state) are parties to litigation and cannot agree on the language of record, her Majesty (the state) will determine the language taking into account what is reasonable in the circumstances. These provisions are profound and afford language rights to civil litigants as opposed to the South African model, where Judge Hartle (2019, Interview Appendix L) explained that proceedings are in English and interpretational services are not provided at the state’s expense. These costs, Judge Hartle (2019, Interview Appendix L) explains may be too high as there are no quantum of costs legislated for interpretational services in civil cases.

According to Section 19(2), the court must understand the language with the assistance of an interpreter. This is reinforced through Sections 20(1) and (2) providing that in having a language of choice right the court must understand the litigant without any form of interpretation. Section 19(2) precludes the possible complication where both languages are used in proceedings, obligating the court to understand both languages. Two languages may be used for instance where a witness to a case provides evidence in a language other than the language in which the proceedings are conducted in. According to Section 21, interpretation is permitted where a witness or any party before court requests the services of an interpreter and such services must be made available on request. Sections 16 to 23 are inclusive and ensure all litigants and witnesses are treated equally and have equal access to courts, where language is not a barrier. Section 18, in fact entrenches the guarantee that there be no disadvantage before the law.

The language of record is often a contentious point of discussion with reference to the judgment and precedent setting judgments to be published in the law reports. Simply put as seen from the interviews in the appendices these interviewees have argued that on this basis there needs to be one language of record, namely English, as it is understood by all the judges, is an international language and thus foreign and international jurisdictions can access our judgments (see Adv Turner, 2019 Interview: Appendix R). Section 24(1) of the New Brunswick Official Languages Act (2002) deals with these issues where there is a bilingual language of record policy and is illustrative of linguistic inclusivity in New Brunswick with the objective of practical interpretation of the equality of two official languages. Judgments must be made available in both languages where:

(a) it determines a question of law of interest or importance to the general public, or

(b) the proceedings leading to its issuance were conducted in whole or in part in both official languages.

The insertion of subsection (2) also addressed the potential time delays that may arise from the publication of a judgment in both official languages. The provision bears testament to the unwavering commitment of equality of status of both official languages. Of greater significance was the manner in which the legislature drafted the New Brunswick Official Languages Act (2002); instead of viewing time delays as a result of bilingual publication of judgments, the legislature skilfully drafted subsection (2) without limiting the right of

litigants and other citizens in accessing judgments. This is the act of balancing rights without limiting either of the rights. These extracted provisions of the New Brunswick Official Languages Act (2002) must be borne in mind in chapter seven where the monolingual language of record directive by Hlophe J (2018) is critiqued.

The legislative position in New Brunswick in the form of the New Brunswick Official Languages Act (2002) is said to be, exemplary in nature in that New Brunswick is the only Canadian Province to be officially bilingual, both theoretically and practically in all disciplines across society (Doucet, 2012: 159).

Given the extensiveness of the New Brunswick Official Languages Act (2002), Doucet (2012) advanced a theoretical discussion in an attempt to explain why a state would not just opt for the simplest solution of adopting one official language of the majority as the official language for use across all disciplines. In engaging with this paradox, it was stated that a state has two options in the process of language planning, namely the territorial or personal approach. Both these approaches have been advanced in chapter two with reference to Turi (1993) as well as in this chapter with reference to the Belgian model. Therefore, the following brief discussion on each of the two approaches is in the Canadian context.

Doucet (2012: 160) states that the adoption of a territorial based approach will result in unilingualism in the specifically defined geographical area. Doucet (2012: 160) advanced further that this was a common human phenomenon where persons of the same linguistic community are positioned geographically.

In the case of Canada, the personal approach may be ideal in the circumstances as there are only two official languages. Therefore, it is my opinion that the type of approach will be dependent on the nature of the linguistic framework of each country. Docuet (2012: 161) also acknowledged the fact that a multilingual state faces greater concerns of linguistic choice in disciplines such as the legislative process, national institutions, government services, administration of justice and education. This point must be borne in mind in chapters six and seven where South Africa presents as a multilingual country with eleven official languages.

5.19 Judicial interpretation and application of a bilingual language of record: Case law

Once again, the practicalities surrounding a bilingual language of record need to be assessed through the relevant case law. The case law advanced in the proceeding paragraphs deals *inter alia* with the court's interpretation of litigants' language rights and the language of

record. A further purpose of advancing Canadian case law is to illustrate the jurisprudential development in the courts' reasoning and interpretation of the language rights provisions. The cases are assessed with the aim of determining whether both the constitutional and legislative frameworks have been interpreted restrictively or purposively. Discussions pertaining to the selected cases below are in accordance with the doctrine of precedent.

Foucher (2012: 333) explained that the Canadian courts ought to adopt a balance in interpreting the language provisions, between an individual's human right, the collective language rights and the constitutional framework giving effect to the national minority. Language rights are not to be interpreted narrowly as opposed to other constitutionally enshrined rights. In avoiding narrow interpretation of language, rights the parameters and objectives of the language rights must be clarified by the courts (Foucher, 2012: 234). The latter two points will be discussed in chapter seven with reference to the cases of *Afriforum and Another v University of the Free State* (2018); and *Gelyke Kanse and Others* v *Chairman of the Senate of the Stellenbosch University and Others* (2019) both South African constitutional court judgments dealing with the parameters of language rights.

The interpretation of language rights was dealt with in the cases of *Jones* v *A.G of New Brunswick* (1975) and *Ford* v *Quebec (Attorney General)* (1988). In both cases the respective courts held that although language rights were fully established rights, they were not absolute in nature and may therefore be limited where such limitations were reasonable in the circumstances (Foucher, 2012: 234). The limitation of language rights in the South African context is discussed fully in chapters six and seven. I engage with the limitations analysis of Section 36 of the Constitution as well as the language specific limitations analysis, namely the sliding scale formula (Currie and de Waal, 2005: 632); which takes into account the context in which the right is being limited.

The case of *Reference re: Manitoba Language Rights* (1985) heard by the Supreme Court of Canada (SCC) following the enactment of the Charter of Rights and Freedoms (1982). The SCC in *Manitoba* (1985) contextualised the importance of language more broadly within society across disciplines. What is important for the purposes of the judgment was the court's statement that all rights, including language rights, contained in the Canadian Charter of Rights and Freedoms (1982) be interpreted fully, where the SCC would follow a "... broad liberal and dynamic approach..." (Doucet, 2012: 162).

It was thought that the case of *Reference re: Manitoba Language Rights* (1985) would provide for further purposive interpretation of language rights, however this was not to be with the trilogy of cases that followed (Doucet, 2012: 162). The trilogy comprised of the following cases: *Bilodeau v Manitoba (A.G)* (1986); *MacDonald v Montreal (City)* (1986) and *Societe des Acadiens du Nouveau Brunswick v Association of Parents for Fairness in Education* (1986).

In the case of *MacDonald* (1986), the facts briefly before the SCC on appeal from the Court of Appeal for Quebec were that the Appellant was initially charged and convicted in the court *a quo* of contravening a municipal by-law. The summons served on the English Appellant was in French only (1986: 460). The Appellant alleged in both the court *a quo* and before the Court of Appeal for Quebec that the French-only summons violated his fundamental right espoused in Section 133 of the Constitution Act of 1867. In both instances, the Appellant was unsuccessful.

The SCC held from the onset that the Appellant had no right to be summonsed in his own language as the provisions provide that the summons can be in either of the official languages, and as such there is no 'obligation nor a duty' to use the other official language (1986: 462). Reasoning further the SCC (1986: 462) stated that Section 133 of the Constitution Act of 1867, which established a language right, protected "... litigants, counsel, witnesses, judges and other judicial officers..." This right was not extended to the writers or issuers of pleadings nor those who were the recipients of summonses (1986: 462).

In the same restrictive breath, the SCC (1986: 462), noted that although it may be "... desirable or fair for summonses to be bilingual to ensure comprehension by the recipient..." there was specific reference to this in the provisions of Section 133 of the Constitution Act of 1867. The SCC (1986: 462) in validating the narrow approach, held that it was not the court's responsibility "... under the guise of interpretation, to improve upon, supplement or amend this historical constitutional promise".

The SCC (1986: 463) held further that in fact language rights in the course of judicial proceedings were not rights *per se*, but rather a consequential part of the right to a fair trial. In this instance, the court would be under an obligation to ensure that proceedings are understood by the accused with the aid of translation services (1986: 463). The appeal was subsequently dismissed.

The *MacDonald* case (1986) highlighted that although the Canadian Charter of Rights and Freedoms was progressive, this remained in theory and not in practice where the court was required to apply the provisions in a positive practical manner, they opted instead for a limiting restrictive interpretation that the restrictive interpretive approach. Similar to the majority judgment in the case of *Afriforum and Another v University of the Free State* (2018), the court's reasoning brought into question the role of the judiciary in safeguarding the constitutional and legislative ideals in the best interests of the citizens.

The dissenting judgment of Wilson J in the *MacDonald* case (1986) was a stark contrast to the majority judgment. Wilson J held that the litigant, namely the Appellant in the matter at hand, had a right to use his own language as espoused in Section 133 of the Constitution Act of 1867. By recognising that in fact, a language right was in existence and further explained the parameters of the right by interpreting that a correlative duty is imposed on the state during judicial proceedings to accommodate the right (Wilson, 1986: 463).

In terms of what was meant by 'accommodate' Wilson J (1986: 463) explained that the use of the words 'may' and 'either' in the provisions of Section 133 of the Constitution Act of 1867 was not inserted with the purpose of conferring a discretionary choice on the state to choose the official language of their choice to communicate with the litigant, but instead to confer such an option on the litigant. As a minimum requirement of Section 133 of the Constitution Act of 1867, all documents emanating from and initiating court processes should be in an official language, which the recipient thereof understands. If the recipient's language of choice is not known, the state is obliged to advise that a translation of the documents in the official language of his choice is available upon application (1986: 464). This reasoning according to Wilson J (1986: 463) gives practical meaning to the constitutional and legislative provisions that the official languages are equal in status and should be treated as such in judicial proceedings.

The dissenting judgment in *MacDonald* (1986) provides for the parameters of the right to be interpreted in favour of the litigant upon whom the right is conferred. The interpretation by Wilson J in *MacDonald* (1986) is important for the discussion pertaining to South Africa in chapters six and seven, specifically with regard to the interpretation of the constitutional provisions and the incessant inclusion of words such as 'may' and 'either'. It is also important in drawing parallels with the dissenting judgment of Froneman J in the case of *Afriforum and Another v University of the Free State* (2018).

In the case of *Bilodeau* v *Attorney General of Manitoba* (1986), the appeal concerned the conviction of an English accused for the contravention of a Highway Traffic Act. The summons was issued in French only. The Appellant alleged that the French summons was a violation of Section 23 of the Manitoba Act of 1870 (1986: 449).

Section 23 of the Manitoba Act (1870) prescribes that the printing of all legislation must be done in both English and French. To this effect, the majority judgment held that it was not mandatory, but rather directory in nature (1986: 452-454). In substantiating this viewpoint, the majority adopted the precise reasoning of the majority in the *MacDonald* case (1986). In doing so, the court explained that in this instance, the legislation was only in French as the prescribed period for translation into both English and French had not elapsed yet, hence the fact that the legislation from which the summons was issued was valid and did not contravene Section 23 of the Manitoba Act (1870). The appeal was subsequently dismissed.

Wilson J in *Bilodeau* (1986) wrote a minority judgment. Wilson J (1986: 458) therefore concurred with the majority in dismissing the appeal. However, his reasons for the dismissal differed significantly. Wilson J (1986: 458) held Section 23 of the Manitoba Act (1870) was mandatory and not directory. As such the Appellant's language rights entrenched under Section 23 of the Manitoba Act, (1870) were in fact contravened. The only reason why Wilson J dismissed the appeal was that if not, it would have opened the floodgates to litigation.

The third case in the trilogy, namely *Societe des Acadiens du Nouveau* v *Association of Parents for Fairness in Education* (1986) concerned an appeal from the Court of Appeal for New Brunswick regarding the Official Languages Act of New Brunswick (2002). The primary issue on appeal was the interpretation of the parameters of Section 13(1) of the Official Languages of New Brunswick Act (2002), which states that a party to court has the right to be heard in a language of their choice by the members of the court in both the oral proceedings and written pleadings.

Engaging with the provision above, the court explained that it was best to trace the sources of legislation, which gave effect to the enactment of the New Brunswick Official Languages Act (2002), namely Section 19 of the Canadian Charter of Rights and Freedoms (1982) as well as Section 133 of the Constitution Act (1867). The court held that both Section 133 of the Constitution Act (1867) and Section 19 of the Canadian Charter of Rights and Freedoms

(1988) did not guarantee that a litigant has a right to be heard in a language of choice or to be understood in that language of choice (1986: 552).

The court held further that it must be noted, language rights are separate to the requirements of natural justice (1986: 552). Simply put the court did not see language rights as a possible catalyst determining or influencing whether or not substantive justice or any form of justice is achieved.

The court held that courts should "... pause before they decide to act as instruments of change, with respect to language rights" (1986: 552). Moreover, the courts were cautioned to "... approach them with more restraint than they would in construing legal rights" (1986: 552). The court ordered that the appeal be dismissed.

The trilogy of cases provided a restrictive interpretation of the various language rights as evidenced above. The court in *R* v *Beaulac* (1999) rejected the restrictive approach adopted in the *Societe* case (1986), reasoning that regardless of the facts before a court, where language rights are concerned, and such language provisions must be interpreted purposively. Purposive interpretation must be guided by the need to ensure the 'preservation' and 'development' of official language communities in Canada (1999: 770).

The court held that in criminal cases, courts were obligated to ensure that they were bilingually functional. This would allow for equal use of both official languages of Canada, in accordance with the core principle of linguistic duality. This, the court said reaffirmed the language right a substantive right and not a procedural right (1999: 770).

The court dismissed the reasoning that language rights were part of the right to a fair trial. Instead, the court held that the right of the accused to be heard in a language of their choice was in place to ensure the accused gained equal access to a public service, one that was linguistically competent to respond fully to the right (1999: 772).

The purposive approach adopted in *Beaulac* (1999) was adopted in the case of *R v Pooran* (2011), a case on appeal. The facts, briefly, dealt with the interpretation of Section 4(1) of the Alberta Languages Act which states:

> Any person may use English and or French in oral communication in proceedings before the listed courts.

The appellant argued that Section 4(1) inferred that English and French were the official languages of the Provincial Court proceedings, thus a French speaking accused was entitled to a French-speaking prosecutor (2011: 78). In a civil trial, the French-speaking litigant has a right to be understood in French without interpretation services being employed. In both instances, a judicial officer must be linguistically equipped in the language of choice (1999: 78). The Crown, acting as the Respondent in *Pooran* (2011) argued that Section 4(1) entitled the accused to have proceedings interpreted in French, but not to have the entire trial conducted in French (2011: 78).

Brown J in delivering judgment in *Pooran* (2011) imparted the reasoning in the *Beaulac* case (1999). Brown J (2011) accordingly held that the appeal succeed as Section 4(1) did entitle the accused to a French trial without the employ of interpretation. In Brown J's judgment, it was clearly stated that liberal and purposive interpretation was required in all instances concerning language rights (2011: 79).

The Canadian case law provides an overview of the development the court have undergone in purposively interpreting language rights and the parameters thereof. The case law also illustrates how the courts have implemented the provisions that both English and French are languages of record and that the accused in criminal cases has the right to have the trial conducted in either of these languages, based on his choice. Regardless of which language is chosen the court must be linguistically competent in both official languages.

5.20 Final remarks

The discussion on Canada have provided an overview of the Canadian constitutional and legislative language developments, which have culminated in the entrenchment of language rights in recognising the official bilingualism of the country. The Canadian model illustrates that language has a significant role to play in the legal system for both litigants and legal professionals. This is evidenced in the New Brunswick Official Languages Act (2002). More pertinently the model is illustrative of the ability that more than one language can be employed successfully in judicial processes at all levels, without the aid of translation and interpretation services, and without causing unnecessary delay in the delivering of judgments and the consequent administration of justice.

As with the legislative developments, the courts, specifically the SCC appeared hesitant if not steadfast on not giving effect to language rights both in the employ of court proceedings and

in the broader legal system. There was a definite divorce between language and law, which the judiciary created both directly and indirectly through the trilogy of cases. The mere fact that the judiciary turned their backs on the restrictive approach to language rights and the limited role of language it recognised in the legal system, illustrated the importance for litigants, legal professionals and the Canadian society that language assumes a rightful place in the legal system. Moreover the case law following the trilogy of cases, upheld the constitutional and legislative frameworks and the ideals of official bilingualism. The case law further provided an example of how skilful purposive interpretation should be undertaken, where language rights were said to be substantive and not procedural in nature.

The Canadian model is proof that regardless of the restrictive constitutional and legislative frameworks as well as the narrow approach of the judiciary in the trilogy of cases and prior to that, a determined resolve for linguistic equality can be achieved in a legal system, where the important role of language is recognised.

5.21 India's sociolinguistic landscape

The Indian sociolinguistic landscape is characterised by the political influences that ultimately determined the language question. Crystal (2003) highlights the political events that led to the growth and dominance of English in India. The first English influences lies with the establishment of the British East India Company in 1600 (Crystal, 2003: 47). In 1612, the British East India Company began its first trading station in Surat and later in Madras, Bombay and Calcutta. These cities are important to note for the forthcoming discussions, concerning the dominance of English and the subsequent language divide across the north and south of India. British power was consolidated during the period of 1784 to 1858 when the India Act of 1858 established a Board of Control that required direct reporting to the British Parliament (Crystal, 2003: 47). The use of English was strengthened during the period of British sovereignty, 1765 to 1947, wherein English was the medium of administration and education throughout the subcontinent (Crystal, 2003: 47). The language question gained momentum in the early nineteenth century with the debating of an educational policy of learning and teaching English (Crystal, 2003: 47). The establishment of the Universities of Bombay, Calcutta and Madras in 1857, saw English become the primary medium of instruction cementing its development (Crystal, 2003: 48). Again, this point is important for the forthcoming discussions where the legal education is discussed in relation to the use of language in the courts. In the 1960s, a language war broke out in India between

the supporters of English, Hindi and other regionally spoken languages in the South of India. This resulted in the 'three language formula', where English was introduced as the primary alternative to the local state language (Crystal, 2003: 48).

Parallels can be drawn with the discussions in chapters one and two of this thesis concerning the development of language in South Africa prior to the drafting and enacting of the Constitution. Simply put the historical influence of colonialism and the growth of a language in this instance English, was due to political and economic interests and how as a result thereof the colonial language is seen as a unifying language rather than an indigenous language. This speaks to the global dominance of English and how through political and economic means English, as a language has been able to grow in both use and popularity in countries where the status and use of indigenous languages have been undermined. Furthermore, this point relates to the relationship between language and power as explicated in this chapter with reference to Australia. Linguistic transformation lies in the hands of those who are powerful and if the majority do challenge the English status quo it results in intra-language battles or the adoption of English to fight for the African languages as seen in South Africa.

On the point of the majority, it is interesting to note that with the Indian population exceeding one billion, the number of English speakers rises as well, contributing to the growth of English rather than the use and development of the indigenous languages. What follows is the presentation of the language demographics in India emanating from the Census.

5.22 Indian language demographics

In 2011, India released its Census results. As will be evident from chapter six below, the language Census (2011) of India differs from South Africa given that the Indian Constitution recognises twenty- two languages as official. The Indian Census (2011: 8) records that there are one hundred and twenty one spoken languages in India. The Census (2011) provides the following table recording the language demographics pertaining to the twenty-two official languages.

Table 1: Constitutionally Scheduled Languages in Descending Order

Language	Persons who returned the language as their mother tongue	Percentage to total population
Hindi	52,83,47,193	43.63
Bengali	9,72,37,669	8.03
Marathi	8,30,26,680	6.86
Telugu	8,11,27,740	6.70
Tamil	6,90,26,881	5.70
Gujarati	5,54,92,554	4.58
Urdu	5,07,72,631	4.19
Kannada	4,37,06,512	3.61
Odia	3,75,21,324	3.10
Malayalam	3,48,38,819	2.88
Punjabi	3,31,24,726	2.74
Assamese	1,53,11,351	1.26
Maithili	1,35,83,464	1.12
Santali	73,68,192	0.61
Kashmiri	67,97,587	0.56
Nepali	29,26,168	0.24
Sindhi	27,72,264	0.23
Dogri	25,96,767	0.21
Konkani	22,56,502	0.19

Manipuri	17,61,079	0.15
Bodo	14,82,929	0.12
Sanskrit	24,821	Negligible

Table 1 above, illustrates that Hindi is the most spoken language in India. The Census (2011: 10) recorded that 2, 59,678 people recorded English as their mother tongue. If one were to place, it alongside the scheduled languages in Table 1 above it would be after Punjabi language. This would amount to approximately two percent of the population yet it is such a dominant language across society and in high status domains such as the legal system and higher education.

5.23 Indian constitutional framework

The discussions above have referred to the Constitution of India, with specific reference to the fact that official status is conferred on twenty-two languages as listed in table 1 above. The following extracted provisions are relevant to the thesis at hand:

> Cultural and Educational Rights
>
> **29.** (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
>
> (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.
>
> **30.** (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
>
> (2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

CHAPTER I.—LANGUAGE OF THE UNION

343. (1) The official language of the Union shall be Hindi in Devanagari script.

The form of numerals to be used for the official purposes of the Union shall be the international form of Indian numerals.

(2) Notwithstanding anything in clause (1), for a period of fifteen years from the commencement of this Constitution, the English language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement:

Provided that the President may, during the said period, by order authorise the use of the Hindi language in addition to the English language and of the Devanagari form of numerals in addition to the international form of Indian numerals for any of the official purposes of the Union.

(3) Notwithstanding anything in this article, Parliament may by law provide for the use, after the said period of fifteen years, of—

(*a*) the English language, or

(*b*) the Devanagari form of numerals,

for such purposes as may be specified in the law.

344. (1) The President shall, at the expiration of five years from the commencement of this Constitution and thereafter at the expiration of ten years from such commencement, by order constitute a Commission which shall consist of a Chairman and such other members representing the different languages specified in the Eighth Schedule as the President may appoint, and the order shall define the procedure to be followed by the Commission.

(2) It shall be the duty of the Commission to make recommendations to the President as to—

(*a*) the progressive use of the Hindi language for the official purposes of the Union;

(*b*) restrictions on the use of the English language for all or any of the official purposes of the Union;

(*c*) the language to be used for all or any of the purposes mentioned in article 348;

(*d*) the form of numerals to be used for any one or more specified purposes of the Union;

(*e*) any other matter referred to the Commission by the President as regards the official language of the Union and the language for communication between the Union and a State or between one State and another and their use.

(3) In making their recommendations under clause (2), the Commission shall have due regard to the industrial, cultural and scientific advancement of India, and the just claims and the interests of persons belonging to the non-Hindi speaking areas in regard to the public services.

(4) There shall be constituted a Committee consisting of thirty members, of whom twenty shall be members of the House of the People and ten shall be members of the Council of States to be elected respectively by the members of the House of the People and the members of the Council of States in accordance with the system of proportional representation by means of the single transferable vote.

(5) It shall be the duty of the Committee to examine the recommendations of the Commission constituted under clause (1) and to report to the President their opinion thereon.

(6) Notwithstanding anything in article 343, the President may, after consideration of the report referred to in clause (5), issue directions in accordance with the whole or any part of that report.

CHAPTER II.—REGIONAL LANGUAGES

345. Subject to the provisions of articles 346 and 347, the Legislature of a State may by law adopt any one or more of the languages in use in the State or Hindi as the language or languages to be used for all or any of the official purposes of that State:

Provided that, until the Legislature of the State otherwise provides by law, the English language shall continue to be used for those official purposes within the State for which it was being used immediately before the commencement of this Constitution.

346. The language for the time being authorised for use in the Union for official purposes shall be the official language for communication between one State and another State and between a State and the Union:

Provided that if two or more States agree that the Hindi language should be the official language for communication between such States, that language may be used for such communication.

347. On a demand being made in that behalf the President may, if he is satisfied that a substantial proportion of the population of a State desire the use of any language spoken by them to be recognised by that State, direct that such language shall also be officially recognised throughout that State or any part thereof for such purpose as he may specify.

CHAPTER III.—LANGUAGE OF THE SUPREME COURT, HIGH COURTS, ETC.

348. (1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides—

(*a*) all proceedings in the Supreme Court and in every High Court,

(*b*) the authoritative texts—

(*i*) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State,

(*ii*) of all Acts passed by Parliament or the Legislature of a State and of all Ordinances promulgated by the President or the Governor of a State, and

(*iii*) of all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State, shall be in the English language.

(3) Notwithstanding anything in sub-clause (*a*) of clause (1), the Governor of a State may, with the previous consent of the President, authorise the use of the Hindi language, or any other language used for any official purposes of the State, in proceedings in in the High Court having its principal seat in that State:

Provided that nothing in this clause shall apply to any judgment, decree or order passed or made by such High Court.

(3) Notwithstanding anything in sub-clause (*b*) of clause (1), where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in, or Acts passed by, the Legislature of the State or in Ordinances promulgated by the Governor of the State or in any order, rule, regulation or bye-law referred to in paragraph (*iii*) of that sub-clause, a translation of the same in the English language published under the authority of the Governor of the State in the Official Gazette of that State shall be deemed to be the authoritative text thereof in the English language under this article.

349. During the period of fifteen years from the commencement of this Constitution, no Bill or amendment making provision for the language to be used for any of the purposes mentioned in clause (1) of article 348 shall be introduced or moved in either House of Parliament without the previous sanction of the President, and the President shall not give his sanction to the introduction of any such Bill or the moving of any such amendment except after he has taken into consideration the recommendations of

the Commission constituted under clause (1) of article 344 and the report of the Committee constituted under clause (4) of that article.

These constitutional provisions quoted in full above are extensive in their mandate, however a point of critique is that the majority of these provisions are qualified or have internal qualifications built into the provisions that secures the use of English. To an extent the provisions are extensive and do make progress at including Hindi, specifically in high status domains. Simply put, whether viewing these provisions from a positive or negative perspective is dependent on the type of interpretation employed i.e. restrictive interpretation or purposive interpretation as I discussed in chapter two of this thesis.

There are important points to note emanating from these provisions that are relevant to the progression of this discussion and to the discussions housed in chapters six and seven of this thesis. The first point of importance is found in Article 29(2) above, providing that an individual may not be turned away from an educational institution based on amongst other factors, language. This can be cross-referenced to the discussion below on Indian legal education and how universities in India are battling to grapple with the language question that is resulting in a language divide that is also geographical between the north and south. This also relates to the point of language and power in India. One must be conscious of the underlying discrimination and classist society based on the caste system, in which language is inherent. This is evident from the Indian constitutional provisions that excludes discrimination based on language and caste. Article 29(2) of the Constitution of India is similar to the language in educational rights in Section 29(2) of the South African Constitution, advanced in chapter six and analysed in chapter seven of this thesis.

I mentioned that the provisions quoted above place Hindi alongside English as per Article 343. The dominance of English in India can be seen from the provisions that attempt to place Hindi on an equal footing. Article 343 resembles the provisions of Section 6 of the South African Constitution that elevates the status and use of the nine African languages that were previously marginalised. In supporting Article 343, the Constitution of India provided for a commission to be established fifteen years following the enactment of the Constitution. Based on the provisions of the Indian Constitution it appears that the commissions' purpose was similar to that of LANGTAG (1996) discussed in chapter two of this thesis. Furthermore

the provisions of Article 343 somewhat overlap with the mandate of PanSALB in South Africa as per Section 6(5) of the South African Constitution.

Taking cognisance of Article 345, there is a divide between language use for the union (country) and state (regional/ provincial) purposes. This distinction is important where in the states, a regional language can be used for official purposes such as in the courts. I discuss the point more fully in the paragraphs below.

What is of most significance of the provisions quoted above, for the purposes of this research, is the inclusion of Article 348 regulating the use of language in the Supreme Court and all High Courts. There is no such provision in the South African Constitution nor in the Superior Courts Act 10 of 2013. Article 348 however falls short of being progressive in my opinion as it prescribes that English be used and ultimately be the language of record. This provision does not correlate with the language demographics provided in the Indian Census (2011) represented in Table 1 above, given that English is spoken by a mere two percent of the population. Furthermore, Article 348 provides that all legislation and all laws be enacted in English. A parallel can be drawn between the case of *Lourens* v *State Party: Republic of South Africa* (2018) and also with the discussion below that by having legislation and other primary texts in English only the large majority cannot access the law neither can universities teach law students in a language other than English, resulting in an English only language of record policy. There is a thin positive aspect provided in subsection (3) that permits the use of Hindi in these courts but this is discretional. The relationship between language and power and language and politics comes to the fore with this discretion, where the litigants do not have this power that directly affects their level of access to justice and procedural fairness.

5.24 Language of record and proceedings in Indian courtrooms

The constitutional provisions above are clear on the language of record in the Supreme Court and all High Courts except for the lower courts and this is where the majority of literature and contention has been based. As with any debate concerning the use of language in a legal system there will be opposing views, India is no different. The language question in courts and the country more broadly is continuously debated with no end in sight. One of the primary reasons cited for the ongoing debate is the linguistic diversity of India, which in most instances is not seen as a rich resource but rather a dividing problem. Before I engage in a

thematic account of the developments and debates concerning the language of record and proceedings in Indian courts, the language of record in the Supreme Courts must be disposed of.

Although constitutionally determined the language of record in the Supreme Court of India has been criticised as eluding the majority of the people, who cannot speak, read, write or understand English. According to the Supreme Court Registry an increase in the number of litigants, requesting the translation of judgments into the indigenous languages was recorded (Nambiar, 2019). In responding to the numerous requests, the Supreme Court Registry reported that it would make its judgments available in regional languages on the court website (Nambiar, 2019). The judgments will be translated into Assamese, Hindi, Kannada, Marathi, Odia and Telegu (Nambiar, 2019). This development followed a previous rejection by the judiciary to make Hindi the official language of all courts in India (Sonewal, 2016). The rejected proposal concerning the Supreme Court and the twenty-four High Courts was based on the fact that Hindi was not the accepted language of communication in many parts of India (Sonewal, 2016). Another reason cited for the dismissal is that cases tend to have a delay of five months for translation purposes (Mehta, 2013). In 2008, the Law Commission in its 216th report held that introducing Hindi as a compulsory language of record in the Supreme Court and all High Courts was not feasible and that the Constitution of India was clear on the matter of the language of record (Sonewal, 2016).

The situation in the lower courts in the states differs given the absence of constitutional and legislative directives on the language of record. As a result, of this situation, lower courts use the regional (local) languages for court proceedings and are thus the languages of record (Sonewal, 2016). This permits litigants the opportunity of understanding proceedings and filing documents in their mother tongue, where justice is seen to be done and access to justice is enhanced for ordinary citizens and not just a political English speaking elite (Naidu, 2018). Speaking on this topic of access to justice for all Indian citizens, the Vice President Shri M Venkaiah Naidu (2018) stated that the language used in courts should be understood by the petitioners who are seeking justice. Naidu (2018) explained that from a political perspective he was of the view that language use in courts was grounded in the Constitution, where the judiciary is a key pillar of the democratic polity. Naidu (2018) went further to explain the importance of the judiciary in upholding the principles of the Constitution and to exclude litigants on grounds of language would be abandoning this duty. A parallel can be sought with the judgment by Froneman J in the case of *Afriforum and Another v University of the*

Free State (2018) discussed in chapters six and seven of this thesis. Simply put it can be questioned whether a monolingual language of record policy does not undermine the constitutional provisions and discriminate against the majority of the people on grounds of language.

The situation is complicated by the fact there are twenty-two languages recognised by the Constitution of India besides English. There are however, regional languages that can be used in the lower courts and this can be regulated by a policy in which the regional language(s) are placed alongside English as is done in Canada and to an extent in Belgium as per the discussions in this chapter above. This would require the collective effort of the judiciary (including legal practitioners) and the state. As with any society, this support is subjective and speaks to the power relations and agendas pursued by these individuals tasked with affecting the rights of the majority. Sonewal (2016) through an investigation of whether it would be feasible for Hindi to be used in all courts of India recorded the views of legal practitioners.

Vivek Sood a senior Advocate in the Delhi High Court provided three reasons why English should be the sole official language of record for all courts. Firstly, that English was an established legal language having been used in Indian courts for a period exceeding one hundred and fifty years (Sonewal, 2016). Secondly, the introduction of Hindi into the courts will be a burden on the courts (Sonewal, 2016). The second point was substantiated through the third with Sood explaining that there was already a huge backlog in cases coupled with the shortage of judges amongst other issues that needed to be addressed as a matter of urgency rather than being hung up on the fact that English a, colonial language was used (Sonewal, 2016). Sood's views undermine the important function of language and the role it plays in facilitating access to justice in a multilingual country where the majority do not understand English. Furthermore that the English only agenda does not adversely affect him so why change it? The importance of the language question is downplayed by what is perceived as more pressing.

Yatindra Chaudhary an Advocate in the Supreme Court, presents both sides of the coin arguing that the introduction of Hindi will be of benefit to the litigants and that in some instances cases proceed in a language other than English where the judicial officer is competent and comfortable to proceed in that language (Sonewal, 2016). Allahabad High Court permits the use of Hindi for court proceedings (Sonewal, 2016). Chaudhary believes

the introduction of Hindi will assist lawyers who have a limited command of the English language (Sonewal, 2016). Chaudhary recognises the limitations, not of introducing indigenous languages but rather Hindi only as there is a language divide in India between the North and South and East and West (Sonewal, 2016). Simply put a one-size fits all, policy will not be effective but rather regionally based language policies. Another Advocate of the Supreme Court, Aishwarya Bhati expressed similar views, providing more examples of courts, which permitted the use of languages other than English namely: Rajasthan courts use Hindi while the courts in Gujarat permit the use of Gujarati language (Sonewal, 2016).

There is consensus by some advocates for the use of languages other than English but also the acknowledgement of the difficulties in doing this given the language diversity and the development of English as a legal language and its colonial history which ensured the dominance of English. The views advanced above must be borne in mind in chapter six of this thesis where I advance the findings of a 2018 language survey that recorded the views of legal practitioners in South Africa on the use of language and multilingualism in the legal system (De Vries and Docrat, 2019). The discussion on the language of record in Indian courts points to the need to have the entire system transformed in which attorneys and advocates enter the legal profession having sound linguistic competency in a regional language in which they practice, as is the case in Belgium and Canada. The next section of this chapter advances a discussion on the legal education in India with specific reference to the language question.

5.25 Indian legal education through the medium of English

Access to education in English from primary school is not standard although this is on the rise, given the status of English as a global language. Hindi is the majority-spoken language in the North of India where a large number of law schools and Universities are located (Getman, 1969: 517). In the preceding paragraphs I made mention of the language war in India and the underlying caste system; this dates back to the 1960s in the education system where Getman (1969: 517) argued that there was an insurgence in the North to do away with English in favour of Hindi in all schools and courts.

Violent protests broke out at universities and law colleges, with Banaras Hindu University going to the extent of removing all traces of English including signage. At Banaras Hindu University as well as all other law colleges and universities in the North of India with the exception of students in Delhi, students had a minimal understanding of English (Getman,

1969: 517). Their limited English linguistic competency made it difficult to engage with the cases and other academic and legal texts written in English (Getman, 1969: 517). As a result, the North was primarily educated in Hindi and the South educated in English. This sparked a further divide between students who could not be recruited to universities in the North given the growing tensions (Getman, 1969: 518).

There is a need to educate students in their mother tongue and this should not result in the exclusion of other students at universities or law colleges. Getman (1969: 519) notes that course material and legal and academic texts will have to be translated in order to graduate lawyers who have a sound accord of the language(s) and where these students themselves are not disadvantaged as the litigants are. Getman (1969: 519) recommends that courses be taught bilingually to ensure representation across Indian states and allow students to be in a position to express themselves in their mother tongue while also acquiring the skill in English.

5.26 Conclusion

This chapter is similar to chapter four in that there are common threads between the international case studies. The case studies of Belgium and Canada illustrate the inclusivity that is being achieved in the legal system through the prioritisation of the language question. In both Belgium and Canada, language is seen as a resource in courts. This progressiveness is enabled and regulated through the constitutional and legislative frameworks. Indeed, there is a history of language marginalisation or restrictive interpretation, but both cases studies have proved that this can be overcome where commitment is key from all relevant persons and sectors in society. Languages are seen as equal in status and use and the speakers of these languages are treated equally. The regionally based language policies are effective and the language policies for the legal system are workable and give effective meaning to language rights. These are both countries, which South Africa can emulate.

Australia and India are similar to South Africa with regard to historical political influences particularly in the form of English that was entrenched as a result of colonialism. The countries are also similar in that there is greater language diversity. It can be argued from the discussions that the language diversity can be a complication depending on which view is adopted. In these countries, the language question was problematized and language, power, politics and economics are closely related in advancing a specific agenda of a political

English speaking elite. There is an inherent system of inferiority bestowed on Aboriginal people and their languages. This is evidenced from the establishment of bush courts and the non-existent or in some areas low levels of interpretation services for Aboriginal litigants. The disregard by a political English speaking elite in Australia is evidenced by the sentiments of the Chief Minister as captured by MacFarlane *et al* (2019) who said providing interpretation services equated to providing a wheelchair to able people. South Africa must take note of the danger of having a monolingual language of record policy in a multilingual country and the effect this will have on the indigenous people and their languages. Furthermore, that when adopting a monolingual language of record policy, interpretation services needs to be of the highest level and readily available at all times at the state's expense.

The case study of India, also presents as a complex model in which language in a multilingual country is further problematized by cultural differences inherent of the caste system. India, although trying to make an effort in certain aspects of the legal system is plagued by additional problems such as the attitude of legal practitioners towards the indigenous languages and the divisive higher education language policies. This is particularly important for South Africa given the recent judgments in the cases of *Gelyke Kanse and Others* v *Chairman of the Senate of the Stellenbosch University and Others* (2019) where universities are adopting English only language policies on the basis of access and transformation.

As with chapter four, the international case studies have highlighted the global dominance of English, although spoken by a minority is advanced through power, politics and economics. When English is the sole official language of record and used in proceedings to the exclusion of the indigenous languages, a country will not be inclusive and will be divided along lines of language. This must be avoided where language policies are drafted that counteract this form of discrimination and marginalisation where inclusivity is achieved as with Belgium and Canada. The chapter that follows contains the data presented in this thesis.

CHAPTER SIX

DATA PRESENTATION

6.1 Introduction

In this chapter, I present the data that underpins the thesis against the theoretical backdrop of chapter two. This chapter lays the foreground for the discussions in chapter seven in which this data is analysed and discussed from a critical point of view. In this chapter, I advance the constitutional and legislative and policy frameworks, and how this relates to the monolingual language of record directive for courts in South Africa. Thereafter I present the language policies of selected universities, in an attempt to show the correlation between these language policies and the language of record directive for all courts. The empirical data, which this chapter presents, is in the form of case law and relevant language surveys and language demographics more broadly, in illustrating the need to have legislative and policy frameworks that give practical and effective meaning to the language demographics.

6.2 South African constitutional framework

Given that South Africa is a signatory to the United Nations Articles, cited, in chapter four of this thesis, the constitutional and legislative frameworks are to comply with these provisions. I have already referred to the Constitution in this thesis, given its authoritative nature being the supreme law in the country. As per the discussions in chapters one and two of this thesis, the Constitution was the final 'product' of the historic CODESA negotiations. This is important given that the objective of the Constitution is to ensure a non-racial, democratic South Africa premised on the rights to dignity, equality and freedom. In chapter five of this thesis, Gibbons (2003) spoke to the importance of dignity for litigants and speakers of the indigenous languages in courts and how this affects the equality of status of the language and the speakers of the languages. In the South African context, this is important given the historical discrimination and marginalisation endured during Apartheid and prior to that during colonial rule.

Section 6 of the Constitution, the languages provision must be viewed in light of the discussions in chapters one and two of this thesis, where I advanced that the NP's intention was clear that Afrikaans had to remain an official language under the new democratic dispensation. Section 6 thus in addition conferred official status on the nine African languages, as reflected in Section 6(1):

> The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

In chapters one and two I argued that the ANC had no similar intention as that of the NP in defending the African languages, so it can be argued that subsection (2) was merely inserted for the purposes of illustrating that they too were interested in the promotion of the African languages. Subsection (2) states:

> Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

It appears that subsection (2) provides for the development of the nine African languages to equate the nine African languages alongside English and Afrikaans. The implementation of Section 6(2) would entail the use of the nine African languages in high status domains, the public sector and in higher education institutions as languages of learning and teaching. As will be evidenced from the forthcoming discussions in this chapter as well as chapter seven this is not the case particularly in the legal system and in higher education, the areas in which this research is located. The lack of implementation is due to the 'opt-out' provision in Section 6(3) (a) stating:

> The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

There are several points of discussion emanating from subsection (3)(a). The first point is the discretionary language used in the construction of this provision as a whole, through the use of words and phrases such as 'may', 'any particular' and 'at least'. As per the Canadian case law discussion in chapter five above, the discretion is not limiting but rather provides for a minimum standard. The method of interpretation employed as discussed in chapter two of this thesis can result in restrictive or purposive interpretation. In the South African context, outlined in chapters one and two of this thesis there is an inherent failure to implement policies and legislation in a purposive manner. Therefore discretionary provisions such as subsection (3)(a) provides government at both national and provincial levels to opt for the English and Afrikaans default position. The default provision is then justified against the criteria of usage, practicality and expense, as it is cost effective to continue using English and Afrikaans as most documentation at public service departments are in these two languages. Even though subsection (3)(a) includes obligatory language in the last line through the insertion of the word 'must' this is qualified by a minimum standard by the phrase 'at least two official languages'. Subsection (3)(a) is also important for policy and legislative purposes where government cannot adopt one language only. This must be borne in mind with the forthcoming discussions on the Languages Act (2012) and the Department of Justice and Constitutional Development's language policy (2019).

The drafting and enacting of the Languages Act (2012) was provided for through Section 6(4):

> The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages, without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

Subsection 6(4) provides for the drafting and enacting of legislation and policies amongst other measures in regulating to the use of the official languages. Subsection 6(4) by including subsection (2) in my opinion provides that the legislation and other measures must conform to the provisions of subsection (2) regarding the elevation, promotion and use of the nine African languages. The phrase "… all official languages must enjoy parity of esteem and must by treated equitably" again appears to be vague given the inclusion of the phrases

‘parity of esteem’ and ‘treated equitably’ which are not defined. The use of phrases such as treated equally is excluded in favour of cryptic language that requires interpretation and thus is discretionary. My reasoning is informed by the discussions in chapter five of this thesis, specifically the Canadian case study that includes the term linguistic duality that equates the languages equally in both status and use. Subsection (4) will be of relevance for the discussion concerning the primary language legislation, the Languages Act (2012) discussed fully in this chapter below.

The Constitution through Section 6(5) provides for the monitoring and evaluation of the legislative means in creating conditions for the development and use of the official languages with the creation of a Pan South African Language Board (PanSALB). According to subsection (5), the role of PanSALB is to:

(a) promote, and create conditions for, the development and use of-

i. all official languages;

ii. the Khoi, Nama and San languages; and

iii. sign language; and

(b) promote and ensure respect for-

i. all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and

ii. Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

Subsection 5(a) (i) is important for the purposes of this research where the provision refers the promotion and development of all official languages not just one or two official languages. This will be important to bear in mind with the discussion of the Languages Act (2012) and its objectives in addition to the Draft Language Policy of the Department of Justice (2019) and the language of record directive of 2018 (Appendix D).

Although I have made initial critiques and observations on Section 6 of the Constitution, a full critique and application can be found in chapter seven of this thesis. Suffice to say at this point of the discussion that holistically Section 6 appears to be discretionary and depending on the viewpoint adopted, this can be either a positive or a negative aspect. In Cameron's (2013: 15) opinion the Constitution merely creates a framework that enables the people of South Africa, government, the leadership and all relevant stakeholders to implement this framework. Therefore, the discretionary element is needed to provide for implementation within practical spheres.

6.3 South African constitutional language rights

In chapters two, four, five, and the beginning of this chapter, I have spoken about the importance of dignity and equality with reference to languages enjoying equal status and the speakers of these various languages being treated equally and thus being treated with dignity. This was also discussed more prominently with reference to chapter five and the case study on Australia where I evidenced with the work of Eades (1994), Cooke (2009) and Gibbons (2003), the plight of Aboriginal people and the loss of dignity due to the continued marginalisation and discrimination on grounds of language. The themes of dignity and equality are thread throughout this thesis and this chapter where I advance the language in equality rights in Section 9 of the Constitution and the need to redress the past discrimination in the legal system as outlined in Section 174 of the Constitution. In this section of chapter six, I advance the language rights applicable in the legal system and higher education.

The language rights are housed in the Bill of Rights (BOR), Chapter Two of the Constitution, as opposed to Section 6, located in the Founding Provisions of the Constitution. This distinction is important for the purposes of the legislative and policy frameworks as well as the case law. Section 7 of the Constitution states:

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in Section 36 of elsewhere in the Bill.

Section 7 reaffirms the values of human dignity and equality in relation to the implementation of the rights, discussed below. Subsection (2) obligates the state to implement the rights and respect these rights. Subsection (2) must be borne in mind with the presentation of the language of record directive in this chapter below and the discussion thereof in chapter seven of this thesis. Subsection (3) provides for the limitation of rights in accordance with Section 36 of the Constitution. This will be discussed in depth in relation to the sliding scale formula (Currie and de Waal, 2005), when limiting language rights.

The right concerning language in the legal system is Section 35 of the Constitution dealing with the rights of arrested, detained and accused persons. I have extracted the following provisions, relevant to this research:

(1) Everyone who is arrested for allegedly committing an offence has the right-

(a) to remain silent;

(b) to be informed promptly-

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released;

(2) Everyone who is detained, including every sentenced prisoner, has the right-

(a) to be informed promptly of the reason for being detained;

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful to be released;

(3) Every accused has the right to a fair trial, which includes the right-

(a) to be informed of the charge in sufficient detail to answer it;

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

The primary focus in research located in language and law in South Africa focusses on Section 35(3) (k) (Docrat and Kaschula, 2015; Docrat 2017; Kaschula and Ralarala, 2004; Lubbe, 2008; Ralarala 2012), however this research focusses more broadly on the language of record in courts of law. Having said this I have extracted other provisions beyond the ambit of Section 35(3) (k), given the relevance. The language of record influences more than just proceedings in courts. In order to proceed in one language all documents have to be available and produced in that specific language, i.e. in the South African context, English.

In criminal cases, to begin with, the police arrest a person; the police in terms of Section 35(1) (b)(i) and (ii) are to inform the arrested person of their right to remain silent. Reading Section 35(3) (1)(i) and (ii) with Section 35(4) the police would need to provide such information in an African language where the arrested person does not understand English. This implies that the police officer is to be linguistically competent in that specific language. This point is discussed in further detail below with reference to the Draft language policy of the South African Police Services (2015).

The next step in the process is that the arrested person be brought before a court as per Section 35(1) (e) to be formally charged. These proceedings are in English given the language of record and an arrested person would then need to rely on an interpreter, where they have limited or no understanding of English.

If charged, a charge sheet will be drawn up in English accompanied by witness statements, complainant's statement, and the accused's warning statement if one was taken (depending on whether the right to remain silent was not exercised) in criminal cases the docket, comprising the various statements and charge sheet is produced in English. There is a contradiction then when reading subsection (3)(a) where the charge is to be supplied in sufficient detail to answer it, this conversely requires the accused to understand the charge in order to answer it. As will be evident from the case law discussed in this chapter there is no case law, which presently examines this area of law. To draw on the case studies in chapters four and five, there was also the question of understanding the charge and presenting a case to that effect. With chapter four, similar issues arise in the African case studies where an emphasis is not placed on language in the legal system. In the case study on Australia, in chapter five, I highlighted the issues plaguing the legal system and how aboriginal indigenous speakers are excluded and discriminated against on the basis of language and understanding. In the case study on Canada in chapter five, I advanced a discussion with reference to case law concerning the charge sheet (indictment) being available in a language of choice based on the two official languages. In these case studies these issues are fleshed out given the literature available on the area, something which is absent in South Africa.

On the point of 'understanding', this is another contentious issue that can be debated taking into account subsection (4) quoted above. What is the definition of understand? To my

knowledge, there is no yardstick in law that determines or can test a person's understanding in court of law. It must be questioned if a judicial officer has the requisite knowledge to test understanding. This is also important for the purposes of the language of record directive by Hlophe J (see Appendix D), who uses the word 'understanding' for the purposes of interpretation.

This is also important in the discussion concerning Section 35(3) (k) of the Constitution where a language right is conferred upon accused persons. This right is however; limited given that, where a person does not 'understand' the language of the proceedings interpretation will be employed. Thus, the insertion of words such as 'practicable' and 'understands' is vague and limiting. I use the word limiting, as it is my opinion that in most instances, given the statistics presented below, the majority of South Africa does not speak English as their mother tongue. The vast majority are then reliant on interpretational services and that in my opinion provides a different standard of justice to English mother tongue speakers and African language and Afrikaans mother tongue speakers. English mother tongue speakers, have a language right conferred and the indigenous speaking accused have an interpretational right conferred. I elucidate this point in chapter seven of this thesis.

Reverting to the discussion of 'understanding' in the context of Section 35(3) (k) Schwikkard (2013: 800) explains that the right is not for a language of choice but rather a language the accused fully understands. Schwikkard (2013: 800) explains that this language must be fully and not partially understood; therefore, minimal understanding of a language is not sufficient. Schwikkard (2013: 800) too, does not provide any elucidation of how a judicial officer determines if an accused fully understands a language. In the Australian and Indian case studies presented in chapter five, the dangers are seen with regard to accused persons stating that they do understand English as they are of the opinion that by saying otherwise they will be disadvantaged before the law. The latter point must be borne in mind with the discussion concerning the case law, in particular the case of the *State* v *Pienaar* (2000). The discussion concerning an interpretational right as opposed to a language right is discussed in chapter seven of this thesis.

I have constantly referred to the language of record affecting the rights of litigants, the effect the language of record has on access to justice and if accessed, the level of justice obtained.

All of these factors are influenced by people, in particular legal practitioners and judicial officers. Simply put the language in law rights are influenced and in my opinion determined by the language in education right of Section 29(2) of the Constitution:

> (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-
>
> (a) equity;
>
> (b) practicability; and
>
> (c) the need to redress the results of past racially discriminatory laws and practices.

Section 29(2) confers a language right on all persons in both basic and higher education public institutions. Similar to the constitutional provisions advanced above, the language right is internally qualified through the phrase "… where that education is reasonably practicable". The reasonability standard is assessed through objective criteria, premised on the facts of each case. The reasonability standard is often a subjective test, where the court will apply the criteria to the facts before it. In the section of this chapter comprising case law, I have discussed this point in greater depth.

It is my opinion further, that the language right is qualified further; through the phase, "… the state must consider all reasonable educational alternatives, including single medium institutions…". This resembles the provisions of Section 35(3) (k) through the limitation "… where practicable…". It is to a certain extent mitigated in the sense of ensuring the right is not limited unfairly through the application of the criteria in (a) to (c). The vagueness of the term 'practicability' is once again included as a criterion. Criterion (c) however, correlates with Section 6(2) of the Constitution in taking cognisance of the historical marginalisation of the nine indigenous languages.

Section 6, should in my opinion permeate all other correlating rights and provisions of the Constitution including Section 174 of the Constitution, which regulates and guides the appointment of professionals to public office that directly affects the broader citizens. Section 174 is related to Sections 29(2) and 35 of the Constitution. In my opinion, it would be of benefit to both litigants, witnesses and legal practitioners to recognise the linguistic competency of legal practitioners when affecting judicial appointments to the bench. Unfortunately, the provisions of Section 174 falls short of transforming the profession in an inclusive way, where access to justice is prioritised through the language question. Section 174(1) and (2), of the Constitution regulating the appointment of judicial officers is relevant to this research and states:

(1) Any appropriately qualified woman or man who is a fit and proper person many be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed. in

There is no inclusion of language alongside race and gender in subsection (2). It is my opinion that subsection (1) referring to "an appropriately qualified woman or man" must include linguistic competence, given especially the multilingual context in which these legal professionals are appointed to the bench, with the majority of persons not speaking English as their mother tongue. This is not a foreign idea, given the African and international case studies I have advanced in chapters four and five of this thesis, where judicial officers have to be linguistically competent before being appointed to the bench. In a multilingual country such as South Africa, this is key to enabling and enhancing access to justice. In chapters four and five I also advanced the importance of ensuring greater representation of legal practitioners, this relates to the language in education right, Section 29(2) and universities' obligation through language policies. Besides the examples of Belgium and Canada, who are successfully producing bilingual/ multilingual LLB graduates, legal professionals themselves have stated the importance of this in India. With Nigeria in chapter five proving the dangers of adopting an English only western system to educate law students, isolates these professionals in practice from giving effective meaning to the broader populace accessing the

legal system. In chapter two I advanced opportunity planning (Antia, 2017) as the forth tier of language planning and how language can be used to create employment opportunities. Where the investment in the micro economy through language in education policies positively affects the macro economy as explained by Kaschula (2004 and 2019) and (Grin, 2010).

This rights framework requires interpretation and application in practice, given Cameron's (2013) views that the Constitution is just a framework that needs to be developed. The Constitution itself recognises the application of the provisions in courts of law, especially when the rights or provisions contained therein are to be determined by a court of law. Section 8 of the Constitution is the provision providing for the application and development of the rights in the BOR advanced above.

6.4 Language equality in the South African legal system

In chapter five, I discussed the importance of equality amongst languages and for speakers of the various languages. In each of the case studies in both chapters four and five there were elements of linguistic inequality, some more prevalent than others. With the Canadian case study, I advanced the principle of linguistic duality, an absent principle in the South African context (this will become more apparent following the presentation of the relevant legislation in this chapter), where the focus is on equitable treatment rather than equal treatment.

Section 9 of the Constitution comprises the right to equality:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including… language…

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

In applying subsection (1) to the monolingual language of record directive for courts, how can everyone be equal before the law and have equal access to justice, if African language and Afrikaans speaking litigants are solely reliant on interpretation? English speaking litigants are then more equal before the law and have easier access to justice than their African language and Afrikaans-speaking counterparts. This scenario entails the majority of South Africans, not benefitting from the equal enjoyment of all rights, in this instance, the language rights espoused in Section 35 of the Constitution, thus limiting the right in Section 9(2) of the Constitution. This is contradictory; given the second half, the right in Section 9(2), which calls for measures to be put in place to ensure the equal treatment of persons who have been disadvantaged by unfair discrimination. The irony lies in the fact that African language speakers have been marginalised during colonialism and Apartheid, as I discussed in chapters one and two, yet the monolingual language of record policy is a measure that appears to entrench this discrimination, even though, unfair discrimination on grounds of language is precluded by Section 9(3) of the Constitution .

Section 9 of the Constitution refers to unfair discrimination and fair discrimination being permissible. Colloquially, discrimination in any form is considered unfair; legally however, discrimination can be fair if proved. Simply put all discrimination is presumed to be unfair unless proved otherwise as per subsection (5). In accordance with subsection (4) legislation was enacted in the form of, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act). The Equality Act (2000) is not a replacement of Section 9, rather an elucidation. When alleging discrimination on one or more grounds in Section 9(3) the allegation must be brought in terms of the Equality Act (2000). Direct

reliance on Section 9 will only take place in exceptional circumstances, where the alleged discrimination is beyond the scope Equality Act (2000) and any other legislation (Ngcukaitobi, 2013: 245).

Unfair discrimination is determined through the application of Section 14 of the Equality Act (2000) to the facts of each case.

> (2) In determining whether the respondent has proved the discrimination is fair, the following must be taken into account:
>
> > (a) The context;
> >
> > (b) The factors referred to in subsection (3);
> >
> > (c) Whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection (2)(b) include the following:

> (a) whether the discrimination impairs or is likely to impair human dignity;
>
> (b) the impact or likely impact of the discrimination on the complainant;
>
> (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage;
>
> (d) the nature and the extent of the discrimination;
>
> (e) whether the discrimination is systemic in nature;
>
> (f) whether the discrimination has a legitimate purpose;
>
> (g) whether and to what extent the discrimination achieves its purpose;
>
> (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstance to –

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(i) accommodate diversity.

According to Docrat (2017a: 301) Section 14(2) limits the possibilities of alleged acts of unfair discrimination being termed fair. Furthermore that if one of the listed criterions in Section 14 is not satisfied the alleged discrimination must be declared unfair (Docrat, 2017: 301). I will engage further with Section 14 in chapter seven of this thesis when I critique, the monolingual language of record directive. At this stage of the discussion, I must however highlight the similarities between Section 14(3) of the Equality Act (2000) and the provisions of Section 6 of the Constitution both make an intrinsic call for the furtherance of the right of those persons previously marginalised and discriminated against.

6.5 The limitations analysis: Sliding scale formula

Section 36 of the Constitution provides for the limitation of rights and is referred to as the limitations analysis.

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

As with Section 14 of the Equality Act (2000) the limitability of a right is minimal according to Section 36(1) and the criteria in (a) to (e). A two-stage approach is employed in limiting a right in the BOR. The first stage is where the court identifies the right in the BOR that has allegedly been infringed by either a person or the state. If the first stage is satisfied and a right has been infringed the court proceeds to the second stage. In the second stage, the court will determine whether the infringement of the right can be justified as a permissible limitation of the right (Currie and de Waal, 2013: 151-152). With the second stage, the court will apply the facts of the case to the criteria listed in Section 36(1) (a) to (e) of the Constitution in determining when the limitation is justifiable in an open and democratic society.

With Section 36 of the Constitution being a law of general application, Currie and de Waal (2005) drafted specific criteria for the limitation of language rights in the BOR. Currie and de Waal (2005) provide this criteria in the form of a sliding scale, that the authors applied to the language in education right, Section 29(2). The sliding scale formula can however be applied to all language rights. Essentially, the sliding scale formula provides checks and balances ensuring rights are not unfairly limited. This includes: "… the number of speakers in a given area; their concentration; as well as the seriousness of the service involved" (Currie and de Waal, 2005: 632). The sliding scale is important with the application of the monolingual language of record policy directive for courts that limits the language right in Section 35 of the Constitution. The sliding scale formula, checks and balances must be borne in mind in relation to the language demographics across provinces is presented further on in this chapter. The seriousness of the service in the context of this research is access to justice and this is pivotal especially in criminal cases for the accused to be afforded a fair trial and where language is not a hindrance in defending the charge; nor a hindrance for a complainant providing evidence, being cross-examined or laying the charge in the initial stage of the

investigation. Thus, the seriousness of the service has already been established at this stage in the research.

6.6 Language legislation: Use of Official Languages Act

In chapter two of this thesis, with reference to the work of du Plessis (2012) and Turi (1993), I outlined the principles guiding the drafting of language legislation in a multilingual country and the importance of having primary language legislation. In the previous sections of this chapter, it was evident that Section 6(4) of the Constitution obligated the government at national and provincial level to regulate and monitor their use of the official languages, without detracting from the provisions of subsection (2). It is my understanding, that this entails a language act at national level that regulates and monitors the use of the official languages by prescribing that all languages be used 'equally' and how this will be achieved. I have placed the word equally in inverted commas, given that the Constitution uses the word equitable, but in my opinion, languages can only be used reasonably, where they are used equally.

In chapter, two of this thesis I discussed LANGTAG (1996) which was supposed to be groundwork upon which primary legislation was to be enacted. This never happened and South Africa accepted that language use and planning was a simple task that did not have to be guided through legislation and regulated by policies. There was a failure to comply with Section 6(4) of the Constitution. The failure to have national primary language legislation was challenged by Cerneels Lourens, a legal practitioner in the North West Province of South Africa, who also has a distinct interest in language rights and the use of language in courts as a means to access justice. In the case of *Lourens* v *President of the Republic of South Africa and Another* (2013) the court held that government did fail in its constitutional mandate of Section 6(4) to enact legislation and ordered government to do so with immediate effect. The judgment thus resulted in the drafting and enacting of the Use of Official Languages Act, 12 of 2012.

When the Languages Act (2012) was in Bill form, there was a process of public participation that needed to have taken place, which was overlooked. This point is advanced against the theoretical discussions in chapter two concerning the process of legislative drafting. With the

Languages Act (2012) there was no proper consultative process followed. The consultative process is important, especially with primary language legislation that will affect the language rights of citizens, and access to public services in the official languages. By failing to engage in a thorough process of public participation, a top-down approach was adopted. This is contrary to Alexander's (1992) bottom-up approach, that Pretorius (2012) argued was necessary to avoid the weakening and effectiveness of the legislation. In my mind, the public participation process is an opportunity to engage with the very people that the statute will affect, be it positively or negatively. The public will have an opportunity to provide their opinions, concerns and recommendations for the production of the final Bill sent for the President to sign it into law. The public are less inclined to accept and comply with a statute that does not positively affect their situation or one they are unfamiliar with. I have extracted the provisions relevant from the Languages Act (2012) to the thesis at hand commencing with the objectives in Section 2 of Languages Act (2012):

(a) to regulate and monitor the use of official languages for government purposes by national government;
(b) to promote parity of esteem and equitable treatment of official languages of the Republic;
(c) to facilitate equitable access to services and information of national government; and
(d) to promote good language management by national government for efficient public service administration and to meet the needs of the public.

The objectives of the Languages Act (2012) are not elucidatory and instead resemble the provisions of Section 6 of the Constitution. There is no issue in resembling Section 6 of the Constitution; however, the Languages Act (2012) is supposed to provide a framework in which Section 6 of the Constitution can be implemented in practice, not repeat what is stated. The objectives of the Languages Act (2012) also include the word 'equitable' and thus includes the reasonable and not equal use of the official languages.

Section 3(1) of the Languages Act (2012) provides for the application of the Languages Act (2012) in the following:

(a) national departments;
(b) national public entities; and

(c) national public enterprises.

The relevance and application of the Languages Act (2012) to the research at hand may be questioned in light of Section 3(1), where the judiciary is not included. In chapter one of this thesis, I discussed the judiciary and its hierarchical structure, in terms of the doctrine of SOP. Although it does not apply to the judiciary, it applies to the Department of Justice and Constitutional Development, who employs prosecutors and all other legal personnel including interpreters. The Languages Act (2012) also applies to the South African Police Services (SAPS), who are the first port of call for complainants in criminal cases, arrested, accused, and detained persons as per Section 35 of the Constitution.

The Languages Act (2012) obligates each of the entities identified in Section 3(1) to draft a language policy that gives practical effect to the Act (2012) as well as the constitutional provisions. These directives are in Section 4 of the Languages Act (2012) and requires that practical measures be taken in publicising the language policy for the broader citizenry. This point can be contrasted to the lack of public participation during the drafting stages of the Languages Act (2012). I am of the opinion that buy in; following the enactment of a statute will be more difficult, as citizens will be raising issues during implementation that should have been addressed at the drafting stage. According to Docrat and Kaschula (2015) language planning in South Africa has a high failure rate during the implementation stage, as the policy does not address the needs of the people and fails to address practical problems.

6.7 Language Policies: Department of Justice and Constitutional Development and the South African Police Services

Regardless of whether or not the Languages Act (2012) has been criticised as an Act for government by government, it is the primary language legislation. Given our history in South Africa and the failure to enact primary language legislation sixteen years after the final Constitution, it would be inane to challenge the constitutionality of the Languages Act (2012). We would be back to square one with no legislation at all. My point is that the focus should shift to the language policies as per Section 4(1) of the Languages Act (2012) and the effectiveness thereof.

The Language Policy of the Department of Justice and Constitutional Development was gazetted on 26 April 2019. At the onset the note from the then Minister, Michael Masutha provides a caveat: "it is further made known that this Policy will be implemented incrementally with effect from 1 August 2019 taking into consideration the resource implications arising therefrom". It is realistic to state that Policy will be implemented incrementally, this is reasonable, although no time frame is provided. Furthermore, one cannot but question the intention behind "…resource implications…". This will need to be assessed in determining whether this policy is not being implemented as a result of a resource-based defence. The following provisions of the Policy are relevant to this research.

Section 4 of the Policy, objectives notably includes the need to:

> 4.1.7 Redress the linguistic inequalities of the past, which resulted in the underdevelopment of indigenous African languages and discrimination against speakers of such languages.

Section 5 guiding principles and values:

> 5.2 Recognition that English is understood across the country, and has become a general language of use nationally and internationally.
>
> 5.4 Acknowledgement that Afrikaans' is an indigenous language that enjoys popularity in the country, except in the Mpumalanga and Limpopo provinces. It had official status in the past, is still an official language in terms of the Constitution, and is a second language in many communities.

7. Scope of the Policy

> 7.1 This Policy applies to all personnel of the Department and all services offered by the Department at its offices and service points.

8. Use of Official Languages for Government Purposes

> 8.1 The Department having considered the language demographics report published in Census 2011 by the Statistician -General in terms of the Statistics Act, 1999 (Act No. 6 of 1999), and taking into account the guiding principles and values in paragraph 5

above, as contemplated in section 4 of the Act, determines the use of official languages as indicated below, subject to the availability of resources.

8.2 It is determined that English is the language of record for the Department.

8.3 It is further determined that in the national office the following languages are selected for official use:

8.3.1 English;

8.3.2 Sesotho;

8.3.3 Afrikaans; and

8.3.4 isiZulu.

9. Use of Official Languages by the Department in the Various Provinces in Communicating with the Public

9.1 The official languages selected for use in the regional offices are indicated in the table Use of official languages in provinces /regions

9.1 1 Eastern Cape: English, isiXhosa, Afrikaans and Sesotho

9.1.2 Free State: English, Sesotho, Afrikaans and isiXhosa

9.1.3 Gauteng: English, isiZulu, Afrikaans and Sesotho

9.1.4 KwaZulu-Natal: English, isiZulu, isiXhosa and Afrikaans

9.1.5 Mpumalanga: English, Siswati, Xitsonga and isiNdebele

9.1.6 Northern Cape: English, Afrikaans, Setswana and isiXhosa

9.1.7 Limpopo: English, Sepedi, Xitsonga and Tshivenda

9.1.8 North West: English, Setswana, Afrikaans and Sesotho

9.1.9 Western Cape: English, Afrikaans, isiXhosa and Sesotho

9.2 All public information signs and signage identifying facilities and services may be displayed /published in line with the determination above.

9.3 The Department's reports, documents, records and transcripts may be published in line with the determination above.

10. Hearings and other Official Proceedings

10.1 Hearings and other official proceedings may be conducted in English where a party to the hearing or proceedings does not understand any of the official languages selected for that area.

10.2 Where all parties understand any of the selected official languages, other than English, the hearing or proceedings may be conducted in that language.

10.3 Where all parties understand any of the official languages, other than those selected for that area, the hearing or proceedings may be conducted in that official language.

10.4 In the event of a review or appeal of the hearing or other official proceedings conducted in terms of paragraph 10.2 and 10.3 above, the Department shall make available the said record in English if required /necessary to do so.

14. Language of Court Proceedings

14.1 The use of official languages in court, including court interpretation services, court processes, court documents and recording of court proceedings, shall be regulated, consistent with section 171(3) of the Constitution, by the Rules of Court or any other applicable legislation.

Sections 4 and 5.4 are positive in that they correlate with Section 6 of the Constitution and goes a step further by recognising Afrikaans as an indigenous language. The presence of Afrikaans as a language in South Africa is noted through the number of speakers as acknowledged in Section 5.4 of this policy. As with the constitutional language provisions this policy detracts from the positive acknowledgements with the inclusion of sweeping ill-informed statements as per Section 5.2 that English is understood across the country. This can only be seen to substantiate a monolingual language of record policy for courts. I make this point based on the statistics presented further on in this chapter, specifically the language statistics pertaining to the legal system, where the majority of litigants have minimal or no

understanding of English, in criminal cases. Section 5.2 also raises the question of what is meant be understood? As evidenced in the Australian context Gibbons (2003) explained that there is a difference between greetings and an informal discussion in a social setting to understanding a language in a courtroom or other formal sector.

The scope of the policy, outlined in Section 7, relates directly to all employees of the Department of Justice and this would include prosecutors who although perform their duties within the ambit of the public prosecutions office, are employees of the state. This point must be borne in mind in chapter seven of this thesis, where I have discussed the language competencies of prosecutors and interpreters (see: Turner, 2019 Interview: Appendix R; Mbangi, 2019 Interview: Appendix O).

There are two distinctive language of records referred to in the policy, it can be argued that they are linked given that the language of record referred to Section 8.2 for all documentation affects the language of record (proceedings) in courts. It is concerning to see that the policy supposedly takes cognisance of the 2011 Census language statistics, yet prescribes that English be the sole official language of record for all documentation. The remaining provisions of Sections 8 and 9 of the policy does allow for communication between officials and the broader public in the official languages of the province, including English.

Section 10 of the policy is advanced and provides practical meaning to Section 6 of the Constitution where all the official languages are treated equally in status and use. By providing for the use of an official language other than, English where all the parties concerned are comfortable with the language, this is both practical and ensures language rights of all are implemented. It is thus disappointing to see that this practical and positive thinking was not extended to the language of record / language of proceedings in courts. Section 14 of the policy fails to address the contentious issue of the language of record in courts. Instead, one is re-directed to the Rules of Court and ‘other relevant legislation’ of which the latter is non-existent. Although the matter is not dealt with and continues to provide uncertainty, one thing, which can be clarified, is that the language of record for courts is not a judicial decision but must rather be determined by legislation. I return to this point in further detail in this chapter with reference to the language of record directive as well as in chapter seven where the issues are elucidated.

The second and final language policy enacted in accordance with the Languages Act (2012), relevant to this research is the Language Policy of the South African Police Service (2015). This policy however is still in draft format and has not been signed into law. This policy is relevant to the research at hand, as accused persons and complainants access the justice system, commencing at the police station or in the case of an arrested person, is read their constitutional rights by a police officer as explained in Section 35 of the Constitution.

The SAPS draft language policy (2015), primarily deals with internal communication within the service. It also adopts English as the 'main working language', defined as the official language selected by the service as the language(s) most practicable to use in that instance of communication, for all communication. The insertion of 'practicable' is again vague and the provision is discretionary. The provincial official languages are recognised as languages of communication, but this is subject to finances and availability of expertise of language practitioners and interpreters. It is distressing and a missed-opportunity for the policy not have addressed the language of statement taking and communication between a police officer and complainant, accused and witnesses. The SAPS draft language policy (2015) is discussed in further detail in chapter seven of this thesis with reference to relevant case law and literature.

6.8 The Superior Courts Act

The language policy of the Department of Justice and Constitutional Development (2019), deferred the question of the language of record in courts to relevant legislation. The legislation governing and regulating the High courts and Magistrates' courts is the Superior Courts Act 10 of 2013 and the Magistrates' Courts Act 32 of 1944.

The Superior Courts Act (2013) makes no pronouncement on the language of record. The next point of determination is the Uniform Rules of Court (2013). The Uniform Rules Court (2013) are procedural rules regulating courts' processes, applicable to the High Courts. Rules 59 and 60(1) are applicable and read as follows:

(1) Where evidence in any proceedings is given in any language with which the court or a party or his representative is not sufficiently conversant, such evidence shall be

> interpreted by a competent interpreter, sworn to interpret faithfully and to the best of his ability in the languages concerned

The rules besides being sexist, by presuming only males are interpreters through the use of personal pronoun, focus on interpretation and thus reinforce the current status quo of the language of record, and do not recognise the nine African languages as languages of record. In fact, the Rules of Court (2013) makes no direct mention of the language of record.

The Rules of Court (2013) and Superior Courts Act (2013) are not alone in avoiding the language of record in courts, as the Supreme Court of Appeal Rules of Court (2013) also make no mention of the language of record. The Constitutional Court, being the apex court in South Africa through the Constitutional Rules (2003) of Court includes Rule 25 on the use of language, stating the following:

> Where any record or other document lodged with the Registrar contains material written in an official language that is not understood by all the judges, the Registrar shall have the portions of such record or document concerned translated by a sworn translator of the High Court into a language or languages that will be understood by such judges, and shall supply the parties with a copy of such translations.

Rule 25 thus permits the lodging of documents in a language other than English only and provides for professional translator services at the expense of the court. This is important in the context of having more than one language as a language of record where that language is not English. Simply put, as will be advanced in greater depth in chapter seven of this research, a criticism is always that using official languages other than English as languages of proceedings and record will result in translation costs and delays when cases are taken on appeal (see Turner, Interview 2019: Appendix R).

The Magistrates' Courts Act (1944) includes provisions on the language of record through Section 6(1) and (2):

> (1) Either of the official languages may be used at any stage of the proceedings in any court and the evidence shall be recorded in the language so used.

(2) If, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given, is one of the official languages or of whether the representative of the accused is conversant with the language used in the evidence or not".

Section 6(1) regulates the language of record and proceedings. By 'either', the Act refers to English or Afrikaans, which were the official languages of record. This will now have to be amended if the language of record directive by the Heads of Courts is in fact constitutionally sounds and gazetted. The point is however, that official languages other than English can be languages of record as there was already a bilingual language of record in place for many years. It is therefore neither foreign nor impractical to propose a bilingual language of record. Subsection (2) is problematic, specifically the phrase: "… accused professes or appears to the court to be sufficiently conversant …". The first reason why I am of the opinion it is problematic, is based on the Australian model in chapter five where indigenous language speaking witnesses are more inclined to state that they do understand the language of record. Secondly, how would a court determine an accused's linguistic competency? I have made this point previously, that there is no yardstick in law to determine the linguistic competency of an accused and the magistrate in all likelihood will not have a linguistic background and be in a position to determine this. These points of critique will be more apparent with the presentation of the South African case law further on in this chapter.

6.9 Legislative language requirements for legal practitioners

For a bilingual or multilingual language of record policy to be existent in each of the provinces, there would need to be linguistically competent legal practitioners. By linguistically competent, I refer to LLB graduates who have also mastered an official language other than or in addition to English at university level. This can readily be achieved where mother tongue African language and Afrikaans speaking students are able to learn their mother tongue at an intellectual university level. The same applies to second language

speakers, who already have a strong command of a second language and pursue this language at university level.

In chapter two of this thesis, I advanced the forth tier of language planning, namely opportunity planning (Antia, 2017) and how through language planning, incentives, must be created in order to successfully implement the language policy/ legislation. University language policies thus have to relate to the broader legislative framework of disciplines such as the legal system, where job creation is key.

In chapter one of this thesis, I noted that language requirements were legislated for attorneys in the Attorneys Act (1979) during Apartheid. These language requirements were in accordance with the official languages at the time, namely English, Afrikaans and Latin. With the transition to a constitutional democracy, the legislation was amended in the form of the Attorneys Amendment Act 115 of 1993. It was anticipated that the Attorneys Amendment Act (1993) would be reflective of the then 'new' constitutional language provisions of Section 6 of the Constitution, which was already in existence in the Interim Constitution (1993). This was not the case, and no African language requirements were included.

Chapter 1, Sections 2 to 24 of the Attorneys Amendment Act (1993) concerns the qualifications, admissions and removal from the roll. Language requirements for admission are absent from these provisions, specifically Sections 4 and 15 solely concerning admission to the attorneys' profession. Sections 13B and 14 concern the completion of training in legal practice management and practical examinations. Section 2 of the Attorneys Amendment Act (1993), the duration of service under articles. None of the provisions listed, include language requirements or training of any sorts.

Similar to the Attorneys Amendment Act (1993), the Admission of Advocates Act, 74 of 1964 was amended post-Apartheid resulting in the Admission of Advocates Amendment Act, 55 of 1994. The Admission of Advocates Act (1964) recognised English, Afrikaans and Latin as language requirements at university level prior to admission to the Bar of Advocates. This changed with the amendment and the change was highlighted in the purpose of the Act:

> [To] Amend the Admission of Advocates Act (1964) to abolish the requirement that must be complied with by persons in respect of the Latin language in order to be

admitted to practice as advocates; and to delete or substitute certain obsolete words and expressions; and to amend laws of the former Republics of Transkei, Bophuthatswana and Venda with regard to the admission of advocates; and to provide for matters connected therewith.

A clear abolishment of the Latin language requirement, however no insertion of an African language requirement. The English and Afrikaans language requirements were later also removed from the Act. Essentially, both the Attorneys Amendment Act (1993) and the Admission of Advocates Amendment Act (1994) failed to address the language question in the then 'new' dispensation. The legislature thought it neutral to removal all language requirements, but by doing so the status quo of the language of proceedings and record were maintained and that was English and Afrikaans. There was then no need or incentive for LLB graduates to acquire an African language before admission to the Side Bar or Bar. Thus, there was no onus upon universities to graduate bilingual or multilingual LLB students.

6.10 A transformed legal profession: Legal Practice Act

Thus far, I have established that the language of proceedings and record must be determined by the legislature through legislative and policy means in accordance with the SOP doctrine. Having said this, courts are creatures of statute, and the legislature in regulating the functioning of courts must have due regard to the constitutional provisions. The legislation I have advanced thus far, pertaining to South Africa, is illustrative of the legislature's failure to incorporate African language requirements, in accordance with Section 6 of the Constitution and provide for the equal application of the rights in Section 35 of the Constitution. As Cowling (2007: 94) pointed out, the legislature has a responsibility to amend and enact legislation, reversing the discrimination and marginalisation endured during Apartheid. This requires vigorous change with the aim of achieving inclusivity for all. In heeding this call, the legal system will embark on a new transformed path, with the incremental introduction of the Legal Practice Act (2014).

In chapter one of this thesis, I stated that the Legal Practice Act (2014) makes no mention of language and the language question in courts. In substantiating this statement, I will advance extracts from the Legal Practice Act (2014) to illustrate this absence, where language in my opinion should have been included. The purpose of the Legal Practice Act (2014) is:

> To provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic;

From the extract, the phrases '…constitutional imperatives…"; "… reflects the diversity and demographics of the Republic…", refer to the inclusion of language, specifically the African languages. Section 3 of the Legal Practice outlines the purpose with more specificity:

> 3(a) provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures the rule of law is upheld;
>
> (b)(iii) measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic;

Subsection b(iii) in my opinion would include language as measure that would enable equal opportunities for legal practitioners, given that the majority of persons in South Africa speak an African language as their mother tongue. This is not the case, upon further examination of the provisions, this includes, Section 24 regulating the admission and enrolment to the legal profession. Subsection (2)(a) refers to a duly qualified person as set out in Section 26 of the Legal Practice Act (2014). Section 26 regulating the minimum qualifications and practical vocational training, prescribes no language requirements for attorneys, candidate attorneys, advocates, or pupils. Furthermore, Section 29 of the Legal Practice Act (2014) governs community service, which will need to be undertaken to be admitted to the legal profession. Community service, to my understanding would involve the small claims court or *pro bono* public interest law, and therefore involve communicating in some if not most instances with African language speakers. It is my opinion that these provisions should have included language requirements or language training programmes. This would have filled the language requirements gap in the Attorneys Amendment Act (1993) and the Admission of Advocates Amendment Act (1994).

6.11 Higher Education legislative and policy framework

The legislative framework pertaining to legal practitioners fails to recognise the important role of language as a means of effective communication, access to justice, the level of substantive justice achieved and employment opportunities through the creation of incentives. The focus of the chapter shifts to language at universities. The linkage between university legislative and policy frameworks and that of the legal system, is the need to graduate linguistically competent LLB students who can positively affect the legal system in this transformational age we find ourselves in.

The HEA (1997) is the primary legislation for regulating higher education in South Africa. I have to a certain extent identified and explained the legislative and policy developments in higher education in chapter two of this thesis. The HEA (1997) enables the drafting of subordinate legislation and language policies at university level. Section 27(2) is the provision that enables this and reads accordingly:

> Subject to the policy determined by the Minister, the council, with the concurrence of the senate, must determine the language policy of a public higher education institution and must publish and make it available on request.

According to Section 27(2), an institution's language policy cannot be inconsistent with the Ministerial Policy. It must further conform to the Higher Education Language Policy (2002) read together with the National Language Policy Framework (2003). This was explained in chapter two of this thesis. I am just briefly advancing the relevant provisions at this stage of the discussion, as the legislative and policy frameworks will be engaged with more fully in chapter seven of this thesis.

It must be noted that although the HEA (1997) is the primary legislation regulating higher education, the Languages Act (2012) being the primary language legislation for the entire country is also applicable. The Department of Higher Education and Training is a government department as with the Department of Justice and Constitutional Development and is required to draft a language policy in accordance with the Languages Act (2012). The point being is that the policies I have referred to in the previous paragraph and in chapter, two of this thesis are to be read with the updated language policy.

The Language Policy for Higher Education (2017) currently remains in draft form as the final of comments are incorporated. The following extracted provisions are relevant:

Introduction and Background:

1. Language has been and continues to a barrier to access and success in higher education, both from the perspective that indigenous official languages have structurally not been afforded the official space to function as academic and scientific languages.

2. The majority of students entering higher education are not fully proficient in the present dominant languages of teaching and learning in higher education and are not even skilled and proficient – to the required level – in the language they call their tongue or choose as their preferred language of learning and teaching (LOLT).

3. Moreover, since the inception of democracy, the South African higher education system has experienced and accelerated increase in linguistic and cultural diversity in terms of student population, and therefore gradually becoming multilingual. For this reason, the country's higher education system is confronted with a challenge of ensuring the simultaneous development of a multilingual environment in which all our official languages are used as languages scholarship, research, teaching and learning, while at the same time ensuring that the existing languages of offering do not serve as a barrier to student access and success.

4. Thus, mindful of the historically orchestrated underdevelopment and undervaluing of indigenous official languages prior to democracy, and the disinclination to empower these languages in the present dispensation; conditions must be created for the valuing of indigenous languages as languages of meaningful academic discourse, as well as sources of knowledge in the different disciplines of higher education.

Purpose:

13. The purpose of the policy is to:

13.1. guide higher education institutions to evolve relevant strategies, policies, implementation plans for strengthening indigenous official languages of South Africa as languages of teaching, learning, research, innovation and science;

14. The policy therefore seeks to address the following:

14.1. the language or languages of learning (medium or mediums of instruction) in higher education institutions, bearing in mind the fundamental right of persons to receive education in the official language of languages of their choice in public educational institutions, where it is reasonably practicable to do so, and the duty of the state to ensure effective access to and implementation of this right (section 29(2) of the Constitution).

Policy Framework:

25. The policy framework recognises the important role of higher education in the promotion of multilingualism for social, cultural, intellectual, and economic development.

The domain uses of the languages:

31. Language of instruction: This policy recognises the linguistic diversity of the student make up of our higher education institutions and the value of language as a means of epistemic access. Universities must diversify the languages of instruction to include indigenous official languages.

Enablers:

34. Institutional language policy and plans: Universities must revise their language policies to accord greater importance to the use of African languages for scholarship; teaching and learning; and administrative purposes. They must set up implementation structures that can leverage the opportunities provided by the instruments of this policy. Higher education institutions must indicate in their language policies and plans, strategies they have put in place to promote multilingualism and transformation.

Effective Date of Policy:

49. This policy will be effective from 1 January 2019.

These extracted provisions illustrate the emphasis placed on, firstly, identifying and acknowledging the historical marginalisation and underdevelopment of the indigenous languages. Secondly, the acknowledgement that there is an increase in student diversity and with this diversity language is key given the multilingual make-up of students. Thirdly, instruction to make indigenous languages, languages of learning, teaching and research. The policy does not promote a monolingual language view and the sole advancement of English only as a language of economic access. I make this point in light of the linkages between language planning and the economy in chapter two of this thesis; the selected university language policies presented below and the case law concerning university language policies.

6.12 Selected University Language Policies

In chapter two of this thesis, I advanced the language planning process from a theoretical perspective, and where language planning is located in the broader legislative framework. I furthermore, engaged with the language policies that broadly affected the country's language development. In this chapter, I present the selected practical language policies.

6.12.1 Rhodes University

Rhodes University's language policy history commenced with the establishment of the Rhodes University Language Committee. The Language Committee was represented by Deans, administrative heads of department, and representatives from the staff union and SRC as well as other relevant co-opted individuals internal to the university. The Vice Chancellor formally elected the Language Committee Chairperson. In 2014, the language policy was officially reviewed by a sub-committee comprising of members who were knowledgeable in drafting of language policies. The policy review made use of the process of 'meaningful engagement' (Docrat, 2013) in conducting university wide consultations on the contents of the policy, thereby adopting a bottom up approach to language planning (Docrat and Kaschula, 2015).

The language policy is reviewed every three years and the review process commenced in 2017 following the same process above and was completed and approved by Council in September 2019. The provisions relevant to the thesis at hand include the following:

1.2. Policy Statement

The Language Policy of Rhodes University is predicated on the following principles:

- The University's language of learning and teaching is English, and the University's official business is conducted in English;
- Creation of an environment where language is not a barrier to equity of access, opportunity and success;
- Promotion of multilingualism and furthering the development of academic languages and literacies of the languages of South Africa where necessary and practicable;
- Creation of conditions for the use of particularly isiXhosa as a language of learning and teaching.

In light of historical conditions and contemporary realities:

- Other languages alongside English in a process of translanguaging may be used in teaching and learning e.g. in the tutorial system;

1.4. Policy Objective/s

The following objectives are recommended where necessary and practicable and subject to the University's resources:

- Promote and support proficiency in isiXhosa, Afrikaans and English through vocation-specific and additional language courses for staff and students.

- Requirements in professions should be addressed through the offering of courses such as conversational isiXhosa in order to produce graduates who can function in a multilingual professional environment.

- Promote the development and literacies of academic languages, particularly of isiXhosa, through teaching, learning and research outputs as part of redressing the previous marginalisation of indigenous languages at departmental level.

Based on the extracted provisions above, Rhodes University has made the clear intention to use isiXhosa as a language of learning and teaching across all subjects in all faculties. Although English is the primary language of learning and teaching the policy dedicates the university's interests and resources to further developing isiXhosa as an academic language. What is also significant of the policy is that it permits the use of translanguaging in teaching and learning processes. Translanguaging is according to Section 3, the definitions of the policy, a process which:

> Occurs when bilingual or multilingual speakers draw on a wide range of languages and language varieties to create meaning and to communicate. For example, reading, speaking or writing simultaneously in multiple languages.

This enables students to express their thoughts, ideas and opinions in their mother tongue to enable them to participate fully without being excluded. The process views language as a resource that enables and enhances the acquisition of knowledge and where language is not a

barrier to teaching and learning. In doing so, the policy recognises the importance of graduating students who can function in professional multilingual contexts. This point is important for the argument of graduating linguistically competent LLB students.

6.12.2 University of Cape Town

UCT's language policy enacted in 2013 is relatively short, in the form of a two-page document. The policy does however take note of the position of UCT as an institution that has an important role to play in the development of the official languages, particularly, isiXhosa. The provisions relevant to this research is as follows:

> **Preamble**
>
> The University of Cape Town views language as a resource and recognised the personal, social and educational value of multilingualism, as well as the importance of promoting scholarship in all official South African languages.
>
> The language policy of the University takes as its starting point the need to prepare students to participate fully in a multilingual society, where multilingual proficiency and awareness are essential.
>
> The first objective is the development of multilingual awareness on the one hand, and multilingual proficiency on the other.
>
> The second objective is to contribute to the national goals of developing all South African languages so that they may in the medium-to-long term be able to be used in instruction, and of promoting scholarship in all our languages.
>
> While- given the location of the university in the Western Cape- English, isiXhosa and Afrikaans are all recognised by UCT as official languages, English is the primary medium on instruction and administration. However, although English is an international language, it is not the primary language for many of our students and staff. The third objective is, therefore, to ensure that our students acquire effective

literacy in English, by which we understand the ability to communicate through the spoken and written word in a variety of contexts: academic, social, and professional.

Teaching and Examination

English is both the primary medium of teaching and of examination except in language and literature departments where another language is taught and may not be used. This applies at all levels, and to dissertations and theses for higher degrees.

There is a definite acknowledgement of using isiXhosa as a language of teaching and learning. The policy however entrenches English even at postgraduate level with the production theses in English except in departments where another language is the course subject. The policy as opposed to that of Rhodes fails to permit the use of translanguaging. The practical components of UCT's vocation specific courses in professional contexts is however discussed in chapter seven of this thesis.

6.12.3 University of KwaZulu-Natal

UKZN's language policy appears from the language policy document to have been revised in 2014 following its 2006 language policy. From the onset, the language policy unequivocally states that importance of being bilingual:

1. Purpose statement

The University of KwaZulu-Natal identifies with the goals of South Africa's multilingual language policy and seeks to be a key player in its successful implementation. The policy recognises the need to develop and promote proficiency in the official languages, particularly English and isiZulu. The benefits for students becoming proficient in English, the dominant medium of academic communication and of trade and industry internationally, and the *lingua franca* in government and institutions in South Africa, are clear. Proficiency in isiZulu will contribute to nation building and will assist the

> student in effective communication with the majority of the population of KwaZulu-Natal. This Policy seeks to make explicit the benefits of being fully bilingual in English and isiZulu in South Africa and to inform a corresponding Language Plan.

There is a further emphasis placed on isiZulu as an academic language of learning and teaching under the purpose statement that includes:

- achieve for isiZulu the institutional and academic status of English;
- provide facilities to enable the use of isiZulu as a language of learning, instruction, research and administration;
- become a national hub in the development of isiZulu national corpus and the development and standardization of isiZulu technical terminology and its dissemination.
- promote the intellectualization of isiZulu as an African language.

Although English is maintained as a language of learning and teaching at UKZN, the language policy is the first of its kind in relation to the others I have and will further discuss in this chapter that places isiZulu alongside English as a language of learning and teaching.

> The University will continue to use English as its primary academic language but will activate the development and use of isiZulu as an additional medium of instruction together with the resources (academic and social) that make the use of the language a real possibility for interaction by all constituencies in the University.

In the language policy UKZN validates the above purpose by stating the importance of isiZulu not only for their current and future students but as responsible institution, practically fulfilling the mandate of Section 6(2) of the Constitution :

2.2 At our University, students whose home language is isiZulu form an important and growing language group, reflecting the fact that isiZulu speakers are by far the largest single language group in KwaZulu-Natal. The University therefore has a duty to provide a linguistic and cultural ethos favourable to all students.

2.4 IsiZulu is one of the official South African indigenous languages named in the Constitution, whose 'use and status' have been 'historically diminished'. The University, following the Constitution, is bound to 'take practical and positive measures to elevate the status and advance the use of isiZulu'. The University is also bound to promote the principle of multilingualism i.e. that all official languages of South Africa enjoy parity of esteem and are treated equitably.

2.5 The Language Policy of the University forms part of a wider interconnected strategy at the national level to promote multilingualism and, at the provincial level, to advance isiZulu.

Realistically, UKZN's objectives would require administrative and academic staff who are bilingual and in English, isiZulu, and the language, policy provides for this, stating the following:

5.4.3 The languages of administration will be English and isiZulu.

5.4.4 To enhance the knowledge of existing academic and administrative staff the University will provide language courses for staff who do not have English or isiZulu communication skills.

5.4.5 Candidates for posts in the administrative or academic sectors shall be expected to have knowledge of English and isiZulu. Where knowledge of either language is inadequate for the post, there will be provision for access to communication courses as appropriate.

Given the extensity of UKZN's language policy, a language plan was formulated to accompany the language policy with the aim of ensuring implementation. The language plan is divided into phases with each phase being implemented over a

specific period. The language plan appears to be incremental in nature. There are two phases. According to the language plan, phase 1 will run from 2015 to 2019, and phase 2 from 2020 to 2030. The purpose is outlined in the following excerpt:

> The Language Plan guides the implementation goals to be achieved within each of the two phases. It also makes reference to the provision and monitoring of the budget and resources necessary for the implementation of the University's Language Policy.
>
> The Language Plan is intended to assist in measuring progress made in the achievement of the goals of the Language Policy.

The Language Plan is divided into eight sub categories under phase 1. For the purposes of this research I will advance the relevant categories and only the relevant extracts from each relevant category.

> **1. Delivery Of Services**
>
> 1.1 An isiZulu language audit will be carried out to identify bilingual staff to ensure that the University has the operational capacity to comply with the Language Plan. Language proficiency records of all staff will be maintained in the University Human Resources data base.
>
> **6. Implementation of Policy on Language of Learning & Teaching**
>
> 6.1 In Phase 1, the main language of learning and teaching at the University will primarily be English. The use of isiZulu as a medium of instruction will be encouraged but will be at the discretion of the Schools and Colleges in consultation with the University Language Board, depending on their contexts of teaching and learning…
>
> 6.2 During Phase 1, students and staff will develop communicative competence in isiZulu and English sufficient for academic interaction.

With regards to receiving education in isiZulu, the language plan is extensive, thus I have extracted the sections relevant to the research at hand and which reads accordingly:

7.1.4 The Colleges will develop the following four main areas of isiZulu-medium provision:

- '*Ab initio'* undergraduate provision provided by the discipline of isiZulu
- High level skills courses, e.g. in translation or in formal written isiZulu
- Professional/vocational provision for undergraduate students, designed to appeal to a wide audience and with individual Disciplines being able to provide subject-specific input for their own students. Such provision will be developed through a gradual and realistic approach, and the possibility of attracting external funding will be explored
- isiZulu for Adults, the provision of which will be extended in the light of identified student and staff demand

7.2 The Colleges will appoint language tutors to teach, develop and co-ordinate isiZulu medium provision throughout their Colleges, building on the current provision offered by the Discipline of isiZulu and drawing on the expertise of the staff of the Discipline.

7.3.2 The University will expand the introduction of modules in professional degrees (e.g. legal and medical isiZulu) that focus on proficiency in isiZulu and English as a priority to facilitate and enhance bilingual professional/ vocational practice.

These extracted provisions from UKZN's Language Policy and Language Plan will be engaged with in chapter seven of this thesis, suffice to say at this point, that there is an unwavering commitment from the institution to place isiZulu on an equal footing alongside English.

6.12.4 Stellenbosch University

As with the language policies of the UFS and the UP, Stellenbosch's language policy is contentiously before the Constitutional Court in the *Gelyke Kanse* case (2019). The provisions of the language policy relevant to this thesis are:

> **5. Aims of the Policy**
>
> 5.1 To give effect to section 29(2) (language in education) and 29(1) (b) (access to higher education) read with section 9 (equality and the prohibition against direct and indirect unfair discrimination) of the Constitution.
>
> 5.4 To promote multilingualism as an important differentiating characteristic of SU.

These aims point to an inclusive, multilingual language policy that will see the use of all three official provincial languages being used as language of learning and teaching. This is however not the case for isiXhosa, which is not incrementally introduced as a language of teaching and learning.

> **7. Policy provisions**
>
> The Policy principles above give rise to the following binding Policy provisions:
>
> **7.1 Learning and teaching**
>
> 7.1.1 Afrikaans and English are SU's languages of learning and teaching. SU supports their academic use through a combination of facilitated learning opportunities for students, including lectures, tutorials and practicals, as well as learning support facilitated by means of information and communication technology (ICT).

The SU language policy speaks to the role of isiXhosa as an academic language in the section on the promotion of multilingualism and reads accordingly:

> 7.5.4 IsiXhosa as an emerging formal academic language receives particular attention for the purpose of its incremental introduction into selected disciplinary domains, prioritised in accordance with student needs in a well-planned, well-organised and systematic manner. The academic role and leadership of the Department of African Languages, through its extensive experience in advanced-level teaching and research in language and linguistic fields will be harnessed to the full. In certain programmes, isiXhosa is already used with a view to facilitating effective learning and teaching, especially where the use of isiXhosa may be important for career purposes. SU is committed to increasing the use of isiXhosa, to the extent that this is reasonably practicable, for example through basic communication skills short courses for staff and students, career-specific communication, discipline-specific terminology guides (printed and mobile applications) and phrase books.

The scope of isiXhosa is therefore limited to certain courses and vocation specific courses in particular. It is not implemented across courses and faculties. Important to note for the purposes of this research, there is scope for teaching isiXhosa as part of the LLB degree and must be borne in mind in chapter seven of this thesis.

6.12.5 University of the Free State

The UFS language policy was approved by the UFS Council on 11 March 2016. This policy is discussed in relation to the case, specifically the CC judgment which forms an integral part of this research.

The relevant provisions from the preamble include:

> The University of the Free State (UFS) is committed to:
>
> - Enabling a language-rich environment committed to multilingualism with particular attention to English, Afrikaans, Sesotho and isiZulu and, other languages represented on the three campuses.
>
> - Ensuring that language is not a barrier to equity of access, opportunity and success in academic programmes or in access to the UFS administration.
>
> - Promoting the provision of academic literacy, especially in English, for all undergraduate students.
>
> - Ensuring that language is not used or perceived as a tool for social exclusion of staff and/or students on any of its campuses.
>
> - Contributing to the development of Sesotho and isiZulu as higher education languages within the context of the needs of the UFS different campuses.
>
> - The continuous development of Afrikaans as an academic language.

It is a known fact that preambles in legislative and policy documents are aspirational in nature, thus it is not surprising that UFS language policy preamble has an aspiratory tone it. There appears to be an intention to create an inclusive multilingual university, however this is limited with the third goal where the focus is primarily on English. The focus is thus on producing monolingual graduates.

2. Principles

The following principles inform the adoption of this policy:

- Diversity, equity, redress, reconciliation and social justice.
- Practicability, cost effectiveness and justifiability.
- Support for academic literacy development at undergraduate level.
- Support for the development of multilingualism.
- Language as a resource for the university to achieve individual development and integration.

The majority of principles, upon which the UFS language policy is premised, encourage and celebrate multilingualism; however, this is qualified through the insertion of the second principle of, practicability, cost effectiveness and justifiability. The costs argument, as I have illustrated, is a caveat that will enable the university to state that it is not practicable to have languages other than English as languages of learning and teaching due to cost implications.

4. Policy statement

Bearing in mind the above commitments, principles and definitions the following policy is accepted:

4.1 English becomes the primary medium of instruction at undergraduate and postgraduate level on all three campuses.

4.2 Multilingualism is supported among other activities by an expanded tutorial system especially designed for first-year students. Tutorials take place in English, Afrikaans and Sesotho in the same

class on the Bloemfontein Campus and in English, Sesotho and isiZulu on the Qwaqwa Campus.

4.3 In particular professional programmes such as teacher education and the training of students in Theology who wish to enter the ministry in traditional Afrikaans-speaking churches, where there is clear market need, the parallel medium English-Afrikaans and Sesotho/isiZulu continues. This arrangement must not undermine the values of inclusivity and diversity endorsed by the UFS.

4.4 The primary formal language of the UFS administration will be English with sufficient flexibility for the eventual practice of multilingualism across the UFS.

4.5 Formal student life interactions should be in English, while multilingualism is encouraged in all social interactions.

The entire policy statement above focusses on English as the languages of learning, teaching and research. The insertion of 4.5 above is gravely concerning, where English is to be used in 'formal student life interactions'. In my opinion, this effectively forces a student to speak in a language other than their mother tongue, given that the majority of persons do not speak English as their mother tongue in the Free State. The policy statements are to be implemented by the university, who includes as part of their policy the implementation goals. Those relevant to the thesis at hand are extracted below.

5. Implementation

5.1 Undergraduate teaching and learning

5.1.1 Lectures, study materials, examinations and related material will be in English.

5.1.2 Multilingual study resources will be provided in the context of tutorials in order to support epistemological access for all students.

5.1.5 Undergraduate programmes offered in English will include as part of their contact time at first- and second-year level tutorials in Afrikaans, English, and Sesotho/isiZulu depending on the campus needs.

5.2 Postgraduate education

5.2.1 The language for the writing of theses and dissertations at the UFS is English except in disciplines where languages other than English are taught as subjects of study.

5.2.2. Specific cases for the use of languages other than English in theses and dissertations is left to the discretion of the head of department and the dean who are accountable for the implementation of this language policy and for the compliance with the academic rules of the UFS regarding external examination of PhD theses.

For undergraduate students English language learning and teaching is entrenched through course material being produced in English only. 5.1.2, does, however provide for the use of languages other than English in tutorials. This is limited as noted in 5.1.5 to first and second year tutorials only. One can only ponder and question if the UFS are under the misinformed understanding that students would be fully competent in English when they reach their third year. It is extremely limiting in my opinion, where the implementation of the language in education right, Section 29(2) of the Constitution is unfairly limited for those students who have limited or no linguistic competency in English.

With the UFS compelling students to produce theses in English only with the exception of theses produced in specific language courses, the institution is not contributing to the development of African languages for terminology, and intellectualisation purposes in accordance with the HEA (1997). 5.2.2 permitting a discretion by a Dean and head of department, for a PHD candidate to produce their thesis in a language other than English, is wholly suspended in the exact section where it states: "… head of department and the dean who are accountable for the implementation of this language policy and for the compliance

with the academic rules of the UFS regarding external examination of PhD theses". If the Dean and head of department permit this they will be in breach of their duties and act contrary to the language policy objectives. Therefore, the production of theses in English only is secured.

These provisions and brief discussions relating thereto are to be borne in mind with the case discussion further ahead in this chapter. Both the policy and case will form part of the discussions in chapter seven of this thesis. The provisions will also inform the conclusions and recommendations of this research in chapter eight, in terms of what needs to be amended by universities in drafting languages policies. Furthermore, highlighting the resultant effect policies such as this UFS language policy has on hindering the promotion, use and development of African languages in accordance with Section 6 read with Section 29(2) of the Constitution.

6.12.6 University of Pretoria

A with the language policy of the UFS, the UP's language policy is central to the core of this research, given that it also informs the case law further ahead in this chapter. The UP is another institution that has adopted an English only language policy. The provisions relevant to the thesis at hand are hereby extracted from the UP's language policy. Although formulated and approved by Council in 2016, the policy was subject to court processes in the form of an application brought, challenging the constitutionality of the policy and reviewing the administrative decision making process, therefore implementation of the policy was effective from 1 January 2019.

> **1. Purpose**
>
> The purpose of this policy is to determine language planning, management and practice at the University of Pretoria in a framework that promotes academic quality, equality and social cohesion, as well as to redress imbalances.

The purpose of the policy emulates the HEA (1997) and the broader mandate of the Constitution to achieve social cohesion and equality, while redressing the past discrimination.

This in my opinion would translate into the policy adopting African languages as languages of learning and teaching alongside English. This is unfortunately not, what was intended.

4. Policy statement

In support of the above considerations, the following policy is adopted:

4.1 English is the language of teaching and learning (in lectures, tutorials and assessments) except in cases where the object of study is a language other than English, and in programmes with profession-specific language outcomes, subject to approval by Senate;

4.2 The University must identify needs and provide the necessary financial and other resources to facilitate learning in the medium of English;

4.3 The University must provide spaces and resources for drawing on students' strongest languages (in particular Sepedi and Afrikaans, but where possible also other South African languages) to assist students in understanding key concepts in their modules;

4.5 The University must adequately resource the development of Sepedi to a higher level of scientific discourse and must support the maintenance of Afrikaans as a language of scholarship;

The policy statement above entrenches English as the sole language of learning and teaching. It is ironic to see in 4.2 how far the institution is willing to go and the financial injections being made in ensuring the successful implementation of the English only language policy. Throughout this research, I have highlighted the costs argument being used in defence of excluding African languages, yet there is no hesitation in allocating funds to further promotion and use of English. The policy statement in my view is contrary to the purpose outlined at the beginning of the policy calling for historical redress, equality and social cohesion. The UP policy goes a step further than the UFS policy, by stating that English will also be the sole language used in tutorials. It seems meaningless to state in 4.3 that Sepedi

concepts be developed for the modules to assist students, though students are not permitted to express themselves in their mother tongue, if that is not English. The 'adequate' resourcing of Sepedi as per 4.5 is vague, with no tangible directive to do so. The policy statement appears to be contrary to the following listed principles:

> **3. Principles**
>
> The University of Pretoria's language policy seeks to:
>
> 3.2 promote inclusiveness and social cohesion, while guarding against exclusivity and marginalisation, and in this way contribute to creating an environment where all students and staff feel confident and comfortable and can enjoy a sense of belonging;
>
> 3.3 be transformative in attending to historical injustices and promote justice and equality;
>
> 3.4 facilitate an equitable learning environment that provides equal access to knowledge and resources;
>
> 3.6 promote multilingualism in all South African languages, with specific responsibility for the development of Sepedi to the highest level of scholarship;

The policy is to be implemented incrementally, with regards to phasing out Afrikaans as a language of assessment, teaching and learning. On the point of assessments, essays at undergraduate level and these at postgraduate level can according to 5.11 of the policy be completed in any language where reasonably practicable.

6.13 Language of Record Directive

With the statutes and policies advanced the focus turns to the language of record directive and the focus on what the practical issues are plaguing the courts with regards to language. On 16 April 2019, the Sunday Times newspaper reported that the Heads of Court acting under the leadership of the Chief Justice had elected to make English the sole official language of record in all high courts. The newspaper quoted the Chief Justice as validating the decision on grounds of transformation, greater access to justice and reversing the discrimination of the past.

On the point of transformation, in chapter two of this thesis I explained what transformation is and how it is a change of affairs that previously existed. Except the change must be for the better. It must be questioned how resorting to a monolingual language of record can be a change for the better and foster greater access to justice. The case studies in chapters four and five of this thesis, prove otherwise and highlight the disastrous effects of having a monolingual language of record and how this adversely affects, the indigenous people of either the country or vulnerable minority groups of people. It is questionable how reversing the discrimination of the past is associated with Afrikaans as a language. Afrikaans is not only spoken by white South Africans but also by the coloured South Africans. This also adopts a racialised view of our languages and an 'othering' in a sense, yet English a non-South African language is seen as a unifying neutral language, regardless of its history outlined in chapters one and two of this thesis. There is a fine line of double standards within the elitist voice that needs to be critiqued.

Following the announcement in April 2017, a series of communication was sent to the Chief Justice, by language activist and practising attorney at law, Cerneels Lourens, resident in the North West province of South Africa and Afrikaans mother tongue speaker. According to Lourens no response was received from the Chief Justice. On 17 September 2019, in a national Sunday newspaper, City Press, a group of academics, legal practitioners and language activists and myself included, joined in writing an open letter to the Chief Justice (Docrat *et* al, 2017d). The group voiced their concern of a monolingual language of record policy and questioned whether this was in fact correctly reported given that the decision was

not published in the government gazette and thus was not legal. I will engage with this article by Docrat *et al* (2017d) in further detail in chapter seven of this thesis.

On 28 February 2018 Judge President of the Western Cape High Court Division, Justice John Hlophe released a directive concerning the language of record. The full directive is included as Appendix D, as I have just extracted the portions that, in my opinion, are relevant to the research at hand.

> WHEREAS on 31 March 2017, the Heads of Courts Forum resolved that English must be the official language of record in all courts in the Republic of South Africa;
>
> AND WHEREAS the commitment by all the role players to ensure adherence to the national resolution applicable to both criminal and civil cases in all courts, will result in speedier and more efficient adjudication and finalisation of ALL cases.
>
> THE ROLE PLAYERS ARE THEREFORE, HEREBY, DIRECTED TO ADHERE TO THE FOLLOWING:
>
> COURT DOCUMENTS:
>
> ALL court documents submitted to courts in both criminal and civil cases and which will form part of the eventual court record shall be submitted in English.
>
> The only limited exception permitted to the said directive will be the submission of witness statements in a language other than English and only if the witness is not sufficiently conversant in English.
>
> COURT PROCEEDINGS:
>
> Court proceedings should as far as possible be conducted in English.

> In order to comply, the presiding officer should ideally at pre-trial stage or if not possible, after the witness has been sworn in at trial stage, enquire as follows:
>
> "In terms of a national directive by the Heads of Courts, the official language of record is English. Are you conversant in English? Do you have any objection to the court proceedings continuing in English?"
>
> Should the witness not have an objection to the evidence being led in English, the court should continue as such. Should the witness not be conversant in English the leading of evidence only may be conducted in any other language. In such cases an interpreter should as far as possible be utilised to interpret the evidence into English.

The extracted provisions from the directive (Appendix D) cements the decision by the Heads of Court, that English be the sole official language of record. By making, English the sole official language of record the court proceedings are thus conducted in English and the judgment is delivered in English. This despite the language demographics presented below in this thesis, overwhelmingly illustrating the majority of people speak an African language and not English as their mother tongue.

The first issue arising from the extracted provisions is the fact that this directive reaffirmed the Heads of Court directive, even though this was not published in the government gazette. This directive fails to provide details of the authority under which they acted or the empowering legislation (as explained in chapter two with reference to administrative law) the Heads of Court derived the power to determine the language of record in all high courts.

The second issue concerns the statement that English as a sole language of record "…will result in speedier and more efficient adjudication and finalisation of ALL cases". The issue or questions, how does interpretation result in speedier finalisation? How is it efficient to provide for English speaking litigants to proceed in their mother tongue and African language and Afrikaans-speaking litigants to be wholly reliant on an interpreter? A parallel can be drawn with the Indian case study in chapter five of this thesis, particularly the views of legal practitioners one of whom also said English is more practical as it is speedier to continue with

one language. One must question whether this is more important than access to justice and the level of justice received.

Thirdly, applying to both criminal and civil cases affects the constitutional language rights in Section 35 of the Constitution; it also adversely affects the Section 29(2) language in education right. What would be the purpose of graduating with a bilingual LLB or being proficient in a language at university level, when entering a profession that is premised on English only? This is in stark contrast to the HEA (1997) and language policy of the Department of Higher Education (2017). Furthermore the financial implications for civil litigants, who bear the costs of interpretation (Hartle, 2019 Interview: Appendix L).

With the submission of documents in English only, there is no indication who will bear the costs for this in criminal cases. It would be ironic if the state bore the costs, yet the costs argument is made against the use of other languages as languages of record. Double standards perhaps or a misunderstanding of the language question in a legal system, both bearing the same consequences.

The forth issue and that of grave significance in my opinion is the statement:

> "In terms of a national directive by the Heads of Courts, the official language of record is English. Are you conversant in English? Do you have any objection to the court proceedings continuing in English?"

Posing these questions to a litigant/ accused person raises several issues. What language is the question being asked in? A layperson is inclined to answer affirmatively, where they have minimal English language competency. The use of the word 'conversant' is problematic as evidence in the Australian case study, in chapter five of this thesis. Conversant to my mind is having a conversation in a social or informal context where minimal linguistic skills are required and not an advanced vocabulary. This is not true of the legal system in court, where cross-examination or even examination in chief may raise complex issues and legal practitioners use their linguistic skills to confuse a witness. The point is, there are varying degrees of speaking, understanding, reading and writing a language, as recorded in the language surveys presented below. The situation is further complicated by courtroom

discourse, including the use of legalese, witness demeanour and credibility affecting the admissibility of evidence.

Would a litigant of a lower social and economic standard feel comfortable with objecting to the proceedings continuing in English? It is highly improbable, given the power relations at play and whether the litigant will think that by objecting they would be disadvantaged in some way. This is not unreal, given the case studies in chapters four and five of this thesis, especially in the case studies dealing with indigenous people in an English/ Western legal system.

If the litigant/ witness objects, an interpreter is provided. This is problematic where interpretation in South Africa is not regulated, there is a shortage of interpreters, and interpreters are under skilled (Mbangi, 2019 Interview: Appendix O; Bloem, 2019 Interview: Appendix G). This relates to an earlier point concerning English speaking accused conferred with language rights while, African language and Afrikaans speaking accused persons conferred with interpretational rights.

6.14 South African case law

On the point of language rights and interpretational rights, a distinction is clear. The case law that elucidates these points are to be divided along the following lines. I will firstly discuss the case law directly addressing the language of record. I will then advance the case law in which interpretation was an issue before court. Lastly, I will advance the case law pertaining to university language policies. Although I will discuss each category separately, all the case law and issues are linked and this will be evident through the discussion.

6.14.1 Language of record cases

There has been minimal case law on the language of record in South African courts; the majority of case law comprises interpretation.

The first case I will discuss directly concerns the language of record. The case of *State* v *Damani* (2016) was before the KwaZulu-Natal High Court on automatic review from the Magistrates' Court, Mahlabathini in KwaZulu-Natal. The trial in the court *a quo* was conducted wholly in isiZulu, including the judgment and sentencing (2014: 2). Upon review, Ndlovu J (2014: 2) posed the following questions to the Magistrate:

> As an accused does not have a right to have his/her trial conducted in a language of his/her choice (*Mthethwa* v *De Bruin NO and Another* 1998(3) BCLR 336 (N)), was it the choice of the presiding magistrate to have the entire proceedings conducted in isiZulu in this case? If so, did the magistrate consider the logistical problems that could or would potentially arise when the manner was brought to the High Court for review? (see: *S* v *Matomela* (1998(3) BCLR 339 (Ck); *S* v *Damoyi* 2004(2) SA 564 (C)). In any event, was there no interpreter available to assist with the translation duties in court?
>
> As the accused was sentenced on 30 April 2014, why did it take nearly 3 months for the matter to be submitted to the Registrar, on 27 July 2014?

According to Ndlovu J (2014: 2) the Magistrate, responded explaining that it was his decision to proceed wholly in isiZulu and that the translation of the record into English was available on 24 June 2014 and the delay was not caused by translation but rather the tardiness of the clerk of the court. The Magistrate cited the following reasons for conducting the trial in isiZulu:

> That the Mahlabathini district comprised mostly rural areas and 99.9 per cent of accused are Zulu speaking.
>
> That, in the present case, the presiding magistrate, the prosecutor, the complainant and the accused (who was not legally represented) were all Zulu speaking.
>
> That the Constitution called for recognition of the equality of all 11 official languages.

From the reasoning, the Magistrate clearly adopted a practical approach giving effective meaning to the constitutional provisions. The Magistrate also interpreted the constitutional provisions as providing for the equality of languages rather than reasonable usage through the implication of the term 'equitable'. It was practical to proceed in isiZulu given that all parties before court were fully competent in the language. The Magistrate did not accord any delay to the translation of the record into English, as was insinuated by Ndlovu J.

For the remainder of the judgment Ndlovu J appeared to have gone on an investigative mission of highlighting the problems associated with conducting trials in languages other than English. Ndlovu J (2014: 3) first commenced with the legislative framework, Section 6(1) of the Magistrates' Courts Act (1944) being read with Section 6(1) of the Constitution provides for any of the eleven official languages to be used as languages of record in court proceedings. According to Ndlovu J (2014: 3-4) this was 'drastic', and as such Section 35(3) (k) of the Constitution needed to be engaged with for criminal trial purposes. Ndlovu J (2014: 4-5) vehemently held that Section 35(3) (k) does not provide an accused with a right to choose a language but rather to have proceedings interpreted into a language they understand.

Ndlovu J (2014: 5) held further that it is a 'constitutional ideal' to see all courts operating in the languages predominantly used in the region in which the court is seated, however noting that this was elusive and or impracticable. The court *a quo* showed otherwise in conducting the trial in isiZulu without any delays relating to language or any other practical issues.

Ndlovu J (2014: 7) furthermore communicated with the Director of Public Prosecutions (DPP) in KwaZulu-Natal who indicated that during the period of October/ November 2008 a campaign was embarked upon through a pilot project to promote the use of indigenous languages in courts. The project was carried out in the KwaZulu-Natal districts of Msinga, Impendle, Nongoma and Hlabisa (this excluded Mahlabathini, from which this case emanates). Ndlovu J recorded the following difficulties (2014:7-8) as per the discussion with the DPP:

> Difficulty experienced by a presiding magistrate, prosecutor, defence attorney in articulating legal terminology in isiZulu, including quotation from statutes and legal precedents.

> Translation into isiZulu of court annexures, forms and statements in police dockets.
>
> Difficulty for the transcribers on preparing court records for review or appeal purposes, hence undue delay caused in this regard.
>
> Different isiZulu dialects occasionally posed problems to court officials and litigants, despite all of them being, otherwise, Zulu speaking.

In 2011, the project grounded to a halt, where operational problems and lack of planning were cited as reasons. On a side not, before I address the issues highlighted in the extracted text, no further information was ever reported on these pilot projects, thus a lack of planning may well be cited as the primary failure of the project. The dialectal and terminology problems could have been addressed inter alia with (forensic) linguists and illustrates the need for trained legal translators who are in a position to handle translation and interpretational challenges. These issues speak to the important role of universities have in affecting the language of record, by ensuring LLB graduates are linguistically competent, legal terminology is produced and widely disseminated and degrees in legal translation and interpretation are offered at universities. Many of these points are already being addressed at UKZN, as previously stated in the discussion on their language policy. I discuss this point further in chapter seven with reference to Khumalo (2019, Interview: Appendix M). The point being, that there is a breakdown in communication between academia and practice. The judiciary appears reluctant to engage forensic linguists and other experts on the matter in formulating sound language policies for courts. Again, bringing into question whether these pilot projects are doomed from commencement, and that being the plan.

On a somewhat positive note, the Chief Magistrates Forum in 2014 with the conclusion of a report entitled ‘preliminary report on indigenous language courts’. The report was never publicly pronounced or made available and Ndlovu J extracts the contents thereof, which I quote below, wholly from the judgment (2014: 8-9):

> That Executive Committee of the Chief Magistrates Forum must seek the guidance of the Chief Justice on the Language Policy as regards the Magistrates Courts.

> That the Executive Committee of the Chief Magistrates forum must establish, through the Office of the Chief Justice, as to whether the Department of Justice and Constitutional Development has ensured that there are proper structures to adequately, timeously transcribe, and translate proceedings recorded in any of the nine indigenous languages into English.
>
> That the Chief Magistrates Forum in the meantime to do an audit of indigenous languages predominantly in use within Administrative Regions, in order to assist the National Department responsible for language policy in determining the most used languages within specific clusters and/or sub-clusters, for purposes of service level agreements with service providers of translation services.
>
> That the Chief Magistrates Forum must inform Mr Dawood that the Forum would not, for reasons specified in the report, support the use of indigenous languages in any courtroom for any proceedings, as long as it is practical to do so.
>
> That the Chief Magistrates Forum must inform Mr Dawood that the Forum would not, for reasons specified in the report, support the idea of 'indigenous language courts', but that it would take practical steps and positive measures to elevate the status and advance the of languages with historically diminished use and status in all the courts of the Republic of South Africa.

To date, implementation based on the above has been non-existent and it remains another report to add to the heap that provides no practical effect for the broader citizenry. It resembles to an extent the LANGTAG (1996) report where findings and recommendations were made, but implementation lacked. As seen with the language policy of the Department of Justice and Constitutional Development (2019) the language of record issue is not dealt with and referred to legislation instead.

The second case was the criminal case of *State* v *Gordon* (2018), commencing with a District court sitting at a Periodical court seated in Darling, a small town in the Western Cape province of South Africa. The case was transferred to a Regional court seated in Malmesbury, another town in the Western Cape, for sentencing. The Regional court then referred the case

to the Western Cape High Court on review, questioning whether the proceedings were in accordance with the administration of justice.

The case was heard in Afrikaans in the court *a quo*. According to Thulare AJ (2018: 14), the magistrate had a duty to ensure that his acts and the proceedings were captured and preserved for authority, truth, testimony and memory, especially for the possibility of review and appeal. Thulare AJ was referring to the importance of conducting the trial in a language used on appeal and review, namely English. This correlated with this comment to the magistrate:

> The proceedings were conducted in Afrikaans, against the backdrop of the direction of the Chief Justice that English is the language of record of all courts in the Republic of South Africa.

The magistrate responded to this comment stating the following:

> I am aware of the directives of the Chief Justice and of the Honourable Judge President Hlophe dated 28 February 2018. The proceedings in this case had already started in Afrikaans on 11 July 2016 before another presiding officer. This trial was deal with at the Periodical court of Darling. Because the accused decided to conduct his own defence and is also Afrikaans speaking, I decided to proceed in Afrikaans.

The magistrate adopted a practical perspective, while giving effective meaning to the language rights of an Afrikaans speaking accused in a province in which Afrikaans is the second largest spoken language. Thulare AJ, however did not stop following this response, instead what followed in the judgment was a series of contradictory statements.

Thulare AJ (2018: 28) acknowledged the understaffing of courts and the scarcity of interpreters and how this resulted in unnecessary delays. Thulare AJ, however then proceeded to state the following:

> The expense and delay occasioned by both transcription and translation is immediately mitigated by the use of English.

A costs based argument is again employed, yet the costs to the administration of justice, an accused's language rights as well as the obligation in Section 6 of the Constitution to elevate the status of African language through practical and positive means is simply overlooked. Thulare AJ (2018: 35) misconstrues Section 6 and its mandate, validating his reasoning, stating the following:

> In the spirit of Section 6(3) (a) of the Constitution, the Heads of Courts elected English as the official language for purposes of litigation in our courts. In that way litigants from Khayelitsha cannot shop for their own judge by constructively excluding Burns-Ward J from their matters through the use of isiXhosa in the same way that litigants from Langebaan cannot shop for their judge by excluding Boqwana J by conducting the proceedings in Afrikaans, or litigants from the Cape Flats exclude Dolamo J by using the lingua franca.

This excerpt racializes our languages where black judges are associated with African languages and white judges with either English or Afrikaans. This line of thinking excludes the possibility of bilingual and multilingual judges and confines judges to the profile of being monolingual. According to Thulare AJ (2018: 37), the onus rests with the Department of Justice and Constitutional Development to make available resources and systems to expeditiously transcribe and translate court records of proceedings from other languages other than English. Until such time, Thulare AJ (2018: 37) stated that magistrates should heed the directive of the Chief Justice and proceed with English as the sole official language of record.

Thulare AJ (2018: 34) in a sense defended the directive by the Heads of Courts through the following statement:

> The leadership of the judiciary had the difficult task to trace the correct footing in balancing the needs and preferences of the population as a whole, considering the sometimes competing interest of, but free from, any misplaced allegiance of the masses, the intellectuals, economic, social and political influences in the spirit of one, sovereign, democratic state founded on our constitutional values.

> As the nation walks towards achieving the progressive realisation of an elevated status and advanced use of all official languages in our courts, the Heads of Courts could only cut the cloth to the size that fits the nation today.

This validation came on the back of Thulare AJ (2018: 32) criticising to a certain extent my research undertaken for my Master of Arts degree (Docrat, 2018) dealing broadly with the status of African languages in the South African legal system under the notion of transformation.

> Academics have the intellectual integrity and moral courage to argue about the language of record should be in our courts [*The Role of African Languages in the South African Legal System: Towards a Transformative Agenda;* A thesis submitted in fulfilment of the requirements for the degree of Master of Arts, Rhodes University by Zakeera Docrat, November 2017]". They can afford to argue about the law. Judges do not have the luxury to argue about what the law should be. They have a constitutional obligation to apply the law. The nation expects judges to resolve disputes expeditiously in a manner that is user friendly, practical and cost effective.

It is ill-conceived to defend a directive by stating that the judiciary had to cut the cloth to the nation today, given that the majority of people in South Africa do not speak English as a mother tongue and have limited if not no English language skills. Furthermore shifting the onus back to the Department of Justice and Constitutional Development, who shifted the onus to the legislature, is simply shifting the goal posts in favour of pursuing an English only mandate undermining the constitutional rights, values and principles, Thulare AJ refers to. In light of the discussion in chapter one of this thesis, specifically the historical background and development of the language of record in South African courts and how political agendas were responsible for shaping these language policies and ultimately marginalising people on grounds of language, makes the validation by Thulare AJ (2018), that a political, social and economic agenda is not being pursued, questionable. An English only language of record does not serve the interests of the majority, there is no comprise and as such a balancing act has not happened as Thulare AJ (2018) suggests. This criticism I make can be substantiated through the application of the sliding scale formula (Currie and de Waal, 2005), advanced earlier, taking into account: "… the number of speakers in a given area; their concentration;

as well as the seriousness of the service involved" (Currie and de Waal, 2005: 632). Applying this to the *Gordon* case (2018), how can the Magistrate have been expected to heed the directive in an area where the majority of people are Afrikaans mother tongue speakers, in addition to the constitutional rights of an accused person to defend himself to the best of his ability and knowledge? It is thus contradictory for Thulare AJ (2018: 38) to have stated the following in an attempt to validate the use of English and place an emphasis on interpretation rather than proceeding directly in other languages, in these geographical areas of South Africa:

> Periodical courts are generally in far-flung areas away from the cities and towns. They are generally found in townships, villages and farms. These are generally settlement areas where the vast majority of the previously disadvantaged people are found. They are vulnerable because of levels of illiteracy. This matter showed that even the guardians sometimes need to be guarded. The provision of elementary resources like functionality literate Clerks of the Court, Court Machines and Court interpreters are very necessary at these courts. It cannot be, that justice is divisible and those from outside the cities find themselves in the island of miseries within the sea of a democratic and constitutional South Africa.

The case of *State* v *Gordon* (2018) also brings to the fore the far reaching effects the directive has on the lower courts and thus does not just apply to the High Courts as stated by both the Chief Justice and Judge President Hlophe.

6.14.2 Interpretational cases

My focus turns to the 'general' case law concerning language in court proceedings, where interpretational issues are highlighted. There is overlap with the language of record cases above, and this will be identified where necessary.

The case of *State* v *Lesaena* (1993) concerned a self-represented Afrikaans mother tongue speaking accused. The accused appealed both conviction and sentence on the grounds that his right to a fair trial was infringed upon (1993: 264g); on the grounds, he was not permitted by the Magistrate in the court *a quo* to conduct his defence in a language of his choice, namely

Afrikaans. The Magistrate had stopped the accused from presenting his case in Afrikaans and cross-examining a witness in Afrikaans (1993: 264-265).

On appeal, the court held that the right to a fair trial was determined in relation to the language used. Mohamed J (1993: 265) explained the importance of language within the right to a fair trial, stating that an accused must be:

> accorded the fairest and fullest opportunity to articulate his defence, to marshal his submissions and to present his evidence to the court with the most effective linguistic and intellectual resources at his command.

The court therefore held that by denying the accused the right to present evidence in Afrikaans, a fundamental irregularity in the proceedings had occurred (1993: 265). The court in substantiating the fact that a procedural irregularity occurred, advanced that any interference of the right, "... however laudable the motive ..." (1993: 265) resulted in a fundamental subversion of the right to a fair trial. With van Dyk J concurring, Mohamed J found that the procedural irregularity, resulted in a 'fundamental injustice'. The appeal was successful and both conviction and sentence be set aside (1993: 265).

The *Lesaena* (1993) judgment illustrates the importance of language use in courts and how it directly affects the right to a fair trial. In contrast to the case *Damani* (2016), a language of choice was entrenched as opposed to a language understood by the accused.

The case of *State* v *Ndala* (1996) concerned a special review brought within the ambit of Section 25(3) (i) of the Interim Constitution (1993), which currently is Section 35(3) (k) of the Constitution. The accused did not understand either English or Afrikaans, which were the official languages of record at the time and an interpreter, was provided. The accused testified in his defence and his evidence was followed by an adjournment. During the adjournment, the Magistrate was alerted to the fact that the interpreter, had not been sworn in as is required.

The court held that the accused's right to a fair trial, included the right to be tried in a they understands, this included having the proceedings interpreted for the accused. Magistrate to "ensure that the accused is sufficiently conversant with the language in which the evidence is being presented and to use a competent interpreter if necessary" (1996: 219). The right to a competent interpreter is of prime importance, especially when the language the accused understands is not an official language of the court (1996: 219). The Magistrate therefore failed in their duty to ensure a competent interpreter is before court, resulting in a gross

procedural irregularity. The Court held further that interpretation after the fact is not permitted as was done by the Magistrate in an attempt to remedy the issue.

The *Ndala* case (1996) highlights the problematic nature of interpretation and the lack of linguistic training of judicial officers and how this adversely affects the course of justice for both the complainant and accused persons.

The case of *State* v *Matomela* (1998) overlaps with the cases of *Damani* (2016) and *Gordon* (2018). The court *a quo* heard the entire case in isiXhosa. On automatic review, Tshabalala J (as he was then) posed the following questions to the Magistrate:

> Why was the evidence, conviction and sentence in the Xhosa language? Is this in terms of an instruction from the Department of Justice? Full reasons are required.

The response from the Senior Magistrate was recorded as follows:

> The fact that the evidence was recorded in Xhosa, is not in terms of an instruction from the Department of Justice, but due to the following reasons:
>
> (a) On the day that this matter came before Court, we had a shortage of interpreters. The matter would of necessity have to be postponed because of this. This would have caused the complainant in the matter further hardship.
>
> (b) When I was approached for assistance, I ascertained that the parties were all Xhosa speaking. The presiding officer is Xhosa and could thus communicate with the parties. I instructed the presiding officer to continue with the case in the language that the accused understood.
>
> The recording of the evidence was discussed between us. I advised that the recording be done in Xhosa. The reason for that was that I did not want the presiding officer to act as an interpreter. I believe and submit that this procedure at the time was the best we could do.

According to Hlophe (2000: 692) further reasons for the use of isiXhosa as a language of record included the fact that isiXhosa was one of the eleven official languages and compliance with Section 6(1) read together with subsections (2) and (4) of the Constitution . Tshabalala J (1998) found the above reasons to be fair and reasonable in the circumstances.

Tshabalala J (1998) discussed the practicalities of hearing cases in African languages and the limitations thereof imposed on an accused. As such, he stated:

> This is a matter that I consider should receive the urgent attention of the national legislature before injustices occur as a result of the present situation. An untenable situation would have arisen if the accused in this case were represented by a person who did not understand the Xhosa language. His case would not proceed and the complainant would be inconvenienced (1998: 341-342).

Based on Tshabalala J's (1998) statements above it was expected that he was urging the legislature to draft legislation that would obligate legal practitioners and judicial officers to undergo vocation specific language training. This was however not what Tshabalala J (1998: 342) had in mind:

> In my judgment, the best solution is to have one official language for courts as stated above. All official languages must enjoy parity of esteem and be treated equitability but for practical reasons and for better administration of justice one official language of record will resolve the problem. Such a language should be one, which can be understood by all court officials irrespective of their mother tongue.

The conflicting statements and reasoning supporting a monolingual language of record policy resembles the latter reasoning in the cases of *Damani* (2016) and *Gordon* (2018). Everything including the reasoning points to the need to have bilingual/ multilingual language of record policies in courts, however suddenly the judges opt for a monolingual language of record policy.

The case of *Mthethwa* v *De Bruin No and Another* (1998) dealt with the contents of Section 35(3) (k) of the Constitution and whether it conferred a language right of choice or a right to understand the proceedings. The accused was a mother tongue isiZulu speaker residing in Vryheid (in KwaZulu-Natal). The accused applied for his trial to be conducted in isiZulu, given that it was his mother tongue and an official languages as per Section 6(1) of the Constitution. The application was dismissed and it was ordered that the case be heard in English and or Afrikaans, the official languages of record. On review, the applicant argued that the failure to be tried in the official language of choice, isiZulu was both unlawful and unconstitutional. The Applicant apparently understood English, the extent to which he understood English was not clear.

Similar to the court in *Damani* (2016), the court on review provided that of 37 regional magistrates, only 4 had isiZulu as their mother tongue, and 33 had English and or Afrikaans as their mother tongue with no proficiency in isiZulu. From 256 prosecutors only 81 were isiZulu speaking, while 135 were English and or Afrikaans mother tongue speakers (Hlophe, 2000: 691). Of 41 state advocates six where able to speak isiZulu, as their mother tongue and 35 were either English or Afrikaans speakers (Hlophe, 2000: 691).

With these statistics made available, Howard JP (1998: 338) held:

> Under these circumstances, as they obtain in this province [KwaZulu-Natal] at present, it is clearly not practicable for an accused person to demand to have the proceedings conducted in any language other than English or Afrikaans. Section 35(3)(k) does not give an accused person the right to have a trial conducted in the language of his choice. Its provisions are perfectly plain, namely, that he has a right to be tried in a language he understands or, if that is not practicable, to have proceedings interpreted in that language.

Although the statistics provided in the *Mthethwa* (1998) case date back nineteen years, the point remains that there is an intrinsic need to transform and create a more inclusive justice system that is representative of the country's language demographics. Howard JP's (1998: 338) was using English and Afrikaans as a yardstick and if an accused could not comprehend English, interpretation services would be made available.

In the case of *State* v *Pienaar* (2000) the accused was an Afrikaans mother tongue speaker, assigned an English mother tongue legal representative (through the state's legal aid services). Given the language barriers between the accused and his legal representative, the accused elected to represent himself. The accused informed the Magistrate of the language barrier and therefore the reasons why he was representing himself. An alternate legal representative was not assigned to the accused. The primary question on review was whether the accused had been prejudiced, by the absence of legal representation.

The court commenced by examining the content of the right to a fair trial and found that it included the right to legal representation, where the respective legal representative was able to communicate with the accused in his or her own language (2000: 144). The court held that communication between the accused and legal representative must take place directly, in the accused's mother tongue, unless in exceptional circumstances through an interpreter (2000:

145). The presiding officer was obliged to inform and explain this right to the accused (2000: 145).

The second stage of the enquiry saw the court engage with how this right is implemented within the practical situation of a trial. The court explained that the implementation of the right was dependent on the obligation conferred upon government through Section 35(3) (k) of the Constitution. Specifically the obligation vested in the Department of Justice (as it was then) to ensure that the languages in each province, namely for the case at hand the Northern Cape, which are used 'overwhelmingly' be used and promoted to ensure the eventual attainment of equality and status, through equitable treatment (2000: 145). This line of implementation would be in accordance with Section 6 of the Constitution.

The court said that the question for determination was whether the accused had this right when legal representation was provided for by the State. (2000: 145). The court engaged with the language demographics pertaining to courts situated in the Northern Cape, finding that Afrikaans was the most commonly used language. Additionally, Afrikaans was used in 72 percent of cases, in comparison to 1.4 percent of cases in English (2000: 145). The court stated that the English status *quo* was in fact a policy directive of the Department of Justice (2000: 145), who were appointing English speaking presiding officers and public defence attorneys (2000: 145).

The court explained that the Department of Justice's English only language of record policy would have 'phenomenal cost and quality implications' (2000: 145) with sole reliance placed on interpretational. Furthermore that the policy position would be in direct conflict to Section 6(4) of the Constitution, (2000: 145).

The court stated that both Section 6 of the Magistrates' Courts Act (1944) and Section 6(1) of the Constitution conferred a right on the accused to be tried in Afrikaans. Therefore, no interpretation of Section 35(3) (k) of the Constitution 'could restrict that right' (2000: 145), and that their interpretation of the law was not impractical. The court validated their interpretation, explaining that the Department of Justice has to comply with Section 6 of the Constitution (2000: 145-146). This according to the court entails the languages of the Northern Cape being promoted to enjoy equal status alongside English:

> In those cases where it was not practical to try an accused who was Afrikaans speaking in Afrikaans or to provide an accused with a legal representative who was

> competent in Afrikaans, this had come about through the failure of the Department of Justice and the Legal Aid Board to give effect to the provisions of the Constitution (2000: 146).

The Magistrate failed in their obligation to explain the right fully to the accused and this, resulted in the right to a fair trial being infringed therefore resulting in an irregularity in the proceedings (2000: 146).

The *Pienaar* case (2000) offers purposive interpretation of the language rights provisions in favour of accused persons who are disadvantaged by an English only language of record policy. The judgment also places the onus upon the state, in particular the Department of Justice and Constitutional Development to develop language policies that are practical and give meaning to the language demographics of each province while implementing the rights. The *Pienaar* case (2000) will be dealt with in further detail in chapter seven of this thesis, given its significance to the research.

The case of *State* v *Siyotula* (2002) is similar to the case of *Ndala* (1996) in that it deals with interpretational irregularities. The accused was an isiXhosa mother tongue speaker, who gave his evidence in isiXhosa, following which eighteen witnesses gave their testimony. After all the evidence had been led, the court *a quo* found that the interpreter was not sworn in as per Rules 68(3) and 68(5) of the Magistrates' Courts Rules. The primary question on review was whether there was an irregularity in the proceedings.

The court explained that where a trial is conducted in a language that the accused does not fully understand and is not interpreted correctly into language a 'proper' trial has not taken place (2002: 157). The court held (2002: 158) proceeded that 'understand' in Section 35(3)(k) refers to full comprehension and not partial understanding as held in the case of *State* v *Ngubane* (1995).

The primary question for determination in instances such as these should be whether the irregularity produced a 'miscarriage of justice'? (2002: 157). Factually dependent and variable from case to case the court should be satisfied "... if the irregularity can be cured without prejudice to the parties" (2002: 158).

In the *Siyotula,* case (2002) the adopted purposive interpretation, with the focus on ensuring the language rights of the accused are prioritised. This case again, highlights the issues associated with interpretation, with an English only language of record policy.

The case of *State* v *Damoyi* (2004) concerned an isiXhosa mother tongue accused who in the court *a quo*, appeared for trial, on several occasions, however the trial could not proceed due to the fact that there was no interpreter available. On the subsequent appearance of the accused, the interpreter remained absent. On this occasion the magistrate resolved to conduct the entire trial in isiXhosa, as the magistrate, state prosecutor and accused were isiXhosa speaking (2004: 122). The proceedings were recorded in isiXhosa (2004: 123). The magistrate detailed the reasons why the record appeared in isiXhosa to the Review Judge, which included: not unduly delaying the accused right to a fair trial; the prosecutor and magistrate spoke isiXhosa proficiently; IsiXhosa was also one of the eleven official languages; isiXhosa was one of the three official languages of the Western Cape according to Section 5(3) of the Constitution of the Province of the Western Cape (2004: 123).

Yekiso J (2004: 122) noted that the language question had evaded the courts, and had not been resolved since the advent of democracy:

> If parity of the 11 official languages were to be adhered to in court proceedings it could result in a considerable strain on resources, which could, in turn, impact negatively on the quality of service delivery and efficiency in the administration of justice.

Yekiso J (2004: 123) was satisfied that the facts of the case before him, the trial conducted in isiXhosa was 'in accordance with justice'. The review judge's comments regarding the 'tremendous problems' experienced in translating the isiXhosa record into English were noted with concern by Yekiso J. Yekiso J (2004: 123) enquired with the DPP what the Department of Justice's language policy was regarding the use of an official language other than English and or Afrikaans being used as a language of record. The DPP stated that no language policy existed and that the languages of record were English and Afrikaans and supplied the following statistics from an audit in proficiency in official languages within the Directorate:

> [of] 262 prosecutors in the lower courts in the Western Cape, only 62 are African and proficient in an indigenous language and only 3 advocates out of 36 in the office of the Director of Public Prosecutions are able to speak one or more indigenous languages (2004: 123).

Yekiso J (2004) held that this was contrary to the provisions of Section 6(2) and (4) read together with Section 35(3) (k) of the Constitution. Yekiso J (2004: 125) held that the issue rests in the provisions of the Constitution, which 'falls short' of addressing the use of official languages in court proceedings. It must be noted that Yekiso J (2004) did not explicate the legislature's role in filling the 'gap' where the Constitution does not pronounce on the matter of the language of record in courts. I make this point in light of Cameron's (2013) statements advanced earlier, that the Constitution is merely a framework that requires further interpretation through legislative and policy means.

In the case of *State* v *Manzini* (2007), the accused was an isiZulu speaker; his trial was however conducted in English with the assistance of an interpreter (2007: 107). During sentencing the accused alleged that his evidence was not interpreted correctly, prompting the Magistrate to refer the record to the chief interpreter, to confirm whether or not this was in fact correct (2007: 107). The chief interpreter, found 'numerous errors' in interpretation and concluded by stating that the interpretation was 'alarmingly poor' (2007: 107). The Magistrate concluded that the interpretational discrepancies did not affect the course of the trial, particularly the evidence imparted by the accused and as such the verdict would be unchanged (2007: 107), following which the court sentenced the accused (2007: 107).

Tshiqi J and Schwatzman J (2007) concurring, held if incorrect interpretation had occurred, the Magistrate would not be in a position to determine the credibility of the witness imparting evidence in isiZulu. This would adversely affect the Magistrate's ability to evaluate such evidence, and obstruct the legal representatives from preparing arguments in mitigation and aggravation of sentence (2007: 107). This would also affect the outcome of the case, particularly whether or not to convict the accused. The Magistrate failed to recognise the importance of language as part of the right to a fair trial. The court held that Section 35(3) (k) of the Constitution had been adversely affected, and ordered that the appeal succeed and conviction and sentence be set aside (2007: 110).

6.14.3 Language in education right cases

Although there are fewer cases concerning the language in education right for higher education, two of three cases are constitutional court judgments and thus precedent setting.

The first case concerned the 'new' language policy of the University of Pretoria, which I advanced earlier in this chapter. The case of *Afriforum and Another* v *Chairperson of the Council of the University of Pretoria and* Others (2017) commenced with an application brought by Applicants: Afriforum and Solidarity, Afrikaans lobby rights groups, against the Chairman of the Council of the University of Pretoria (UP), and the Minster of Higher Education, who was cited as a fourth Respondent.

The facts of the case were that following the onset of democracy, the UP changed its language policy in 1993 to one which was bilingual (English and Afrikaans) and included Sepedi as a third language. English and Afrikaans were recognised as languages of instruction and communication while Sepedi was recognised as a language of communication in the policy. The bilingual policy was reaffirmed by the relevant university structures in 2003. In 2016 the university, acting under the authority of Senate and Council, enacted a new policy (presented above), which removed Afrikaans as a language of instruction and made English the sole official language of learning and teaching. The development of Afrikaans and Sepedi would be promoted. So effectively the 2016 policy, in addition to removing Afrikaans as a language of instruction and communication also removed Sepedi as a language of communication. The Applicants therefore sought to review the decisions and have them set aside. Just a side point, reviewing of decisions of an authoritative nature, falls within the ambit of administrative law, as discussed in chapter two of this thesis.

The Applicants sought the review on three grounds of law:

1. The decision should be reviewed, as it is non-responsive to the language in education right, Section 29(2) of the Constitution.

2. The decision constitutes a denial of the right in Section 9 of the Constitution .

3. The decision constitutes a withdrawal of existing rights of current and future students.

The Respondents argued that the 2016 language policy did not violate the Section 29(2) right and if the court found that the right was limited, it would be justifiable in accordance with Section 36(1) of the Constitution.

The first and overarching enquiry according to Kollapen J (2017: 13) was to determine whether or not the decision was reasonably practicable taking into account factors relevant to

equity, reasonable practicability and historical redress. With competing constitutional and administrative issues, a two-pronged approach must be adopted. The constitutional issue of Section 29(2) is that the right can be diminished with sound justification. Kollapen J (2017) therefore held that the right was limited and that it was justifiably limited in that all students were disadvantaged equally by the English only language policy.

Disposing swiftly of the constitutional enquiry, Kollapen J moved on to determine whether the decision was lawful and justifiable in the circumstances within the ambit of administrative law. Kollapen J adopted a narrowed view stating that the function of the court was merely to ensure, decision makers entrusted with performing the function, had done so. The UP had therefore taken the decision entrusted upon them through the empowering provisions of the Ministerial Policy and the HEA (1997).

The second stage of the two-pronged approach was determining the reasonability of the decision and that hinges on the fairness. Kollapen J turned to the *Bato Star Fishing* case (2004), which I discussed in chapter two of this thesis. In this instance, the case was used as the precedent in administrative law and the factors in determining the reasonability of the decision and the fairness of the process, namely:

> the nature of the decision; identity and expertise of the decision maker; range of factors relevant to the decision; reasons given for the decision; nature of competing interests; as well as the impact of the on the lives and well-being of those affected.

In applying these factors to the case at hand, Kollapen J held that the poll conducted in 2010 by the UP constituted a high level of engagement and thoroughness. The poll also illustrated that in addition to research done by the UP that there was a steady decline in home language Afrikaans speakers amounting to 25.1% of the student population. As a result of this reasoning, the application was accordingly dismissed.

The second case of *Afriforum and Another v Chairman of the Council of the University of the Free State and Others* (2016) involved an application being brought by Afriforum as the first Applicant against the chairman of the University of the Free State's (UFS) Council and others. The application was brought as a result of a decision by the UFS to change the language of instruction to English only. Prior to this decision in 2016, a parallel medium of instruction language policy was in place, dating back to 1993 and was reaffirmed in 2003. Similar policy developments to the UP as evidenced above. As evidenced above, the policy

removed Afrikaans as a language of learning and teaching with the exception of the language being used for teacher education and theology courses.

The Applicants argument was based on three primary grounds, comprising of sub allegations. I have extracted those relevant to this research:

> In reaching the decision to adopt the new language policy of the UFS, the Council and Senate were unconcerned with:
>
> (i) considering whether it remain reasonably practicable for the UFS to offer Afrikaans as a medium of instruction, by having regard to the relevant factors to be brought into account in such an assessment;
>
> (ii) the legal implications of its election forthwith to deprive Afrikaans speaking students (current and prospective) of the opportunity to assert their Section 29(2) right at the UFS;
>
> (a) the UFS Council and Senate were also unconcerned and did not take into account (or effectively so) the result of a poll conducted across all three campus that demonstrated substantial support for parallel medium of instruction, with 3323 students in favour thereof compared to the 1107 that favoured English with tutorials in Afrikaans and Sesotho.
>
> (b) The Language Committee tasked with preparing a report on the new language policy left it to the Council of the UFS to consider the legal and constitutional implications of its adoption. The UFS council took no internal or external legal advice on this issue. Both members of the UFS Senate and the members of the UFS Council making the decision were led to believe that no constitutional issue for consideration arose.
>
> Against these issues, the Applicants attacked the decision arguing that:
>
> relevant considerations were left out of account;
>
> account was taken of irrelevant considerations; and/ or a material error of law influenced the adoption of the new language policy;

> no rational connection existed between the decision to adopt the new language policy and the purpose for doing so, the purpose of the empowering provision and/ or the information available to the decision-maker;
>
> the decision to adopt the new policy was otherwise unconstitutional or unlawful.

The Respondents argued that the language policy was adopted for transformational and academic reasons with the aim of achieving integration (2016: para 48).

Hendricks J was guided by the *dictum* in the *Ermelo* (2010) case, where Moseneke DCJ stated the following:

> it is an injunction on the state to consider all reasonable educational alternatives which are not limited to, but include, single medium institutions. In resorting to an option, such as single or parallel/dual medium instruction, the state must take into account what is fair, feasible and satisfies the need to remedy the results of racially past discriminatory laws and practices. When a person already enjoys the benefit of being taught in an official language of choice, the state bears the negative duty not to take away or diminish the right without appropriate justification.

The point of reasonableness emanates from this excerpt, which Hendricks J reasoned that this would have required the UFS to adopt reasonable measures to fulfil current and prospective student's rights to receive education in both English and Afrikaans. Furthermore, for a single medium to be preferred to another reasonable practicable institutional arrangement, such as dual medium, it must be demonstrated that it is more likely to advance or satisfy the listed criteria of equity, practicability and historical redress. There are two parts in determining whether or not the decision was equitable. Following this line of reasoning, Hendricks J applied each of the three criterion in Section 29(2) (a)-(c) as advanced above, to the facts at hand.

Equity, according Hendricks J comprises two parts. The first part is an academic assessment, where the vast majority of students (black, mother tongue African language speakers) will not benefit from the new language policy, given that they are neither English or Afrikaans mother tongue speakers. Secondly, the new language policy by disposing of Afrikaans violates Afrikaans speakers' rights to be taught in their language of choice as entrenched in Section 29(2) of the Constitution. The second criterion of practicability was disposed of with minimal

engagement given that Hendricks J was of the view that it was not impracticable to have a dual medium language of instruction policy.

The redress criterion is inserted to ensure that language is not a barrier in accessing education, especially for Black, Indian and Coloured students. Applying this understanding to the facts before him Hendricks J found, that the new language policy does not favour 'new over old' Hendricks J held that the old policy favoured multilingualism; that Afrikaans alone may be a barrier to many Black students but that English may be a barrier to Coloured students. Hendricks J held that by abandoning the dual medium of English and Afrikaans, the decision to adopt the new language policy was inconsistent with the Ministerial Policy designed to promote multilingualism and enhance equity and access in HE institutions through the retention and strengthening of Afrikaans as a language of scholarship and science. The belief of the decision makers that integration and transformation would justify their decision, without them taking into account factors universally accepted to form part of the reasonable practicability standard in Section 29(2) of the Constitution, constituted a material error of law. Hendricks J accordingly ordered that the decision be reviewed and set aside. The decision was taken on appeal to the Supreme Court Appeal Court (SCA) by the UFS, who were successful. Given that this case did not conclude in the SCA on appeal, the precedent setting judgment of the Constitutional Court (CC) is advanced.

Afriforum applied to the CC for leave to appeal. Leave to appeal was not granted by the majority, with three judges dissenting.

Mogoeng CJ writing the judgment of the majority first considered whether the decision to formulate a language policy constituted an administrative action, in terms of administrative law. Mogoeng CJ (2017: 17) explained that the requirements for an administrative action needed to be satisfied and in applying the facts thereto, the decision was not administrative in nature, as it did not satisfy the listed grounds. It was not administrative action according to Mogoeng CJ, as UFS's Council was not designated to make administrative decisions; and determining policy by nature is executive and not administrative. Mogoeng therefore held that the appeal was grounded on legality.

According to Mogoeng CJ (2017: 17), the appeal gave rise to two key issues/ questions to be determined:

1. Whether the UFS acted consistently with the provisions of Section 29(2) of the Constitution.

2. Did the UFS when adopting the new language policy, pay adequate attention to the Ministerial Language Policy concerning the language of instruction.

With regards to the language right in Section 29(2), the equity test emerging from the provision needed to be satisfied (Mogoeng, 2017: 23). It would be equitable to maintain Afrikaans as a medium of instruction, when the Section 29(2) right is exercised in a manner that is not inconsistent with any other provision and does not undermine any 'constitutional aspiration or value'. The exercise of the right to be taught in a language of choice must not '...pose a threat to racial harmony or inadvertently nurture racial supremacy' (2017: 23).

In applying this reasoning to the facts, Mogoeng CJ (2017: 23) stated that the primary question arising is whether Afrikaans 'had a comfortable co-existence with our collective aspiration to heal the divisions of the past or has it impeded the prospects of our unity in our diversity'. Mogoeng CJ consequently found that learning was racialised. White students were attending the lectures taught in Afrikaans, while Black students were attending lectures conducted in English.

Moving swiftly to the second issue concerning the Ministerial Language Policy framework Mogoeng CJ held that the UFS acted in accordance with the framework. Mogoeng CJ held that the UFS ensured that a language of instruction (Afrikaans) not be employed where it creates racial segregation and does not heed the internal modifiers in the Section 29(2) right for equity, practicability and the need to redress the past discrimination. The majority thus held that the adoption of the language policy was lawful and valid and leave to appeal was accordingly denied (2017: 79).

Although the majority ruled that leave to appeal was denied Froneman J dissented, with Cameron J and Pretorius AJ concurring in the dissenting judgment. Commencing with the dissenting judgment, Froneman J (2017: para 82) stated that it would have been in the interests of justice to have heard the matter *viva voce* and thus grant leave to appeal.

It was explained that Mogoeng CJ similarly to the SCA who heard the case prior to this, denied speakers of an official language (Afrikaans) the right to exercise their right in accessing education in their mother tongue. The 'factual and normative' boundaries within

which the Constitution permitting the implementation of Section 29(2) must be explained, and this however did not occur (Froneman, 2017: para 83).

The dissenting judgment advanced that one primary question for determination arises: what circumstances would justify prevention of a person receiving education in a language of choice as prescribed in Section 29(2) of the Constitution? This according to Froneman J (2017: para 85) is two pronged, where a 'proper' interpretation of Section 29(2) of the Constitution be advanced as well as the role of the Ministerial Language Policy in formulating language policies. With regards to the majority judgment, there was no engagement on the parameters of the right in Section 29(2) of the Constitution, instead the judgment focussed primarily on the use of Afrikaans as a racist tool, as was the case during Apartheid (Froneman, 2017: para 91). What the main judgment failed to do is state that other official languages (African languages) should be imposed on Afrikaans and English speakers, to ensure parity of esteem. To this effect, Mogoeng CJ made no reference to the state's obligation to advance the other official languages (Froneman, 2017: 91). Froneman J explained that it was 'ironic' that the majority harped on the Afrikaans 'historical oppression' bandwagon, in favour of English, a language with a longer history of colonial oppression. Froneman J (2017: 123) quoted Moseneke DCJ in the *Ermelo* case, where he termed 'collateral irony', where learners and parents choose English as opposed to their own African languages as mediums of instruction. Froneman J (2017: 123) questioned whether discrimination would be found if an African language was used as a medium of instruction, as the majority judgment states that the exercise of official languages other than English, results in exclusion and discrimination fostering segregation. Froneman J (2017: 115-123) reasoned further that by granting leave to appeal, students, affected persons and experts could have provided their input, on Afrikaans and the other official languages as mediums of instruction.

With regard to the second issue of the Ministerial Language Policy, Froneman J (2017: 115) held that there was no evidence presented to inform a decision by the majority as noted in Mogoeng CJ's judgment, advanced above, that students receiving instruction in a language of choice (Afrikaans in this case) were guilty of racial discrimination. This did not justify the finding that the Section 29(2) right can be limited on grounds of entrenching racism and segregation. Furthermore that the Ministerial Language Policy states that the current situation of English and Afrikaans as mediums of instruction should only be endured until the African languages have been developed to be used as mediums of instruction at higher education

institutions. This according to Froneman J (2017: 94) was in concurrence with the objectives of the Ministerial Policy, which recognises the constitutional imperative for African languages to be promoted and advanced in reversing the past historical marginalisation.

In conclusion, Froneman J (2017: 127) held that the majority judgment's reasoning and order '...does not bode well for the establishment and nurturing of languages other than Afrikaans and English as languages of higher learning.' The CC's constitutional duty is to create space for other official languages. That is what true unity in diversity entails. On this note, Froneman J (2017) held that he would have granted leave to appeal.

The last case concerning language policies is, *Gelyke Kanse and Others v The Chairman of the Senate of the Stellenbosch University and Others* (2017). The case in the court *a quo* concerned an application brought against the chairman of Stellenbosch University. The Applicants asked the court to review and set aside decisions by Senate and Council to adopt a new monolingual English language policy in terms of Section 27(2) of the HEA (1997).

The crux of the Applicant's argument was that the new language policy was contrary to Section 29(2) of the Constitution as it promoted and adopted the sole use of English to the exclusion of the other ten official languages.

Dlodlo J and Savage J concurring held that the language policy conformed with the constitutional provisions, specifically Section 29(2). According to Dlodlo J, it was reasonably practicable in the circumstances to adopt the new language policy to ensure equity and equal access while redressing the past discrimination. Language and specifically Afrikaans was once again associated with race, and in this instance white, Afrikaans speaking people, to the exclusion of all Coloured speaking students. The role of African languages as official languages was not dealt with by the court. The application was subsequently dismissed with costs.

The case law is essentially all linked having commenced with the cases dealing primarily with the question of the language of record. The preceding cases highlighted the numerous issues concerning interpretation in courts and how the rights of both the accused and complainants were adversely affected. The cases also illustrated that African languages could be used as language of record where there was sufficient and competent legal translators to translate the record for appeal and review processes, this would circumvent the numerous interpretational errors of both a procedural and substantive nature. The issue of legal

language terminology development in relation to the university language policies, as raised in the case of *Damani* (2016) will be dealt with in chapter seven of this thesis. Suffice to say at this point in the discussion that terminology is being produced on a large scale especially with UKZN. On the point of universities, the language policy cases highlight again the narrowed approach adopted by the judges when interpreting language rights and how English is seen as a unifying medium, not taking into account the barriers that English only language of instruction policies create for African language and Afrikaans speaking students. Given the language situation and language complexities highlighted through the other case law, it proves more than pivotal to ensure graduates are bilingual or multilingual when leaving university. Instead, the mother tongue of students is undermined and underdeveloped. The argument that English monolingual languages policies discriminate against all equally, is skewed, as white English mother tongue students are not discriminated against. This reinforces the privileged position that has always been enjoyed by these speakers.

The decision was take on appeal and the Constitutional Court heard the case and delivered judgment, *Gelyke Kanse and Others* v *Chairperson of the Senate of the University of Stellenbosch and Others* (2019). A unanimous judgment was delivered by Cameron J, with Mogoeng CJ and Froneman concurring, but with different reasons. The core challenge of *Gelyke Kanse* was that the 2016 language policy, I advanced in chapter six and critiqued in this chapter, violated Section 29(2) in addition to contravening other constitutional provisions, namely Sections 6(2) and 6(4) and the equality clause of Section 9 amongst others.

According to Cameron J (2019: para 19) the question before the CC was "… whether the university has sufficiently justified the diminished role for Afrikaans in the 2016 Language Policy, as issued, and not as applied". I will not extract all the provisions concerning the contentions of each side, as there is considerable overlay with the CC's UFS judgment.

One argument put forward by *Gelyke Kanse* was to insist that Stellenbosch implement parallel medium of instruction (English and Afrikaans) which was feasible but not practicable. In this instance, practicability was assessed based on costs. According to Cameron J (2019: para 31), Stellenbosch explained that in total it would cost six hundred and forty million rand for infrastructure in addition to seventy million for personnel costs, which was not reasonably practicable. Cameron dismissed the appeal with an order to costs.

What is of direct relevance to this research given the Chief Justice's view on Afrikaans as a language of record and his silence on the use of African languages as languages of record it was interesting to note what Mogoeng CJ (2019: paras 61-63) stated at the end of his reasoning in the judgment after concurring with Cameron J:

> [61] … it needs to be said that Afrikaans is indeed an Afrikaans language, our historic pride to be treasured by all citizens. Its existence precedes colonialism. And its subsequent development with the appropriately enriching infusion of terms from Dutch or any other European language and the unjust attempt to impose it on others, do not at all affect its original African DNA.
>
> [62] Our highly challenged fiscus has however, imposed a constraint on us to share all the acutely limited public resources among ourselves as generously as considerations of justice, equity and reconciliation, informed by reasonable practicability, permit us to. As a result, it is most fitting to appeal particularly to our corporate citizens' spirit of generosity, to help preserve Afrikaans, and develop other indigenous languages, as essential tools for knowledge impartation and comprehension. And that they can do by deploying resources to the establishment of private institutions of learning envisaged by section 29(3) of the Constitution, which would obviously not be driven by any sinister agenda to discriminate against others on any unconstitutional basis.
>
> [63] … Plans to enhance the status and promote the use of indigenous languages, in line with section 6 of our Constitution, must thus be developed and kept ready for implementation as soon as the contestation for our scarce resources, by key national priority areas, has ebbed out. Where immediate implementation is reasonably practicable it would arguably serve us well to act.

Paragraphs 63 above, provides a glimmer of hope that the Chief Justice may well be open to the idea of having bilingual/ multilingual language of record policies for courts where such a plan is well thought out and resourced. I return to this point in chapter eight of this thesis. I also return to Froneman J's concurring judgment but different reasoning in the *Gelyke Kanse* (2019) case in chapter seven of this thesis.

6.15 South African language demographics: Statistics

This chapter has constantly advanced referred to the language demographics especially in light of the constitutional provisions and case law. Section 6 of the Constitution makes

reference to the number of speakers as well as sliding scale formula (Currie and de Waal, 2005). Even though the case law in the majority of instances saw the judges adopting a narrowed interpretation, the number of speakers of the language was often a point raised, when limiting the right. It strengthens my argument, if there is a large contingent of people from a specific language in a province where that language is an official language.

In this part of chapter six I will advance the relevant language statistics emanating from the latest national census (2011), the language and racial demographics of the legal professionals in South Africa, as well as the language survey capturing the views of attorneys in South Africa on using official languages other than English in the legal system (de Vries and Docrat, 2019).

Statistics South Africa, drawing on the work of the United Nations, defines a population census as:

> the total process of collecting, compiling, evaluating, analysing and publishing or otherwise disseminating demographic, economic and social data pertaining, at a specified time, to all persons in a country or a well-defined part of the country.

The last Census was conducted in 2011, with the next one expected in 2021, given the ten yearly review period. The Census is an extremely important process in South Africa and for languages, where Lourens (2012: 285) advanced that the census would be critically important in highlighting the linguistic demographics of South Africa, which could be used to assess whether these demographics are reflective across domains.

Graph 1: National language statistics (Census, 2011)

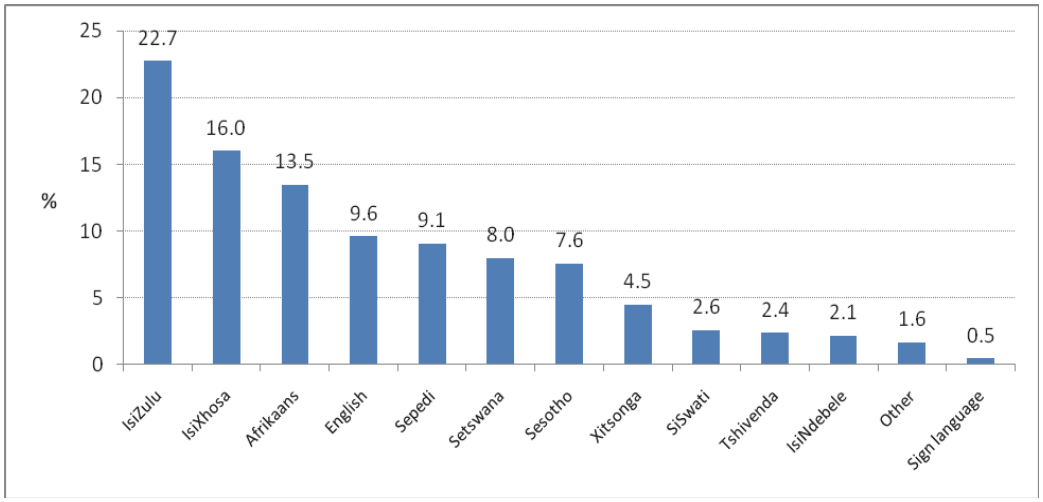


Table 1: National language demographics of South Africa (Census, 2011)

Language	EC	FS	GP	KZN	LP	MP	NC	NW	WC
Afrikaans	10.6	12.7	12.4	1.6	2.6	7.2	53.8	9.0	49.7
English	5.6	2.9	13.3	13.2	1.5	3.1	3.4	3.5	20.2
IsiNdebele	0.2	0.4	3.2	1.1	2.0	10.1	0.5	1.3	0.3
IsiXhosa	78.8	7.5	6.6	3.4	0.4	1.2	5.3	5.5	24.7
IsiZulu	0.5	4.4	19.8	77.8	1.2	24.1	0.8	2.5	0.4
Sepedi	0.2	0.3	10.6	0.2	52.9	9.3	0.2	2.4	0.1
Sesotho	2.5	64.2	11.6	0.8	1.5	3.5	1.3	5.8	1.1
Setswana	0.2	5.2	9.1	0.5	2.0	1.8	33.1	63.4	0.4
Sign Language	0.7	1.2	0.4	0.5	0.2	0.2	0.3	0.4	0.4
SiSwati	0.0	0.1	1.1	0.1	0.5	27.7	0.1	0.3	0.1
Tshivenda	0.1	0.1	2.3	0.0	16.7	0.3	0.1	0.5	0.1
Xitsonga	0.0	0.3	6.6	0.1	17.0	10.4	0.1	3.7	0.2
Other	0.6	0.6	3.1	0.8	1.6	1.0	1.1	1.8	2.2

Graph 1 represents the national percentage of speakers for each official language in addition to sign language, at national level. Nationally it is recorded that only 9.6 percent of the population speaks English as their mother tongue, 13.5 percent speak Afrikaans as their mother tongue amounting to 23.1 percent of the population, being less than a quarter of the population. The number of African language speakers amounts to 75 percent of the population, nationally. The national language statistics in Graph 1 provides a clear indication that the majority of persons in South Africa speak an African language as their mother tongue.

The whole argument in this thesis is not for one national language policy for all courts but rather provincially determined language policies. Table 1 represents the provincial language demographics and this is important in assessing whether or not there are majority-spoken languages. More than 50 percent of persons in the Eastern Cape, Free State, KwaZulu-Natal, Limpopo and North West provinces speak an African language as their mother tongue, as indicated in Table 1. A minority of speakers in the aforementioned provinces speak English as their mother tongue.

In Gauteng, there is no single language with an outright majority of mother tongue speakers, as apparent from Table 1. However, the number of mother tongue speakers of English and Afrikaans, with recorded percentages of 12.4 and 13.3 combined equals a mere 25.7 percent of speakers in the province. On the other hand the three dominant African languages in

Gauteng, namely, isiZulu 19.8 percent, Sesotho 11.6 percent and Sepedi 10.6 percent, combined equals 42 percent. Therefore as with the other provinces, the majority of speakers in Gauteng speak an African language as their mother tongue. Similar to Gauteng's language demographics, Mpumalanga does not have a majority of persons in the province speaking one African language as their mother tongue. It is evident from table 1 that there are two equally poised African languages, namely SiSwati with 27.7 percent and isiZulu with 24.1 percent. The percentage of African language speakers outweighs the percentage of English speakers.

The Northern Cape and Western Cape provinces are two of nine provinces, where the majority of persons do not speak an African language. In both of these provinces, the majority of persons speak Afrikaans as their mother tongue and not English. 33.1 percent speak Setswana with 24.7 percent speaking isiXhosa. A further point to note is that the Western Cape Province has the largest percentage of English mother tongue speakers with 20.2 percent, in comparison to the other eight provinces appearing in Table 1.

These language demographics need to be considered against the constitutional provisions of Sections 6, and 35(3) (k) as well as the limitations analysis with specific reference to the sliding scale formula. These language statistics are also to be contrasted to the monolingual language of record policy directive by the Chief Justice in addition to the reaffirming directive by Judge President Hlophe. These contrasts form part of the discussion in chapter seven of this thesis.

In the case of *Damani* (2016), the court also relied on the report by the DPP in KwaZulu-Natal who explained that there were pilot courts in which African languages were being used and this served to be impractical on a number of grounds, listed above, including dialectal differences across districts. With the following nine tables below, relying on the Census (2011) results I have presented the language demographics of each district for each of the nine provinces to assess whether there are vast language differences. I specifically focus on language differences and not dialectal differences as these would be synonymous with each district, where people are able to communicate in that language variety. It is therefore difficulty to comprehend why that would have been listed as an issue. It draws the argument back to the thinking of Ruiz (1984) regarding language planning and how language planners or states see language as a problem, rather than a right or a resource.

Table 2: Eastern Cape language statistics per district municipality (Census, 2011)

Language	Cacadu	Amatole	Chris Hani	Joe Qgabi	O.R Tambo	Alfred Nzo	Buffalo City	Nelson Mandela Bay
Afrikaans	43.6	2.0	6.0	5.8	0.5	0.8	7.0	28.9
English	6.2	2.2	2.6	1.6	2.7	2.3	10.7	13.3
IsiNdebele	0.2	0.2	0.2	0.2	0.2	0.3	0.2	0.3
IsiXhosa	43.9	91.6	87.4	69.8	93.1	84.0	76.9	53.2
IsiZulu	0.4	0.3	0.3	0.3	0.5	1.2	0.4	0.4
Sepedi	0.2	0.2	0.2	0.2	0.2	0.3	0.2	0.2
Sesotho	0.5	0.2	0.5	20.0	0.3	8.7	0.3	0.4
Setswana	0.3	0.1	0.2	0.1	0.1	0.2	0.2	0.3
Sign Language	0.3	0.6	0.7	0.6	0.8	0.9	0.7	0.4
SiSwati	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Tshivenda	0.1	0.0	0.0	0.0	0.1	0.0	0.0	0.1
Xitsonga	0.1	0.0	0.0	0.0	0.0	0.0	0.1	0.1
Other	0.8	0.3	0.5	0.4	0.3	0.6	0.7	1.0

Table 3: Free State language statistics per district municipality (Census, 2011)

Language	Fezile Dabi	Lejweleputswa	Mangaung	Thabo Mofutsanyana	Xhariep
Afrikaans	13.8	11.3	16.2	6.0	31.6
English				2.0	
IsiNdebele					
IsiXhosa	6.0	12.2	9.9		15.8
IsiZulu	5.6			10.4	
Sepedi					
Sesotho	67.3	62.2	53.3	78.5	45.3
Setswana		5.9	12.6		3.5
Sign Language					
SiSwati					
Tshivenda					
Xitsonga					
Other					

Table 4: KwaZulu-Natal language statistics per metropolitan and district municipalities (Census, 2011)

Language	Amajuba District Municipality	eThekwini Metropolitan Municipality	iLembe District Municipality	Sisonke District Municipality	Ugu District Municipality
Afrikaans	3.1	1.7		1.3	2.1
English	5.2	26.8	9.6	3.2	8.3
IsiNdebele			1.2		
IsiXhosa		3.9	3.3	28.6	4.3
IsiZulu	87.5	62.8	82.2	62.7	82.7
Sepedi					
Sesotho					
Setswana					
Sign Language					
SiSwati					
Tshivenda					
Xitsonga					
Other					
Language	**uMgungund-lovu District Municipality**	**uMkhanyaku-de District Municipality**	**uMzinyathi District Municipality**	**uThukela District Municipality**	**uThungulu District Municipality**
Afrikaans			1.0	1.2	2.3
English	15.3	1.7	3.1	4.7	5.1
IsiNdebele		1.2		1.1	1.3
IsiXhosa	1.9				
IsiZulu	76.4	94.6	91.0	90.5	89.1
Sepedi					
Sesotho	1.7		2.3		
Setswana					
Sign Language					
SiSwati					
Tshivenda					
Xitsonga					
Other					

Table 5: North West language statistics per district municipality (Census, 2011)

Language	Bojanala Platinum District Municipality	Dr Kenneth Kaunda District Municipality	Dr Ruth Segomotsi Mompati District Municipality	Ngaka Modiri Molema District Municipality
Afrikaans	7.2	18.4	7.6	5.0
English			1.9	3.2
IsiNdebele				
IsiXhosa	5.6	11.5		2.7
IsiZulu				
Sepedi				
Sesotho		15.3	1.8	
Setswana	55.3	44.8	83.6	81.8
Sign Language				
SiSwati				
Tshivenda				
Xitsonga	8.1			
Other				

Table 2 illustrates that isiXhosa, is spoken by the majority of persons across the province. Table 3 provides similar statistics to the Eastern Cape, where Sesotho, is spoken in every district of the province. The statistics pertaining to the district municipalities of KwaZulu-Natal in Table 4 illustrates an overwhelming majority of persons in all districts; speak isiZulu as their mother tongue. The statistics in Table 5 see Setswana mother tongue speakers outnumbering all other languages in each district.

Table 6: Northern Cape language statistics per district municipality (Census, 2011)

Language	Frances Baard District Municipality	John Taolo Gaetsewe District Municipality	Namakwa District Municipality	Pixley ka Seme District Municipality	ZF Mgcawu District Municipality
Afrikaans	38.6	16.5	93.9	76.8	76.4
English	6.2	2.6	1.2	1.6	1.8
IsiNdebele					
IsiXhosa	4.9		1.5	17.5	2.7
IsiZulu					
Sepedi					
Sesotho					
Setswana	43.3	75.6	1.7	1.6	15.8

Sign Language					
SiSwati					
Tshivenda					
Xitsonga					
Other					

Table 7: Western Cape language statistics per metropolitan and district municipality (Census, 2011)

Language	Cape Winelands District Municipality	Central Karoo District Municipality	City of Cape Town Metropolitan Municipality	Eden District Municipality	Overberg District Municipality	West Coast District Municipality
Afrikaans	74.8	87.2	35.7	70.8	70.3	83.7
English	4.3	2.6	28.4	7.5	6.8	4.0
IsiNdebele						
IsiXhosa	16.6	7.8	29.8	18.3	17.9	8.6
IsiZulu						
Sepedi						
Sesotho	1.9				2.1	1.3
Setswana						
Sign Language						
SiSwati						
Tshivenda						
Xitsonga	0.1	0.0	0.0	0.0	0.0	0.0
Other	0.8	0.3	0.5	0.4	0.3	0.6

The district municipality language statistics, of the Northern Cape and Western Cape provinces, differ to tables two to five, where there is not an overwhelming number of speakers of one particular African language. Table 6 represents the district language statistics of the Northern Cape, where the Frances Baard and John Taolo Gaetsewe district municipalities comprise of the majority of persons speaking Setswana. In the remaining three district municipalities of Namakwa, Pixley ka Seme and ZF Mgcawu, Afrikaans is the majority-spoken language. In the Northern Cape Afrikaans and Setswana are almost equally poised in terms of the percentage of speakers.

Similarly, the districts and metropolitans in the Western Cape Province, appear from Table 7 to have three dominant languages, namely Afrikaans, isiXhosa and English. This must be

contrasted to the reaffirming directive of Judge President Hlophe, that English be the sole official language all courts. This line of thinking precludes two thirds of the people in Cape Town and relegates them to relying on interpretational services when implementing the Section 35(3) (k) constitutional right.

Table 8: Limpopo province language statistics per district municipality (Census, 2011)

Language	Capricorn District Municipality	Mopani District Municipality	Sekhukhune District Municipality	Vhembe District Municipality	Waterberg District Municipality
Afrikaans	3.0	2.1		1.3	7.7
English	2.0				
IsiNdebele			4.4		
IsiXhosa					
IsiZulu			3.3		
Sepedi					
Sesotho	84.9	45.9	82.2	1.6	56.4
Setswana					11.5
Sign Language					
SiSwati					
Tshivenda				67.2	
Xitsonga	2.6	44.3	2.0	24.8	8.3
Other					

Table 9: Mpumalanga language statistics per district municipality (Census, 2011)

Language	Ehlanzeni District Municipality	Gert Sibande District Municipality	Nkangala District Municipality
Afrikaans	4.0	9.1	10.0
English			
IsiNdebele			28.4
IsiXhosa			
IsiZulu		60.9	23.1
Sepedi			
Sesotho	10.3	4.2	14.7
Setswana			

Sign Language			
SiSwati	54.5	13.0	
Tshivenda			
Xitsonga	21.8		
Other			

In the Limpopo Province the district municipalities language demographics, resembles the Western Cape and Northern Cape provinces, with no single language spoken by the majority of persons. The language policy in Limpopo would need to be carefully drafted in ensuring that these language groups are all recognised and this speaks to the argument of having linguistically competent legal practitioners and judicial officers servicing the lower courts. This approach if adopted could then be applied to the Mpumalanga Province district municipalities' language demographics, as represented in Table 9 as well as the other provinces. Nonetheless, in both Limpopo and Mpumalanga, there is a majority spoken African language in each district. Moreover, it would be difficult to validate the use of English as a language of record in these two provinces, where it is evident that there is a minimal number of English language speakers.

Table 10: Gauteng province language statistics per metropolitan and district municipalities (Census, 2011)

Language	**City of Johannesburg Metropolitan**	**City of Tshwane Metropolitan Municipality**	**Ekurhuleni Metropolitan Municipality**	**Sedibeng District Municipality**	**West Rand District Municipality**
Afrikaans		18.8	11.9	15.2	16.9
English	20.1		12.0		
IsiNdebele					
IsiXhosa				7.1	14.9
IsiZulu	23.4		28.8	16.0	
Sepedi					
Sesotho	9.6	19.9	11.4	46.7	10.8
Setswana	7.7	15.0			27.3
Sign Language					
SiSwati					
Tshivenda					
Xitsonga		8.6			

Other					

In Table 10 above, three African languages are spoken by the majority of persons in the district municipalities, namely isiZulu, Sesotho and Setswana. In addition, Afrikaans is spoken in all the municipalities. Besides the Northern Cape and Western Cape Provinces, Afrikaans features prominently in all districts in Gauteng, thus it is questionable how the removal of Afrikaans as a language of record is justified on the these statistical grounds. It is impossible to state that all Afrikaans speakers in these areas are white and not coloured, by adopting the reasoning by the Chief Justice and Judge President Hlophe on the monolingual language of record policy directive.

These language demographics must be borne in mind in chapter seven of this thesis; I critique the monolingual language of record policy. The demographics are also important for chapter eight of this thesis, wherein I had proposed recommendations in the form of drafting and enacting language policies for the courts in each province, taking into account the language demographics.

6.16 Legal professionals: racial demographics

It well and good to propose provincial language policies for courts, however, meaningless if the legal professionals' language demographics do not correlate with language demographics of the country presented above. This once again links to the role of university language policies and broader educational policies in shaping the linguistic trends of students at an early age, prior to entering the profession. There has been no official or unofficial release of language competencies of legal professional including judicial officers across the county that I am aware of. The statistics pertain primarily with race and gender and in a way emulate the provisions of Section 174 of the Constitution identifying only race and gender with the exclusion of language. The reason why I have included these racial statistics of South Africa's legal professionals is that in the *Damani* (2016), *Gordon* (2018), and *UFS* (2017) cases amongst others, the judges have reverted to these statistics. There is a constant linkage in South Africa between race and language. In fact, this is not only confined to South Africa as seen in Australia and in India, although not race but a caste divide that includes language. The thinking of racializing our languages is one, which must be excluded in order to build a united and inclusive society where languages are seen as the languages of all South Africans.

The education system has a pivotal role to play in this regard, hence this aspect in my research.

Table 11: Racial demographics of the practicing attorneys per law society during the period of April 2014 to April 2015 (Law Society of South Africa, 2015: 34 – 43)

Race	Cape Law Society	Free State Law Society	Law Society of The Northern Provinces	KwaZulu-Natal Law Society
African	919	214	3586	617
Coloured	1016	14	129	41
Indian / Asian	216	4	652	1257
White	4320	817	8381	1176
Unknown	39	6	312	1

Table 12: Racial demographics of the practicing advocates per Bar recoded in April 2014 (Law Society of South Africa, 2015: 49)

Bars	African	Coloured	Indian/ Asian	White
Cape	15	60	12	365
Port Elizabeth	6	6	2	54
Grahamstown	4	2	1	20
Free State	7	1	0	60
Northern Cape	2	0	1	8
Johannesburg	251	21	65	664
Pretoria	104	3	9	454
KwaZulu-Natal	49	5	97	157
North West	7	0	0	12
Transkei	26	1	0	1
Bisho	11	2	0	6

The racial statistics pertaining to practicing attorneys and advocates are housed in Tables 11 and 12. In Table 11, the Cape Law Society, the Free State Law Society and the Law Society of the Northern Provinces all comprise of a majority of white practicing attorneys. The KwaZulu-Natal Law Society is the only law society, in which the majority of practising attorneys are non-white. Thus, the overwhelming majority of practicing attorneys across the various provinces are white. A similar situation exists for advocates as captured in Table 12 above. There is an overwhelming majority of white advocates at each bar, with the exception of the Transkei and Bhisho bars, in the Eastern Cape. For purposes of drafting and enacting

provincial language policies for courts, in line with the recommendations in chapter eight of this thesis, the law society and general council of the bar would need to assess against these statistics what languages these legal professionals are able to speak, read and write in and to what level.

Table 13: Racial demographics of high court judges per division in each province as at April 2015 (Law Society of South Africa, 2015: 50)

Divisions	African	Coloured	Indian	White
Constitutional Court (Johannesburg)	7	0	0	3
Supreme Court of Appeal (Bloemfontein)	10	2	5	6
Northern Cape (Kimberley)	4	1	0	2
Eastern Cape (Grahamstown)	4	1	0	4
Eastern Cape Local Division (Port Elizabeth)	2	0	1	4
Eastern Cape Local Division (Bisho)	0	0	0	3
Eastern Cape Local Division (Mthatha)	4		1	2
Western Cape Division (Cape Town)	8	11	2	12
North West (Mafikeng)	3	1	1	1
Free State Division (Bloemfontein)	5	1		5
Gauteng Division (Pretoria)	27	2	2	19
Gauteng Division (Gauteng)	14	2	3	12
KwaZulu-Natal Division (Pietermaritzburg)	7	1	3	5
KwaZulu-Natal Local Division (Durban)	5	2	4	2
Labour Court	3			7

Table 13 pertains to the racial demographics of the judges per division in the various provinces, which appears to be racially representative of the Republic's demographics. However, as I stated previously, in accordance with my recommendations in chapter eight of this thesis, a study will have to be undertaken to determine the linguistic competency of the judges regardless of race and ensure that this is representative of the language demographics across provinces.

Table 14: Racial statistics of magistrates in South Africa at April 2015 (Law Society of South Africa, 2015: 52)

Magisterial Level	African	Coloured	Indian	White
Regional Court President	7	1	0	1
Regional Magistrate	147	23	32	132
Chief Magistrate	9	2	3	4
Senior Magistrate	37	6	4	31
Magistrate	464	113	126	447

The racial equitability among Magistrates in South Africa is evident from the statistics in Table 14 above. The linguistic competency of Magistrates is ever more urgent, and necessary as opposed to the CC, given that the magistrates are presiding officers in the lower court and are courts of first instance, the majority of whom deal with criminal law cases and thus has implications for the Section 35(3) (k) right. In almost all the cases I advanced above the cases saw the magistrates grappling with the language of record and interpretational errors and inconveniences that surmounted to grave injustices for both the accused persons and complainants.

Table 10: Gauteng province language statistics per metropolitan and district municipalities (Census, 2011)

Language	City of Johannesburg Metropolitan	City of Tshwane Metropolitan Municipality	Ekurhuleni Metropolitan Municipality	Sedibeng District Municipality	West Rand District Municipality
Afrikaans		18.8	11.9	15.2	16.9
English	20.1		12.0		
IsiNdebele					
IsiXhosa				7.1	14.9
IsiZulu	23.4		28.8	16.0	
Sepedi					
Sesotho	9.6	19.9	11.4	46.7	10.8
Setswana	7.7	15.0			27.3
Sign Language					
SiSwati					
Tshivenda					
Xitsonga		8.6			
Other					

The language statistics presented in Table 10 above, in capturing the language demographics of the Gauteng province, illustrates that three African languages are spoken by the majority of persons in the district municipalities, namely isiZulu, Sesotho and Setswana. In addition, Afrikaans is spoken in all the municipalities. Simply put, given that the courts are already linguistically equipped to give effect to an Afrikaans speaker's language right, it would be practicable and equitable if the same could apply to the three African languages.

The geographical position of the various courts is clearly linked to the geographical language statistics presented in the various tables above. Each district should be in a position to accommodate the majority of persons therein who speak an African language as their mother tongue. This approach should by no means exclude the legal system, where persons are unable to access the courts due to language barriers.

6.17 English language limitations of South African litigants

The following step in the process is to assess the English language competency of litigants. It is expected that when a decision is taken to make English the sole official language of record, a survey has already been conducted attesting to the high levels of English competency of litigants in the legal system. To my knowledge, this was not done by Chief Justice Mogoeng. To date one such survey that has recently been made public was conducted by Legal Aid South Africa, who offers from legal services to indigent persons and who are provided for by the state in terms of Section 35 of the Constitution.

Table 15: Primary spoken language in criminal matters (Legal Aid South Africa's 2016 Language Survey, 2016: 2)

Province	No of Respondents	Zulu	Afrikaans	Xhosa	Sotho	Tswana	English	Pedi	Tsonga	Swati	Venda	Ndebele	Other
WC	9,302	0%	66%	26%	0%	0%	7%	0%	0%	0%	0%	0%	0%
KZN	7,031	85%	0%	3%	1%	0%	10%	0%	0%	0%	0%	0%	0%
GP	6,278	37%	8%	7%	15%	9%	7%	8%	5%	1%	2%	1%	0%
EC	5,392	0%	15%	82%	2%	0%	1%	0%	0%	0%	0%	0%	0%
FS	3,113	5%	5%	6%	74%	5%	3%	0%	0%	0%	0%	0%	0%
NW	2,631	4%	6%	7%	9%	69%	1%	2%	2%	0%	0%	0%	1%
MP	2,558	39%	3%	1%	4%	1%	1%	14%	3%	27%	0%	6%	1%

NC	2,065	2%	58%	6%	2%	31%	1%	0%	0%	0%	0%	0%	0%
LP	1,988	1%	1%	1%	9%	3%	0%	48%	20%	0%	15%	1%	1%
Grand Total	**40,358**	**24%**	**22%**	**20%**	**10%**	**8%**	**5%**	**5%**	**2%**	**2%**	**1%**	**1%**	**0%**

Table 16: Primary Spoken language in civil matters (Legal Aid South Africa's 2016 Survey, 2016: 3)

Province	No of Respondents	Zulu	Afrikaans	Xhosa	English	Sotho	Tswana	Pedi	Tsonga	Venda	Ndebele	Swati	Other
KZN	1,083	68%	1%	1%	29%	0%	0%	0%	0%	0%	0%	0%	0%
GP	1,045	24%	12%	6%	11%	19%	9%	11%	4%	2%	1%	1%	1%
EC	797	0%	23%	67%	9%	1%	0%	0%	0%	0%	0%	0%	0%
WC	758	0%	63%	18%	18%	0%	0%	0%	0%	0%	0%	0%	1%
FS	480	1%	12%	8%	1%	70%	8%	0%	1%	0%	0%	0%	0%
NW	374	2%	20%	6%	3%	9%	58%	2%	1%	0%	0%	0%	0%
LP	318	1%	8%	1%	1%	3%	2%	44%	19%	21%	0%	0%	0%
MP	313	31%	8%	1%	5%	4%	0%	26%	2%	0%	12%	11%	1%
NC	188	1%	59%	10%	5%	6%	20%	0%	0%	0%	0%	0%	0%
Grand Total	**5,356**	**21%**	**20%**	**16%**	**12%**	**11%**	**7%**	**6%**	**2%**	**2%**	**1%**	**1%**	**0%**

Tables 15 and 16 above, comprises of the language statistics in criminal and civil matters for the year of 2016. The statistics in Table 15 clearly indicate that the languages spoken by applicants varies across provinces. However, the table provides that at National level three languages are prominent across provincial borders, namely isiZulu at 24 percent, Afrikaans at 22 percent and isiXhosa at 20 percent. Table 16 presents a similar pattern for litigants in civil cases with the most widely spoken languages being isiZulu at 21 percent, Afrikaans at 20 percent and isiXhosa at 16 percent. What is most important for the research at hand is that a mere 5 percent in criminal cases spoke English as their mother tongue, while the number is 11 percent for civil cases. However, according to Chief Justice Mogoeng and Judge President Hlophe, it is practicable to proceed in English only. In addition, to note is the large

percentage of Afrikaans speakers and how invariably these statistics could not have been taken into account when removing Afrikaans as a language of record.

Earlier in this chapter I questioned how a court or judge was in a position to determine linguistic competency in the context of the term 'understand' in Section 35(3) (k) and in light of the African and international case studies in chapters four and five of this thesis, understanding included, speaking, reading and writing in a language at a high level. The case law in this chapter has also seen judicial officers determining when they think a witness understands proceedings and how this actually adversely affected the outcome of the case. Legal Aid South Africa, therefore, as part of their language survey included results on English proficiency for litigants in both criminal and civil cases. These statistics are encompassed in Tables 17 and 18 below.

Table 17: English proficiency in criminal cases (Legal Aid South Africa's 2016 Language Survey, 2016: 4)

Prov	Understand			Speak			Read/Write		
	Good	Satisfactory	Poor	Good	Satisfactory	Poor	Good	Satisfactory	Poor
EC	15.9%	27.7%	56.4%	14.2%	24.6%	61.2%	13.8%	23.6%	62.6%
FS	26.8%	39.7%	33.4%	24.0%	34.9%	41.1%	22.7%	33.1%	44.2%
GP	33.8%	41.7%	24.5%	30.7%	40.9%	28.4%	30.3%	38.5%	31.2%
KZN	21.9%	37.0%	41.0%	20.1%	33.4%	46.5%	18.8%	31.2%	50.0%
LP	27.2%	36.3%	36.6%	21.1%	35.4%	43.5%	21.5%	31.9%	46.6%
MP	25.4%	38.2%	36.4%	21.4%	36.7%	41.9%	21.5%	35.1%	43.4%
NW	28.3%	40.4%	31.3%	24.0%	39.3%	36.7%	24.6%	37.3%	38.0%
NC	15.0%	42.4%	42.6%	12.3%	37.9%	49.8%	11.9%	33.2%	54.9%
WC	24.4%	43.5%	32.2%	21.4%	40.6%	38.1%	19.4%	37.7%	42.9%
Grand Total	**24.4%**	**38.7%**	**36.8%**	**21.5%**	**36.1%**	**42.4%**	**20.7%**	**33.8%**	**45.6%**

Table 18: English proficiency in civil cases (Legal Aid South Africa's 2016 Language Survey, 2016: 5)

Prov	Understand			Speak			Read/Write		
	Good	Satisfactory	Poor	Good	Satisfactory	Poor	Good	Satisfactory	Poor
EC	44.8%	30.0%	25.2%	41.5%	30.4%	28.1%	43.4%	27.1%	29.5%
FS	46.9%	30.2%	22.9%	43.8%	32.1%	24.2%	44.2%	30.8%	25.0%
GP	52.6%	31.4%	16.0%	48.5%	34.4%	17.1%	49.6%	30.8%	19.6%
KZN	47.7%	29.8%	22.4%	44.1%	29.7%	26.1%	46.8%	25.5%	27.7%

LP	35.2%	40.9%	23.9%	33.0%	40.6%	26.4%	35.2%	36.8%	28.0%
MP	37.4%	30.7%	31.9%	36.4%	28.8%	34.8%	35.5%	27.8%	36.7%
NW	48.1%	28.3%	23.5%	43.6%	28.6%	27.8%	47.3%	25.4%	27.3%
NC	32.4%	33.0%	34.6%	31.9%	32.4%	35.6%	31.9%	27.7%	40.4%
WC	39.7%	40.4%	19.9%	37.7%	38.0%	24.3%	37.9%	36.0%	26.1%
Grand Total	**45.2%**	**32.4%**	**22.4%**	**42.1%**	**32.7%**	**25.2%**	**43.5%**	**29.6%**	**26.9%**

Table 17, illustrates at national level in all three categories of, speaking, understanding, reading/writing English was mainly poor or satisfactory with the 'good' percentage in each of the categories below 25 percent. Through further analysis from a provincial perspective, the majority of litigants in the Eastern Cape do not understand English. Exacerbating this is the fact that the overwhelming majority of litigants in the Eastern Cape cannot speak, read or write English. Litigants in KwaZulu-Natal also have poor proficiency in English, in understanding, speaking and reading/writing English.

Table 18 concerning civil cases, illustrates that in comparison to litigants in criminal cases, the level of English proficiency across all nine provinces was in the satisfactory range. Overall, English proficiency was increased in comparison to criminal cases but remained below 50 percent in the 'good' category.

These statistics are important for the discussions in chapter seven and the recommendations in chapter eight of this thesis, however the statistics lay bare the discrepancies in the reasoning and thinking by the judicial officers in the case law adopting narrowed interpretation of language rights as well as Chief Justice Mogoeng and Judge President Hlophe, with the monolingual language of record directive. These statistics by Legal Aid South Africa (2016) also illustrate the importance of a bottom up approach to language planning where empirical data in the form of statistics emanating from surveys are taken into account and provide policy direction.

6.18 Attorneys views on languages other than English

For bilingual and multilingual language, policies to be successfully implemented in South African courts, legal practitioners and judicial officers cannot be averse to the policies. It is therefore important as part of a bottom up approach to language planning that the views of legal practitioners be taken into account and addressed before implementing the policy to ensure its successful buy in. De Vries and Docrat (2019) conducted such a survey, however

focussing solely on the attorneys' profession. Participation in the survey was voluntary and this should be possibly be revised when undertaken by the state or legislature, where participation be mandatory. According to de Vries and Docrat (2019: 96), approximately 25900 attorneys are registered with the Law Society in South Africa. 2157 completed a computerised self-administered survey. Essentially the survey investigated the following:

> The first section of the questionnaire comprised biographical questions focusing on aspects such as gender, age, provincial location in South Africa, undergraduate legal qualification and institution(s) of study. Questions excluded race. In the second section, participants answered questions about their language ability, their use of two official South African languages in which they were fluent, as well as the languages used most often, and secondarily most often, in these contexts: at home; in their social circles; during written and oral communication with clients; and during communication with colleagues. Participants were also asked about these aspects: the language in which they mostly conducted their research; the language of documentation and/or correspondence with clients, courts and opponents; the language of legal training; the practitioner's competence in English; and the clients' competence in English (as evaluated by practitioners). The final section of the questionnaire included 18 Likert-scale questions on practitioners' language attitudes, needs and choices. There were four response options for the Likert-scale questions, where the value of 1 indicated that the participant strongly disagreed with the applicable statement, while a value of 4 indicated that the participant strongly supported the applicable statement.

Table 19: de Vries and Docrat, 2019: 98.

Clients' English proficiency from the perspective of the legal practitioner		
Proficiency in reading and writing	*100*	*N = 1 915*
Measured average	2.16/3	
Reasonable	20.94	401
Good	41.83	801
Excellent	37.23	713
Proficiency in oral communication	*100*	*N = 1 915*
Measured average	2.15/3	
Reasonable	19.74	378
Good	45.43	870
Excellent	34.83	667
N = total number of participants answering this question		

Table 20: de Vries and Docrat, 2019: 100

Table 7.4 Results of questionnaire on attorneys' language attitudes, needs and choices						
Legend: 1=Strongly disagree; 2=Disagree; 3=Agree; 4=Strongly Agree The highlighted percentage under "Total" is a "measured mean".						
The general language of use in the legal profession should be English.		***1***	***2***	***3***	***4***	***Total***
	No.	443	196	320	821	1 780
	%	24.89	11.01	17.98	46.12	2.85
Transformation in the judicial system is fair.		***1***	***2***	***3***	***4***	***Total***
	No.	419	468	481	399	1 767
	%	23.71	26.49	27.22	22.58	2.49
Transformation in the judicial system takes place at a satisfactory rate.		***1***	***2***	***3***	***4***	***Total***
	No.	345	498	563	358	1 764
	%	19.56	28.23	31.92	20.29	2.53
The judicial system cannot transform adequately if multilingualism is sought		***1***	***2***	***3***	***4***	***Total***
	No.	684	397	324	367	1 772
	%	38.60	22.40	18.28	20.71	2.21
It is in the best interests of the client to consult with him/her in English.		***1***	***2***	***3***	***4***	***Total***
	No.	760	441	291	278	1 770
	%	42.94	24.92	16.44	15.71	2.05
It is in the best interests of the client to consult with him/her in his/her home language.		***1***	***2***	***3***	***4***	***Total***
	No.	180	257	365	970	1 772
	%	10.16	14.50	20.60	54.74	3.2
I have experienced communication problems with clients before because we did not properly understand each other's language.		***1***	***2***	***3***	***4***	***Total***
	No.	469	354	410	538	1 771
	%	26.48	19.99	23.15	30.38	2.57
I had to translate legal documents from another language into English before.		***1***	***2***	***3***	***4***	***Total***
	No.	798	221	256	490	1 765
	%	45.21	12.52	14.50	27.76	2.25
The translation of legal documents can influence the speed at which a case is settled.		***1***	***2***	***3***	***4***	***Total***
	No.	173	223	415	952	1 763
	%	9.81	12.65	23.54	54.00	3.22
Multilingualism can create confusion in the legal profession.		***1***	***2***	***3***	***4***	***Total***
	No.	365	270	344	787	1 766
	%	20.67	15.29	19.48	44.56	2.88
In a multilingual country,		***1***	***2***	***3***	***4***	***Total***
	No.	496	401	372	486	1 755

Table 7.4 Results of questionnaire on attorneys' language attitudes, needs and choices						
Legend: 1=Strongly disagree; 2=Disagree; 3=Agree; 4=Strongly Agree The highlighted percentage under "Total" is a "measured mean".						
multilingualism in the courts should be a given.	*%*	28.26	22.85	21.20	27.69	2.48
It can be confusing to the client if an attorney does not litigate in his/her home language.		***1***	***2***	***3***	***4***	***Total***
	No.	378	367	463	558	1 766
	%	21.40	20.78	26.22	31.60	2.68
I regularly use language practitioners to translate legal documents.		***1***	***2***	***3***	***4***	***Total***
	No.	1 208	310	110	133	1 761
	%	68.60	17.60	6.25	7.55	1.53
I regularly use translators during court proceedings.		***1***	***2***	***3***	***4***	***Total***
	No.	650	344	325	422	1 741
	%	37.33	19.76	18.67	24.24	2.3
In a criminal case it is fair that a victim should pay for translation services himself if he/she cannot make a statement in English.		***1***	***2***	***3***	***4***	***Total***
	No.	1 279	188	96	185	1 748
	%	73.17	10.76	5.49	10.58	1.53
I have experienced before that interpreters' translations cause confusion during court proceedings.		***1***	***2***	***3***	***4***	***Total***
	No.	288	356	486	605	1 735
	%	16.60	20.52	28.01	34.87	2.81
In my profession I will benefit from learning another indigenous South African language.		***1***	***2***	***3***	***4***	***Total***
	No.	325	183	382	876	1 766
	%	18.40	10.36	21.63	49.60	3.02
During the translation process, I found that legal concepts could not be translated meaningfully and in context in other languages.		***1***	***2***	***3***	***4***	***Total***
	No.	252	390	494	596	1 732
	%	14.55	22.52	28.52	34.41	2.83

Table 19, is illustrative that attorneys view the English language proficiency of clients as mainly 'good' and 'excellent'. This is contrary to Legal Aid's language survey (2016). This also illustrates the somewhat obliviousness of legal practitioners to their clients language difficulties. This was also the case in India, Morocco, Nigeria and Kenya, where the focus is on legal practitioners understanding the language regardless of the client's language

limitations. Table 20 presents mixed views on the importance of multilingualism and acknowledging this, but then disagreeing when asked on the importance of using other languages, citing among the reasons, difficulty, in translation and time constraints as well as costs. I engage further with the findings by de Vries and Docrat (2019) and Table 20, in greater depth in chapter seven of this thesis.

6.19 Conclusion

This chapter in advancing the data drew on the literature in chapter two of this thesis as well as the African and International case studies, in illustrating parallels. This is important in formulating the conclusions and recommendations, in chapter eight of this thesis. This chapter essentially lays the foreground upon which the entire thesis is brought together in chapter seven, where the data is engaged with from a point of critique. This chapter, through presenting the data has highlighted the issues in both the legal system and higher education in South Africa and how the two disciplines are connected. The chapter has illustrated that the language of record transcends many disciplines of society and that it is not one policy that affects one domain only. It intersects with higher education, which ultimately informs the direction of the language of record policy for courts.

This chapter has more specifically commenced with the constitutional framework, specifically highlighting the language rights and the contentiousness of the parameters of the rights when applying the African languages. This is true for both the legal system with Section 35 and Higher Education with Section 29 of the Constitution. The case law bears testament to the methods of interpretation employed in practical instances and how litigants' language rights are adversely affected. The case law also brings to the fore the competing interests judicial officers are balancing and how the balancing act, through the limitations analysis and sliding scale formula is misconstrued in favour of English (*S* v *Gordon*, 2018). Legislative interpretation is subjective to an extent as noted in chapter two of this thesis; however, the lens through which judicial officers are currently interpreting and applying the law is of grave concern, where compliance with the monolingual language of record directive is the primary goal (*S* v *Damani*, 2016; *S* v *Gordon*, 2018).

Contributing to these problems is the often vague and discretionary statutes and policies. As I advanced in the course of this chapter, this could be either a positive or a negative aspect (Cameron, 2013); however, in a system where a narrowed interpretation is adopted, this has adverse implications for the broader citizenry and their rights. Having said this, there is often

an agenda at play, in this instance it is the pursuit of an English only policy across domains on the basis of inclusivity, equality, transformation and historical redress. This is more prevalent in the language policies of universities, where former 'Afrikaans' institutions of higher learning have excluded Afrikaans language speakers on the misinformed basis that they are only white and not coloured. This argument then weakens the opportunity of elevating the use of African languages as languages of teaching and learning, cementing monolingualism on the basis that everyone is discriminated against equally, and thus discrimination is fair and enables access for all. This is not the case for students from far-flung rural areas, who have limited or no understanding in English. An institution in their province suddenly becomes inaccessible on grounds of language. This chapter has highlighted the issues that need to be discussed in greater depth in chapter seven of this thesis.

CHAPTER SEVEN

DATA ANALYSIS

7.1 Introduction

This chapter provides and analysis of the data presented in chapter six of this thesis. Through the analysis, this chapter engages with data through a critical lens by contrasting it to the literature in chapter two of this thesis. This chapter sees the convergence of points on the main issues highlighted in this thesis and the identified objectives of this research in chapter one of this thesis. This chapter essentially links the theory with the practical components and by doing so takes account of the views of experts in the field and their opinion. It is of critical importance to gauge the views of those who are directly involved in higher education and legal practitioners, judicial officers and the interpreters. I have elaborated on this point in chapter three of this thesis. The overarching purpose of this chapter is to establish the base upon which the conclusions and recommendations are formulated and presented in chapter eight of this thesis.

7.2 The enforceability of the constitutional language framework

In chapters one and two of this thesis I explicated the political negotiations that led to the drafting of the Interim Constitution (1993) followed by the final Constitution. In chapter six, I extracted the constitutional language provisions commencing with Section 6, the languages provision. As part of this discussion in chapter six, I limitedly outlined the discretionary nature of the provisions. In this chapter I will advance a critique of Section 6 where I draw on relevant authors' works in determining whether or not this is a positive ideal and if not what the implications are for a multilingual country such as South Africa, with an English only legal system.

One point of critique that arises through the authors' works (Perry, 2004) is that the languages provision is housed in the Founding Provisions of the Constitution and not in the Bill of Rights and thus limits the enforceability of the provisions. Perry (2004: 131) quoted Sachs who stated that the provisions of Section 6 were "… messy, inelegant and contradictory." Therefore, according to Perry (2004: 131) the provisions of Section 6 amount to 'symbolic gesturing' only. As I discussed in chapter six of this, the discretionary insertions

of terms including ‘practicable’ and ‘may’ are dependent on interpretation in practical situations. My point is that the relevant authorities (the state) should not be looking at exploiting the ‘gaps’ but rather implementing these provisions in a manner, consistent with the constitutional ideals, whereby the ‘gaps’ are filled. There are obligatory provisions in Section 6, which I have highlighted in chapter six of this thesis. The starting point and where the issue arises is through the conferring of official status on languages and what this requires the state to do in practice, given especially the obligatory onus on the state in subsection (2) “… to take practical and positive measures…” in elevating the status and use of the nine indigenous languages.

According to Lourens (2012) by conferring official status on all eleven official languages, the state is obligated to use all these languages equally in all domains in society. There is a disjuncture then between theory and practice. Leung (2019: 123) confirms this disjuncture, where “Official languages seem to have, at least on paper, the strongest possible legal protection a state can afford… public institutions rarely live up to the expectations explicitly or implicitly communicated by the law”. Leung (2019: 123) explains that the lack of implementation “… is a product of, among other things, the general lack of specificity in constitutional provisions”.

For Leung (2019: 123) these issues are hinged on what does it mean to confer official status on a language, which she argues carries ‘no fixed legal meaning’. This allows states such as South Africa, who have conferred official status on languages to, “… diverge in their understanding of the legal implications of status, their degree of commitment, and their corresponding institutional adaption” (Leung, 2019: 123). Leung (2019: 124) advances further that constitutions tend to be “… vague, directive, and aspirational” and whereby there is no spelling out of what the legal significance is of ‘official’ languages and “… how a government may act constitutionally or unconstitutionally regarding an official language provision”.

There is a sense that there are moral rather than legal commitments made through the constitutional provisions. One such example according to Leung (2019: 125) is South Africa and subsections (2) and (4), where subsection (2) “… does not specify how much state action is required”, whereas subsection (4) is mysterious in how precisely to achieve parity of esteem and whether equitability “… can be interpreted as fairly but less than equally”. Leung (2019:126) highlights the importance of PanSALB in ensuring the constitutional provisions

are implemented. The PanSALB has an important function in ensuring the equal development and use of all indigenous languages including the use of Afrikaans alongside English. The PanSALB through the Pan South African Language Board Act 59 of 1995, have the inherent authority in terms of Section 3(a) to ensure the use of all official languages in high status domains where organs of state do not interfere with this authority. Two objectives from Section 3(a) of the PanSALB Act (1995) are relevant to this thesis and read accordingly:

(i) The creation of conditions for the development and for the promotion of the equal use and enjoyment of all the official South African languages;

(iii) The prevention of the use of any language for the purposes of exploitation, domination or division;

The first objective speaks to "equal use" as opposed to the constitutional provisions which uses the term equitable, which as Leung (2019) and Perry (2004) suggest not only weakens the enforceability but creates uncertainty as to what actions precisely need to be taken by the state. This objective also speaks to all official South African languages and not English only. This speaks to the third objective where language may not be used for the purposes of "exploitation, domination or division". It is my opinion that by using English only as the language of record and proceedings this is amounting to the increased supremacy of English, which will prove to be decisive in a multilingual country such as South Africa. The point I am conveying is that PanSALB must play an active role in guarding against the exclusive use of English only in the legal system where this will be to the detriment of the use and development of African languages in high status domains.

The overarching point that must be made is, Section 6 must not be undermined by the state nor must the discretionary provisions be interpreted in manner, which detracts from the purpose of the provisions, which is to confer official status on the nine African languages and by doing so use the languages equally alongside English and Afrikaans. It is my opinion further that the built in practicability and equitability standards should not be used as defences when failing to implement the provisions. It is about the intention and agenda of the state in implementing these provisions. Unfortunately, Section 6 does have that aspirational tone that provides the feeling and meaning that the obligations created therein can be deviated from on grounds of practicability and equitability. The costs to the languages, the rights of the speakers of the languages and their other rights to contribute and participate in a constitutional democracy will be unfairly limited and where access to justice becomes an

elusive find for those who cannot speak, understand, read or write English, the vast majority of our country. I will discuss the important role of the PanSALB in chapter eight of thesis as part of the recommendations.

7.3 Section 35 imposing language or interpretational rights

Throughout the discussions pertaining to the rights in Section 35, one must be consciously aware of the fact that Section 6 influences the interpretation and application of these rights. In other words the interpretation and implementation of the rights in Section 35 must not be undertaken in a manner that is inconsistent with the provisions, of Section 6, whereby the African languages are to be elevated in status. Leung (2019: 211-212) draws a distinction between language rights flowing from fundamental human rights, this includes the right to a fair trial; and language rights may also flow from legal rights which are not universal human rights. As I advanced in chapter six of this thesis, language rights in South African courts emanate from the right to a fair trial. This follows, the fact that South Africa is a signatory to the Universal Declaration of Human Rights, as discussed in chapters four, five and six of this thesis. Leung (2019: 210) imparts and interesting argument, that in multilingual jurisdictions, courts tend to find persuasive principles, justifying the derivation of language rights from official status. This is indeed true in the South African context, particularly with the monolingual language of record directive for courts, where there is a clear abandonment of the official status conferred on the ten official languages as opposed to English.

In chapter six of this thesis, I explained that the language of record policy directive, affects more than just the fundamental right to a fair trial, in Section 35(3) (k). Reading, the rights contained in Section 35 as whole, it, is clear that in almost every instance language is needed to communicate in exercising these rights. Take for example subsection (1)(a) where an arrested person must be informed of their right to remain silent. This has to be communicated through the medium of a language. A police officer will do this. Applying the contents of the SAPS Draft Language Policy (2015) to this right, the right is then limited where an arrested person has no command of English, given that English is the working language of the SAPS. The SAPS Draft Language Policy (2015), as seen in chapter six, does recognise the provincial official languages as languages of communication, but where practicable. It is improbable that an arresting officer will make use of an interpreter when reading the arrested person's rights to them. Non-availability of costs and interpreters is most likely to be cited as reasons for not providing an interpreter at these preliminary stages of a criminal investigation.

The language of record policy directive affects the arrested person even before being formally charged through subsection (1)(e) with their first court appearance, where the arrested person would immediately be reliant on an interpreter if they are not able to understand English. This would be the case, regardless of the fact if all parties to court where for example competent in an African language or Afrikaans, given the monolingual language of record policy directive.

The undertone of language in these rights is again made known in subsection (2) where a detained person is to be informed of the reasons for their detainment; to be informed of their right to consult with a legal practitioner; and to challenge the lawfulness of the detention. This has to be done through a language and with an English only language of record policy directive, the detainee will have to rely on interpretation services where they cannot speak or understand English. In all instances, thus far, the arrested and detained persons are essentially conferred with an interpretational right and not language rights, where they cannot speak, read, write nor understand English.

The right to a fair trial is guaranteed in subsection (3) and as with subsections (1) and (2) above language is of prime importance for an accused person in formulating his/her defence and disproving the charge. On the point of a charge, the charge sheet will be provided in English only. This again is problematic in the context of South Africa, with the majority of persons in criminal trials not understanding English, as evidenced in the statistics in chapter six of this thesis. This innately affects the other rights as part of the overarching right to a fair trial, including, and not limited to, securing legal representation to present the case and consult with. The importance of this right was outlined in the case of *State* v *Pienaar* (2000). The court held that subsections (3)(f) and (g) are central to the right to a free trial where the legal practitioner provided by the state must be able to communicate directly with the accused unless in exceptional circumstances (see discussion in chapter six above). The standard or rather the 'opt out' clause is somewhat heightened through the phrase 'exceptional circumstances'. Simply put the state cannot in every instance then provide the excuse that there are not enough attorneys who can communicate directly with accused in the African languages. This would prove the point that there is a flaw in the justice system, where emphasis needs to be placed on employing linguistically competent attorneys. Conversely, there is a need for universities to graduate these students and the legislature to legislate African language requirements for the attorneys and advocates for admission to the side bar

and bar. This point highlights the intersecting disciplines of law and higher education in relation to language facilitating access to justice.

Section 35(3) (k) of the Constitution as opposed to the other provisions above, has been engaged with at various levels in both academia and in practice. The latter is evidenced by case law in chapter six that I will make reference to at this stage in the thesis. Section 35(3) (k) in my opinion confers a language right in the first part of the provision and an alternative interpretational right in the second part of the right. According to Schwikkard (2013: 800), it is essential for an accused to be given information in a language they understand and to be tried in a language they understand. Schwikkard (2010) qualifies this statement, by stating that Section 35(3) (k) does not confer a right to be tried in a language of choice but rather a language the accused understands and where that is not practicable to have the proceedings interpreted into that language. It is my opinion that by adopting this interpretation read together with the monolingual language of record directive a standard is created where as an accused if you cannot speak and understand English your language right falls away by default and you have an interpretational right only. It is my opinion further that this creates an unfair advantage for English speaking accused persons as opposed to the majority who speak an African language and Afrikaans. This is then contrary to the provisions of Section 6(2) of the Constitution. This systemic disadvantaged is perpetuated through the numerous issues arising from interpretation in the courts.

7.4 Interpretational rights and the failures of social justice

Those not opposing the English only language of record directive (Bloem, 2019 Interview: Appendix G) argue that accused persons can still exercise their right in Section 35(3)(k) and use their language, as an interpreter is provided at the state's expense in criminal cases. I disagree with these views as the current system of interpretation in South African courtrooms is not of a high quality and inconsistent. Secondly, there is a shortage of interpreters. Thirdly, interpretation as a profession in the legal system does not require any formal degree qualification as a prerequisite. Fourthly, the overarching distinction between interpretation *per se* and legal interpretation. These are the issues I will flesh out in relation to the case law advanced in chapter six of this thesis, authors' works and interviews (Mbangi, 2019 Interview: Appendix O).

Leung (2019: 213) states quality interpretation is problematic in many jurisdictions where local and foreign speakers of non-official languages enter the court system. In South Africa,

the system is complex for speakers of official languages to access justice, where they are African language or Afrikaans speaking accused persons. Leung (2019: 214) reminds us that interpretational rights are protected by the International Covenant on Civil and Political Rights as discussed in chapter four of this thesis. Simply put, if the Heads of Court are intent on pursuing a monolingual language of record policy for courts, interpretation services that are of the highest quality and readily available at all stages of criminal investigation and prosecution must be available and that this apply to civil cases as well.

Leung (2019: 216) makes an important point with bilingual or multilingual accused persons who may be more comfortable and proficient in their mother tongue than the language of court and in this instance, the standard to which the court will assess the linguistic competency will follow the fact that the accused can speak the language of the court. This was evidenced in the case law, in *Mthethwa* v *De Bruin No and Another* (1998) as a result of the accused understanding English, regardless of the extent to which the accused could speak English. This reaffirms the point that if you appear to speak English or say so when asked the trial proceeds in English.

The importance is not solely to be placed on the right to speak in your mother tongue but also the right to be understood by the court in your mother tongue. Leung (2019: 217) encapsulates this point:

> How often does the right to speak in an official language (by a litigant/defendant) translate into the right to be understood (directly, not via an interpreter) in that language? The right to argue a case in one's own language is of strategic value in adversarial trials, where the rhetorical resources may be crucial in legal argumentation but may be lost in translation.

This excerpt highlights the many permutations arising from the right in Section 35(3) (k) of the Constitution, while also highlighting the complexities of interpretation and even though this is in a legal domain, the issues are linguistic. This point alludes to the conclusions and recommendations in chapter eight of this thesis in relation to forensic linguists in South African courts and the importance of legal practitioners and judicial officers to either be linguistically competent and undergo necessary training on language matters in courts or call forensic linguists as experts. Conversely, three important questions central to this thesis and the objectives of this researched outlined in chapter one are captured by Leung (2019: 217).

> Can a defendant demand that a particular official language be used as the medium of trial proceedings, or that a judge who can understand a particular official language presides over his or her trial? Should the approval of such an application be conditioned upon the defendant's language proficiency? How might this proficiency be measured, and by whom?

The first question emanating from the excerpt has been directly dealt with and disposed of in the *Mthethwa* case (1998). The second question too, has been dealt with in a number of the cases presented in chapter six of this thesis, more specifically in the cases of *Gordon* (2018); *Damani* (2016); *Matomela* (1998) and *Damoyi* (2004). The third question has been raised in relation to the language of record directive by Hlophe (Appendix D), which I discuss in further detail at a later stage in this chapter. The last question has not been dealt with and I address this in chapter eight as part of the conclusions and recommendations. Suffice to say at this stage, it is my opinion that this has intentionally been overlooked in the South African context, given that the language question has never been afforded the space to be discussed and assessed with experts in the field. I can substantiate my point by drawing reference to the language of record directive by Hlophe (Appendix D), in which the litigants are merely asked at pre-trial stage whether they can speak English.

According Leung (2019: 218) with official status conferred on language(s) there is an expectation that as a citizen you are free to use the official language of your choice to be heard directly in that language, in courts. As I have also relied on Canada as a case study, which satisfies all four questions above, Leung (2019: 218) similarly credits Canada with their progressive interpretation and application of the language rights in both criminal and civil courts. Leung (2019: 218) also speaks about the trilogy of cases and how the courts developed the law from a narrowed interpretation of language rights to one of purposive interpretation where accused persons have the inherent right to be heard by a judge in a language of their choice, where that language is official. Although I have discussed the Canadian case of *R* v *Beaulac* (1999), Leung (2019: 218) advances further insights stating the following that is relevant to this research:

> The court granted the accused a new trial before a judge and jury who speak both official languages, and established that this right is not derived from the right to a fair trial, but rather from the country's guarantee of equality between the two official languages. It is absolute and substantive. The defendant's

> native language and ability to speak the other official language are irrelevant, because the accused should be able to freely and subjectively assert either official language as part of his/her cultural identity.

Again, the Canadian case study as with Belgium proves to be a leading example, which can be emulated in bilingual/ multilingual legal orders. Moreover, the emphasis placed on the right as substantive rather than procedural. The important linkage between language and culture is overlooked in the African case studies, specifically in Nigeria and Kenya, while Australia ignores cultural behaviour of indigenous people in trials. India discriminately maintains the caste system, which creeps into influencing court proceedings and legal education. Morocco, also in a sense classifies different cultures along linguistic and classist lines. Simply put, although Canada is only a bilingual jurisdiction, their model is inclusive and premised on equality rather than reasonability conveyed through equitability. I refer to equality as opposed to equitability in the South African context, which Leung (2019: 222) says that "… fair trial instead of linguistic equality is the overriding consideration". Leung (2019: 222) made these comments in relation to the cases of the *Mthethwa* (1998) and *Damoyi* (2003), which I have advanced in chapter six of this thesis.

This part of the discussion has confirmed that Section 35(3) (k) of the Constitution does not confer a language right but rather affords persons the right to use and be understood in a language they fully understand through interpretation. This is true not for English accused persons but for African language and Afrikaans, speaking accused persons. I maintain that this provides a lesser standard of justice on linguistic grounds and that this is contrary to the prescripts of Section 6 of the Constitution. To apply the work of Leung (2019), South Africa as a multilingual order does not marginalise the minority (English language speakers) but rather does so to the majority of people (African language and Afrikaans speaking people).

7.5 The problem with interpretation: quality versus efficacy

The next step in mind is to explain why I am of the opinion that as a long-term language plan, the courts in South Africa cannot focus on interpretation rather than adopting bilingual/multilingual language policies to regulate the language question for court proceedings and record purposes. Throughout this research, I have alluded to and directly referred to quality of interpretation. In the African case studies in chapter four as well as the international case studies in chapter five of this thesis, I have highlighted the various inconsistencies resulting from the use of interpreters in courts and how this affects access to

justice. In this part of the discussion, I focus on the qualifications for interpreters and the quality of interpretation in South Africa.

In South Africa, with a monolingual language of record policy, the quality of interpretation is central to ensuring the attainment of justice for all and the right to a fair trial is protected. According to Namakulu (2019: 230) as part of the deliverables of Section 35(3) (k) of the Constitution, competent interpreters can only produce quality interpretation. As noted in the case of *Ndala* (1996: 221) discussed in chapter six of this thesis, the court explained that competent interpreters are those who are 'able to give a true and correct interpretation of the evidence'. With the competence of the interpreter determined at the onset of the trial the following criteria is applied as identified by Namakulu (2019: 230)

> (1) proficiency in both the source and target languages, (2) a basic understanding of the legal process at the least, (3) impartiality and (4) professional conduct including operating within the boundaries of neutrality.

The limitation to this determining criteria is that the competence of the interpreter is assessed on their track record. This is problematic as all cases are different and present different challenges where the level of interpretation required varies. Simply put, it is not a precise science and thus non-regulatory. Given the non-regulation of interpreters for courts through legislative and policy means, this results in instances where interpreters "… ask their own questions, omit certain information, and add information that was not conveyed by the original speaker" (Namakulu, 2019: 230). Speaking from a point of practice Judge Hartle (2019, Interview Appendix L) bore testament to instances such as these. Judge Hartle (2019, Interview Appendix L), shared an experience in which an isiXhosa speaking accused was before her and she was postponing the matter, during this time Judge Hartle said she provided detailed reasons for the postponement, which took her a 'while' to read. The interpreter before court interpreted the reasoning into isiXhosa. What was startling and of grave concern for Judge Hartle was the fact that the interpreter was able to interpreter her lengthy reasoning within approximately two minutes. Given that Judge Hartle is bilingual (fully proficient in English and Afrikaans but not isiXhosa) she enquired from the interpreter whether in fact everything she said had been interpreted, given the brevity of interpretation, to which the interpreter responded along the lines of I took it upon myself to summarise your reasoning when interpreting for the accused. Instances such as these alert one to the practical issues concerning competent interpretation in South Africa.

The aspect of competence relates to quality of interpretation where according to Namakula (2019: 228) "interpreting of good quality is correct and comprehensible; it is simultaneous, and conducted by a competent and sworn interpreter". There are three points of departure from this quotation, namely, correctness, consistency and sworn evidence, each of which Namakula (2019: 228-229) addresses. Namakula (2019: 228) advanced that correctness is embedded in the Section 35(3) (k) right and requires the interpreter to interpret the proceedings properly and intelligently. Whatever the interpreter interprets, is recorded in the record, this will be in a high number of cases, where there is an English only language of record policy. Therefore, if it is interpreted incorrectly, the record will reflect as such (Namakula, 2019: 229). In chapter six of this thesis, I provided one, such example through the case of *Manzini* (2007), in which an isiZulu accused, during sentencing alleged that his evidence had not been properly interpreted. The magistrate after receiving confirmation from the chief interpreter that there were numerous errors and the interpretation was alarmingly poor proceeded with sentencing on the grounds that it did not affect the materiality of the facts. The dictum on appeal as quoted in chapter six of this thesis is relevant at this stage of the discussion and I re-quote it again:

> Tshiqi J and Schwatzman J (2007) concurring, held if incorrect interpretation had occurred, the Magistrate would not be in a position to determine the credibility of the witness imparting evidence in isiZulu. This would adversely affect the Magistrate's ability to evaluate such evidence, and obstruct the legal representatives from preparing arguments in mitigation and aggravation of sentence (2007: 107). This would also affect the outcome of the case, particularly whether or not to convict the accused. The Magistrate failed to recognise the importance of language as part of the right to a fair trial. The court held that Section 35(3) (k) of the Constitution had been adversely affected, and ordered that the appeal succeed and conviction and sentence be set aside (2007: 110).

This proves the point of the importance of correctness in interpretation, and the effects thereof in affecting the outcome of the trial for both accused and complainant. On the point of the witnesses' credibility, language is central as noted in the Australian case study in chapter five of this thesis. Where interpretation is employed, the credibility of the witness's evidence will be determined through the correctness of interpretation.

With regard to the consistency of interpretation, where an interpreter is called to interpret for an accused that the interpreter is required to interpret all proceedings not only parts of the trial (Namakulu, 2019: 229). Partial interpreting will result in a procedural irregularity that will adversely affect the outcome of the trial proceedings and limit the Section 35(3) (k) constitutional right to a fair trial. This overlaps with sworn evidence and the irregularities arising where interpreters have not been sworn in as evidenced in the cases of *Ndala* (1996) and *Siyotula* (2002). Although a procedural irregularity, it is of grave consequence for a complainant where for instance the trial is to commence *de novo*.

Namakula (2019: 231) also points out that judicial officers are tasked with determining the accuracy of interpretation, but are unable to do so as they lack the necessary language skills. Simply put, the point that must be conveyed is that interpretation "… is time-consuming. It may lead to loss or distortion of evidence, and to misunderstandings, and it may dilute the effect of cross-examination" (Namakula, 2019: 231). Further shortcomings including the inability to determine demeanour, "…voice intonations, and useful projections of paralinguistic forms of expression" (Namakula, 2019: 231). This can be substantiated from a practical perspective with the case studies in chapter four and five, with Australia as a case study that proves this point.

My intention is not to discredit the important profession of interpretation, but to merely lay bare the challenges that currently present in courts of law in South Africa and to also recognise that these problems are not inherent to South Africa only but are seen throughout Africa and internationally as far as India and Australia. I have advanced varying opinions, highlighting the challenges; the next point of discussion to advance the 'other side of the story' the views of an interpreter. As Turner (2019 Interview: Appendix R) pointed out, there are interpreters with whom she has worked well with, who have displayed their skill and quality and correctness was never in question. McConnachie (2019 Interview: Appendix N) also shared these views, but also noted that this depended on the interpreter and his or her ability and was thus unpredictable.

Yoliswa Mbangi (2019 Interview: Appendix O), a senior interpreter in the Bhisho High Court in the Eastern Cape Province, explained how she became an interpreter. The interview with Mbangi (2019 Interview: Appendix O) confirms that a university degree in interpretation and or translation studies is not a prerequisite for appointment as an interpreter in either the Magistrates' or High courts. Initially employed in an administrative clerkship position,

Mbangi together with fellow colleagues were appointed as interpreters on the basis of their matric marks for their language subjects.

According to Mbangi (2019 Interview: Appendix O), an interpreter will commence at the Magistrates' court at what is referred to as entry level 5. Mbangi (2019 Interview: Appendix O), goes further in explaining the levels:

> Senior court interpreter, level 7; Principal interpreter, level 8; Cluster manager, level 9; and Provincial manager, level 10.

Mbangi (2019 Interview: Appendix O), states further that the requirements from Principal level upwards is diploma, or degree in legal interpreting or equivalent qualification. It is gravely concerning that as Mbangi (2019 Interview: Appendix O), states, the current requirements for entry-level interpreters is a matric qualification. These entry level interpreters will then be assigned to the Magistrates' courts where the majority of cases heard are criminal and thus affect the application of the right in Section 35(3)(k) of the Constitution. Thus, there seems to be prerequisite qualifications in place already and this framework can be built upon and strengthened through legislative and policy developments, this must occur if English is to be the sole official language of record.

From a theoretical perspective, relying on the authors' works above, I outlined what is required of an interpreter. I asked Mbangi (2019 Interview: Appendix O), what the role of interpreters was and her role as a senior interpreter. She responded as follows:

> … senior interpreter, supervising other interpreters. It is to communicate effectively, the message from source language to target language. Place those who understand the source language on an equal footing with those who understand the target language by conserving every element of information contained in the source language communication when it is rendered in the target language. Interpret accurately without altering, omitting or adding anything to what is stated and without explanation, unless permission for explanation has been given by the Presiding officer.

There are indeed parallels with what Mbangi (2019 Interview: Appendix O) says in this excerpt and the theory advanced above. The last point in the excerpt, that interpreters are not permitted to deviate from what is being said is important in the context of what Judge Hartle (2019 Interview: Appendix L) said concerning the interpreter who summarised her reasoning.

Having said this Mbangi (2019 Interview: Appendix O) also listed three areas of difficulty she has experienced with interpreting which are:

> Inability to hear the speaker: when he speaks very soft and I have to plead with him for several times. Cultural differences: I have the responsibility to not only understand and to fluently speak the target language, I must also have a deep-rooted sense of cultural awareness, regional slang and idioms. Social evolution provides new words and phrases on a continuous basis. So an interpreter should be able to deliver any given word or phrase accurately. No pre-prep or sight interpretation materials: very long judgment delivered without seeing it first or given to look while interpreting.

I have dealt with the first two challenges in chapters five and six of this thesis. The last challenge points to a lack of understanding of the language question by judicial officers and the difficulty of interpreting legal language emanating from judgments. This also points to the need to have interpreters who are in possession of a diploma or degree in legal interpreting, and having specialised in both the source and target languages. There are clear roles for universities together with the legal system in ensuring these qualifications are offered at tertiary level and warranted for practice through legislative and policy requirements.

7.6 The legality of the language of record directive

I have spent a considerable amount of time discussing the shortcomings of the interpretation profession in South Africa and the challenges concerning quality of interpretation as well as the language barriers embedded in cultural idioms that need to be interpreted into English, where the cultural concepts are non-existent in a western system. The purpose of these discussions was to argue that sole reliance on interpretation in a multilingual country such as South Africa is not practical in my opinion in its current form. This points directly to the language of record and proceedings and how ill advised the monolingual language of record directive is.

One important question is whether in fact the monolingual language of record directive is in fact law (Froneman, 2019 Interview: Appendix K). By law, I mean is it legal? If not then why are these arguments, being put forward and how can the directive be legally challenged on constitutional grounds? Besides the media report in the Sunday national newspaper Sunday Times, there was no tangible policy that had been gazetted stating that the language of record in courts would be English only. The monolingual language of record directive by Hlophe

(Appendix D) confirms that the decision was taken by the Heads of Court to make English the sole official language of record in all courts.

The starting point is to trace back to the empowering legislation to assess if the Heads of Courts under the Chairmanship of Chief Justice Mogoeng had the authority to change the language of record for all courts. Chapter 3, Governance and Administration of all Courts, of the Superior Courts Act (2013) is of relevance, more specifically Section 8 therefore, concerning, judicial management of judicial functions and reads accordingly:

(1) For the purpose of any consultation regarding any matter referred to in this section, the Chief justice may convene any forum of judicial officers that he or she deems appropriate.

(2) The Chief Justice, as the head of the judiciary as contemplated in section 165 (6) of the Constitution, exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

(3) The Chief Justice may, subject to subsection (5), issue written protocols or directives, or give guidance or advice, to judicial officers-

(a) in respect of norms and standards for the performance of the judicial functions as contemplated in subsection (6); and

(b) regarding any matter affecting the dignity, accessibility, effectiveness, efficiency or functioning of the courts.

(4) (a) Any function or any power in terms of this section, vesting in the Chief Justice or any other head of court, may be delegated to any other judicial officer of the court in question.

(b) The management of the judicial functions of each court is the responsibility of the head of that court.

(c) Subject to subsections (2) and (3), the Judge President of a Division is also responsible for the co-ordination of the judicial functions of all Magistrates' Courts falling within the jurisdiction of that division.

(5) Any protocol or directive in terms of subsection (3)-

(a) may only be issued by the Chief Justice if it enjoys the majority support of the heads of those courts on which it would be applicable; and

(b) must be published in the *Gazette*.

(6) The judicial functions referred to in subsection (2) and subsection (4) (b) include the-

(a) determination of settings of the specific courts;

(b) assignment of judicial officers to sittings;

(c) assignment of cases and other judicial duties to judicial officers;

(d) determination of the sitting schedules and places of sittings for judicial officers;

(e) management of procedures to be adhered to in respect of-

(i) case flow management;

(ii) the finalisation of any matter before a judicial officer, including any outstanding judgment, decision or order; and

(iii) recesses of Superior Courts.

Chapter 3, Section 8 of the Superior Courts Act (2013), quoted above is the legislation from which the argument stems, that the language of record for courts cannot be determined by the Chief Justice together with the Heads of Court. My reasoning follows: subsection (1) provides the authority for the Heads of Court forum, who under the leadership of the Chief Justice took the decision to make English the sole official language of record. Subsection (3) provides that the Chief Justice may issue directives, which the language of record decision was recorded as a directive. Subsection (3)(a) and (b), however make no direct mention of the language of record. Subsection (3)(b) refers to 'accessibility' and 'efficiency', this is interesting to note in the context of the language of record directive (Appendix D), but the fact remains that such a reasoning would be far-fetched and there is no direct mention. Subsection (3) in any case is to be read with subsection (5) where (a) clearly states that the directive by the chief justice must enjoy majority support which was the case. Subsection (5)(b) however requires that it be published in the Gazette, which has not happened.

Jude President Hlophe has exercised his delegated power in issuing the directive (Appendix D) in terms of subsection (4). Subsection (4)(c) explains the far reaching powers of a Judge President in his or her jurisdiction, where their decisions apply to both the High courts and Magistrates' courts in their division. The fact of the matter remains a decision concerning the language of record could not be taken by any judge president nor the Chief Justice.

It appears from these discussions that the decision concerning the language of record for courts can be reviewed and set aside in terms of administrative action as explained in chapter two of this thesis. Having said this, I maintain that the argument is not solely of a constitutional nature (I advance the point later in this chapter). It is my opinion based on my reasoning above that Section 8 of the Superior Courts Act (2013) does not enable or confer the authority on the Chief Justice or the Heads of Court to determine the language of record policy for courts. Reverting to the discussion in chapter, two of this thesis, the decision/ directive by the Chief Justice and Heads of Court on the language of record can be brought in terms of administrative law. Section 239 of the Constitution excludes a judgment by a judicial officer but not administrative decisions, in the definition of an organ of state. Furthermore, according to Section 1 of PAJA (2000) administrative action, concerning taking or failing to take a decision must be done by an organ of state to fall within the ambit of administrative law. That being said, the point remains that the language of record in courts is a policy or legislative matter that needs to be explicitly stated where the legislature has failed to deal with the matter as evidenced in chapter six of this thesis with specific reference to the Department of Justice and Constitutional Development's Language Policy (2019).

7.7 The constitutionality of the language of record directive for courts

With the administrative argument dealt with above, the focus shifts to the constitutional impact of the monolingual language of record directive. There are two interrelated points of discussion, the first concerning whether or not the language of record directive results in unfair discrimination in accordance with an equality based argument. The second point is whether the limitation of rights by the language of record directive is constitutionally sound.

Given the critique I have advanced in chapter six of this thesis, concerning the monolingual language of record directive (Appendix D), the underlying imperative of each point of critique is the inequality that is created. Based on the discussions pertaining to the right to equality and the Equality Act (2000), in chapter six of this thesis, there is no doubt in my mind that a monolingual language of record policy unfairly discriminates against the majority

of persons in South Africa. There is no possibility of justifying fair discrimination in terms of the Equality Act (2000), given that fair discrimination would entail reversing the effects of the past and being the most plausible option, where everyone is discriminated against equally. With the monolingual language of record policy, an English-speaking minority enjoys the rights in Section 35 and Section 9 of the Constitution, with no linguistic limitations, yet the majority (African language and Afrikaans speaking) are conferred with interpretational rights and as a result are treated unequally. The disadvantage that the monolingual language of record directive creates is systemic in nature.

Examining the cases of *Damani* (2016) and *Gordon* (2018), both concerning the language of record in courts, there was a failure to engage in a constitutionally based equality argument grounded on neither Section 9 of the Constitution or PAJA (2000). I am fully aware that in both instances the courts were not asked to determine if unfair discrimination had taken place, however given the nature of the cases, one would have expected the court at the very least to have spoken about equality of languages and the speakers thereof. Instead, in both instances the courts were preoccupied with illustrating why it is impractical to conduct cases in African languages. The issue of practicality is not confined to the court cases when discussing the language of record. The interviewees whom I interviewed (Bloem, 2019 Interview: Appendix G; Froneman, 2019 Interview: Appendix K; Hartle, 2019 Interview: Appendix L; Mbangi, 2019 Interview: Appendix O; and McConnachie, 2019 Interview: Appendix N) all also indicated that it would be ideal to proceed in official languages other than English in courts, but for practical reasons this was not yet possible. The interviewees listed the language competencies of legal practitioners and judicial officers as a 'practical' issue hindering the implementation of provincial bilingual or multilingual language policies for courts. Turner (2019 Interview: Appendix R), however maintained that regardless of the language competencies of legal practitioners and judicial officers, it would in her view remain impractical to conduct cases in other official languages and have the record translated into English for appeal and review processes as meaning would be lost or distorted in the translation process. This speaks to the issue of equivalence in translation; I have inadvertently addressed this issue in preceding paragraphs of this chapter, in which I argued that meaning is lost during court interpreting from African languages into English, which is then incorrectly recorded into English nonetheless. Mbangi (2019 Interview: Appendix O) provided practical insight which I have advanced, on the difficulty of interpreting cultural idioms into English. This would be mitigated where African languages were used as languages of record. The

primary issue from the interviewees amounted to the language competencies of legal practitioners and judicial officers. The focus is then not on the language rights but rather accommodating the linguistic limitations of legal practitioners and judicial officers in a multilingual South Africa. I will discuss this point in further detail in this chapter.

Reverting to the cases of *Damani* (2016) and *Gordon* (2018). The court in *Gordon* (2018) focussed on defending the decision on the basis of practicality and 'cutting the cloth' accordingly. Yet the statistics I have provided in chapter six of this thesis illustrate that the majority of South Africans do not speak English as their mother tongue and this is problematic when they enter the courts with 'conversant' English and are deemed to 'understand' English. Furthermore that the majority accessing the courts are reliant on interpretational services.

In the *Damani* (2016) case, it was disappointing that the court failed to engage with the equality of languages, and rather chose the discretionary terminology that the languages be treated equitably. The issue of dialectal variations within a language was unnecessarily overemphasised with the pilot project. These dialectal differences are often minor and should not pose any difficulties for speakers in the region.

The point is that, when limiting the right through Section 36 of the Constitution, a balancing act must take place, something which the courts in most instances failed to do as reflected in the case law in chapter six of this thesis. In the case of *Pienaar* (2004), the court took account of all the relevant factors in determining the parameters of the right in Section 35 of the Constitution. There is a difference between rights in theory and the application of rights in practise. With the *Damani* (2016) and *Gordon* (2018) cases the courts in both instances reasoned that it was impractical to have trials conducted in official languages other than English as judicial officers cannot be 'shopped for'. The rights of accused persons needs to be balanced against the 'rights' of judicial officers. Simply put, it would in my opinion not be unfair to appoint a judge who is linguistically competent in a specific language to hear a trial as opposed to another. The argument put forward by Thulare AJ in the *Gordon* (2018) case racializes the official languages and infers that only black judges will be competent in an African language and white judges will most likely be English mother tongue speakers with no competency in an African language. This line of thinking and reasoning must be rejected. Furthermore, it continues to create an 'othering' of African languages and the speakers of these languages. There must be no divide between 'my' language and 'your' language, as

South Africans the official languages are ‘our’ languages, as a collective. This is what true unity in diversity entails. There are many South African who are competent in multiple of the official languages, and who possess mother tongue proficiency in these languages.

As Currie and de Waal (2013: 154) suggested when limiting the right and ultimately striking a balance with the rights and needs of the other party, the reasonability and justifiability standards cannot be decided abstractly. This determination requires evidence in the form of sociological and or statistical data in highlighting the impact the limitation will have on society at large. I have presented the relevant statistics, including surveys and other language demographics in chapter six of this thesis. The most conflicting thereof are the views of attorneys on the language question in courts and the misunderstandings legal practitioners have of the language question and more specifically the language competencies and preferences of their clients (De Vries and Docrat, 2019). From the case law presented in chapter six, the courts failed to engage with relevant statistics. For example in the *Gordon* (2018) case, Thulare AJ, in referring to my Master of Arts thesis (Docrat, 2017), failed to engage with any language demographics I had presented. This is illustrative of the failure to striking a balance, and in doing so; give effective meaning to the language rights of Section 35 of the Constitution. Woolman (1998-2003: 12-61) says that it boils down to how we wish the world to look, what kind of world we wish to live in. It is therefore a subjective interpretation of the law. Woolman explains (1998-2003) that although *grundnorms* (legal norms/ legal principles) are in existence in the theoretical underpinning of the limitations analysis, the implementation and application thereof in practical situations may differ depending on a judicial officer’s interpretation of the facts in relation to the law.

I have spoken about balancing through the second of the two ways identified by Woolman (1998-2003: 12-55), where balancing means ‘striking a balance’ between the competing rights or interests equally. The first instance in which balancing takes place, is with two competing rights, which I have touched upon above regarding the rights of an accused in Section 35(3)(k) and Section 9 of the Constitution for judicial officers in terms of being discriminated against on grounds of language.

7.8 A critique of the Use of Official Languages Act and its resultant language policies

Throughout the discussion in this chapter, above, there has been an implicit need for legislation and policies to address the language of record/ proceedings in South African courts, given that the language of record is an executive decision and cannot be determined

by the judiciary. The legislative and policy instruments to directly address these issues have been advanced in chapter six of this thesis, what follows at this stage is a critique of the primary language legislation and language policies emerging therefrom.

The Languages Act (2012) is broad and discretionary as seen in chapter six of this thesis, it nonetheless provides for the enactment of language policies by each government department and state entity to regulate their use of official languages. I will deal with the language policies in due course in this chapter. Although Lourens (*Lourens* v *President of the Republic of South Africa and Another*, 2013), litigated on the issue of language legislation and was successful, he has also shared his opinions on the contents of the Languages Act (2012), when it was in Bill form, in relation to the principles of language legislative drafting outlined by Turi (1993) and du Plessis (2012). The overarching opinion was the need for enforcement mechanisms to be included with practical guidelines as to how the policy will be implemented and the time lines as to limitation. Unfortunately, this was not included as seen in chapter six of this thesis. When the Languages Act (2012) was in Bill form, it came under much scrutiny and was publicly criticised for failing to set out how precisely the African languages would be used in each government department, given that the purpose of primary language legislation was to provide for the practical implementation of Section 6(1) and (2) of the Constitution. The FW de Klerk Foundation (2011) also criticised the Languages Act (2012), on the basis that it adopted a top down approach and that this was contrary to effective language planning as pointed out by Alexander (1992) who advocated for a bottom up approach to language planning. Although LANGTAG (1996) was drafted sixteen years before the Languages Act (2012), extensive research and sound conclusions and recommendations were made that needed to perhaps be revised and updated but form the basis for the drafting of the Languages Act (2012). When one engages with the provisions of the Languages Act (2012), it is to my mind clear that this never happened. Pretorius (2013: 310) having advanced critique of the Languages Act (2012), also acknowledged that it does provide a shimmer of light, be it dim, where language policies be drafted to deal with the practicalities of using African languages in each domain.

An observation from the critique on the Languages Act (2012) is that it emerged from the Afrikaans speaking community, where the African language speaking communities appeared to have been silent on issues directly concerning the status, use and promotion of their mother tongues. The commentary on the Languages Act (2012) from an African languages perspective emanated from Docrat and Kaschula (2015) writing on the importance of

language legislation taking into account the language demographics of South Africans in addition to the attitudes of people and their needs when accessing government services in their mother tongue. Docrat and Kaschula (2015) highlighted further the importance of the Languages Act (2012) in giving effective meaning to the language rights, an aspect of which the Languages Act (2012) falls short on. The Afrikaans community should be commended for their constant promotion of their mother tongue, post-Apartheid. As I noted in chapters one and two of this thesis, during the CODESA talks there was an unwavering commitment for Afrikaans as opposed to the African languages. This appears to be a continuous trend. It is concerning that instead of promoting the African languages, the Chief Justice and Heads of Court opted to vilify Afrikaans and select English. One can only but question why you would not want to advance the use of your mother tongue, which has been/ is marginalised. The same principle applies to the language legislation and policies, instead of finding ways in which to use the African languages in high status domains, the focus is on how to best avoid using African languages, on the basis of 'practicability' and costs.

The language policies of both the Department of Justice and Constitutional Development and the SAPS need to correlate with each other in terms of objectives. The policies should not have been drafted in isolation of each other. As I advanced in chapter, six of this thesis the criminal justice system commences with the SAPS. In a police investigation language as a tool of communication is of critical importance, for both an accused and a complainant. The process of statement taking is flawed where a complainant or accused are required to provide a statement to a police officer either in English, where the police officer cannot speak their mother tongue or through the medium of their mother tongue, where the police officer then translates the statement into English as he is hand recording it. In both instances, language may serve as a barrier to communication where the statement is incorrectly recoded and factual inaccuracies are recorded which forms part of the evidence that is to be deduced through examination in chief or cross-examination. Ralarala (2019) highlighted the implications of these in accuracies in many high profiled cases in South Africa during the period 2018-August 2019. In each instance when the statement was put forward to the witness in court, there was a dispute of fact that brought into question the witness's credibility. Examples included the case of *State* v *van Breda* (2018) and the case of *State* v *Omotoso* (see *Omotoso and Others* v *State,* 2018) which is commencing *de novo* as a result of the recusal of the judicial officer. In the later instance the first witness during cross-examination was presented with her original statement that according to the witness was re-

written by the police officer in English and which she did not read in detail. The witness disputed facts emerging from the statement which placed the accused at the times and venues of the alleged crimes. In essence, the case highlighted the anomalies of police statement taking and the importance of language in this process.

The case of *State* v *Sikhafungana* (2012) highlighted the linguistic issues in the SAPS, specifically the issues concerning police statement taking and the effects thereof on the outcome of the trial. The case concerned the alleged rape of a complainant by her neighbour in the rural area of Mount Frere, in the Eastern Cape Province (Docrat *et al*, 2017c). The accused was caught in the act of perpetrating the rape, where a citizen's arrest was affected (Docrat *et al*, 2017c: 289). The incident was reported immediately and the police only arrived the next morning and failed to advise on the process that the complainant be taken to a medical facility to undergo the necessary medical examinations for evidence capturing purposes. The accused was instead taken into custody and charged with sexual assault and house breaking and charged in the alternative with trespassing. At trial the accused was acquitted on both charges and convicted in the alternative and sentenced to three months imprisonment or a fine of three thousand rand (Docrat *et al*, 2017c: 289-290). The issues arising from the case of *Sikhafungana* (2012) were compounded by the fact that the complainant in the case was deaf and her account of the incident was relayed from her (using gesticulation and sounds) to her sister (isiXhosa mother tongue speaker) to the isiXhosa speaking police officer who then hand recorded the statement in English.

Police officers are not linguists and although it is expected that as part of primary training language skills needs to be addressed, the SAPS Draft Language Policy (2015) must solve this issue. As seen in chapter six of this thesis the SAPS Draft Language Policy (2015) permits the use of interpreters where there are communication barriers in police stations but this is not guaranteed at all, times where interpreters are stationed in each police station. Instead, this service is subject to financial resources and other 'practicalities' noted in chapter six of this thesis. Specialised interpretation services must be made available where complainants and accused persons are not permitted to make their statements in their mother tongue, where that language is an official language and spoken as a language of majority in that particular province, were that original statement forms part of the 'record'. I acknowledge there are a multitude of subsequent issues that need to be addressed such as training programmes and the deployment of interpreters whether permanently stationed at the

police station or ‘on call’ in outlying areas as well as the issue of statement recording by hand (Ralarala, 2019).

The SAPS Language Policy (2015) remains in draft form and these issues I raised can hopefully be addressed before being gazetted. The proposition of interpreters in police stations can be piloted, while resources are sought to implement across the country, time frames will need to be clearly documented to hold government to account. In chapter two of this thesis, I defined opportunity planning (Antia, 2017) as having developed from econo-language planning (Kaschula, 2004 and 2019) and how language planning relates to the economy (Grin, 2010). This can be applied to SAPS with employment of interpreters. Not only are employment opportunities created; the African languages, will be promoted and used in accordance with both Section 6 of the Constitution and the Languages Act (2012); and justice will be more fair and accessible to the majority of South Africans. The latter would also affect the rights of arrested people in Section 35 of the Constitution as advanced in chapter six of this thesis.

These points and critiques would be irrelevant in a legal system that was premised on an English only language of record policy for courts. As with the SAPS Draft Language Policy (2015) the Department of Justice and Constitutional Development’s Language Policy (2019) fails to directly enforce mechanisms for the use of African languages without wholly qualifying the provisions with the insertion of phrases such as where practicable and resource dependent. Earlier in this chapter I established that the language of record for courts is an executive and not a judicial decision to be made, it was thus the ideal opportunity to exercise this authority and establish a policy on the language of record. Instead, “Section 14: Language of Court Proceedings” was inserted in the Department of Justice and Constitutional Development’s Language Policy (2019), which fails to state what the position is and rather refers one to the Rules of Court and other applicable legislation. This was done, knowing very well that the language of record was/ is not dealt with at the time the policy was formulated and gazetted. This is the major shortcoming of the Department of Justice and Constitutional Development’s Language Policy (2019). As a result the uncertainty and non-regulation of the language of record policy four courts remains in place and the directive of the Chief Justice and subsequently that of Judge President Hlophe (see Appendix D) remains in place even though there was no authority to take this decision. The point is that the judiciary has no authority to determine the language of record policy regardless of whether or not the executive has determined this policy though legislation and other policies (see

Appendix E). In chapter eight of this thesis, I expand on the processes to be followed, failing the policy dealing with the language question in courts.

7.9 Legislative language requirements for legal practitioners and judicial officers

In chapter six, I made the point that the language of record policy needs to be decided simultaneously to legislation and language policies being formulated or amended with regard to language qualifications of legal practitioners, which will ultimately feed into the judiciary by means of linguistically competent judges. In chapter four of this thesis, comprising the African case studies, I illustrated that by failing to legislate African language requirements for legal practitioners, the status and use of the African languages was diminished. Furthermore, the entire legal system, premised on an English western system excluded the majority of people from accessing justice as a result of language barriers. Morocco, although not promoting English, also alerts one to the dangers of creating an exclusive legal system for those who speak the language of the political or social elite. The same applies to the Australian and Indian case studies presented in chapter five of this thesis. The point is South Africa is not alone on the African content and internationally with favouring English at the expense of the other ten official languages.

Again, the matter concerning the legislating of language requirements for legal practitioners vests with the executive which through the legislature can ensure the practical implementation of Section 6 of the Constitution and thus give effect to the language rights contained in Section 35 of the Constitution. During Apartheid, the executive in furthering their policies of dominance, legislated language requirements for all attorneys and advocates through the Attorneys Act (1979) and the Admission of Advocates Act (1964), as discussed in both chapters two and six of this thesis. Besides the Latin language requirements, the two official languages, English and Afrikaans were included. As I stated in chapter six of this thesis, there was no intention to do the same for the African languages when these statutes were amended post-Apartheid through the Attorneys Amendment Act (1993) and the Admission of Advocates Amendment Act (1994). What is highly suspect in my opinion is the blatant exclusion of language, particularly the African languages in the Legal Practice Act (2014). I use the word ‘suspect’ as the Legal Practice Act (2014) was supposedly drafted to transform legal practice and the profession through transformative means to ensure broader and equal representation. With this understanding in mind, the exclusion of the language question was indirect support for English, which has become the accepted default position in

the legal system. This raises the point I have continuously made in this thesis regarding the agenda being pursued and what is really meant by transformation and equal representation? Why is there an intentional unawareness surrounding the language question? There is no alternative but to question the motives of those in authority, who are genuinely supposed to redress the past marginalisation.

This intentional obliviousness has transcended the primary legislative instruments into the association structures of the South African Law Society (SALS) and General Council of the Bar (GCB). I (Docrat, 2017: 96) previously noted that in November, 2016 a report pertaining to the review of the attorneys' profession addressed briefing patterns, and demographics in the form of race and gender with reference to transformation, but excluded the language question (Thebe, 2016). The position has since not changed, illustrating the static nature of the profession concerning the language question, in particular African languages.

Section 7 of the Department of Justice and Constitutional Development's Language Policy (2019) clearly states that the policy applies to all personnel, this would include prosecutors. It would make sense for prosecutors to undergo language-training programmes. There is no policy in place as noted by Yekiso J in the case of *Damoyi* (2004) for the prosecutors, neither are there demographics available as to the language competencies of prosecutors in both the Magistrates' Courts nor the High Courts. This can be juxtaposed to the Legal Aid Survey (2016) presented in chapter six of this thesis, highlighting that the majority of litigants in criminal cases have poor levels of English proficiency. Simply put the prosecutors in both the Magistrates' Courts and High Courts, would need to have proficiency in the languages of the province, in order to give effective meaning to the Section 35(3)(k) constitutional language right and furthermore for a language of record policy in each province to be bilingual or multilingual.

As noted from the Indian case study in chapter five of this thesis, legal practitioners are unware or take for granted the importance of language for persons accessing the legal system, given that they are well versed in English. Where they are aware of the linguistic fault line, they attempt to validate the use of English on the basis of practicality (legal practitioners and judicial officers' language competencies) and the costs implications. The same applies in South Africa, where I have advanced in chapter six of this thesis, extracts from the survey by de Vries and Docrat (2019) documenting the views of attorneys in South Africa. The overarching point in the South African context when engaging with the survey is that there is

an acknowledgment of the importance of multilingualism in the legal system and the benefits thereof, coupled the lack of interest in pursuing such an agenda. Legal practitioners in South Africa, appear to have overestimated the English language proficiency of their clients and thus confirming the obliviousness, where the situation suites their position (De Vries and Docrat, 2019).

This exclusionary legislative and policy finds resonance with the absence of the language question for judicial officers. It must first be noted that there were recommendations made by the Chief Magistrates Forum in 2014 as advanced in chapter six of this thesis, however these recommendations were not acted upon or implemented, similar to the broader language question addressed in LANGTAG (1996). As I stated in chapter six of this thesis, Section 174 of the Constitution concerning judicial appointments focusses on gender and race to the exclusion of language. In elucidating the constitutional provisions, the Judicial Service Commission Act (1994) makes no mention of language.

Essentially the entire legal profession has no language requirements as prerequisites as one would come to expect in a multilingual country such as South Africa, and given the emphasis placed on reversing the past marginalisation and discrimination. The understanding of transformation on the basis of equal representation appears to be a skewered view in favour of those pursuing an agenda, where language, specifically the ten official languages other than English are excluded. This is the same agenda that appears to consolidate power and marginalise the majority under the guise of racial transformation. The point of extraction for purposes of discussion is that the language question cannot only be addressed at a professional level, there are far more actors at play in affecting the language of record policy for courts and the education system is key in this process.

7.10 The language question at selected universities

In chapter six of this thesis, I advanced the relevant provisions of each of the six selected universities, each of which are located in a province, where English is not the majority spoken language as evidenced in the language statistics captured in Table 1 of chapter six of this thesis. It would thus be practical for the selected universities to have formulated or revised language policies that are reflective of the language demographics of the respective provinces. This would also have ensured constitutional compliance with Section 6 of the Constitution. Unfortunately for three (UFS, UP and Stellenbosch) of the six selected universities, monolingual language planning models were formulated and adopted. What was

severe was the fact that each of these universities were previously bilingual institutions, where English and Afrikaans were both recognised as languages of teaching and learning. Having had experience with bilingual learning and teaching and recognising the issues associated with a bilingual language policy, the universities were poised to successfully amend these policies to include an African language spoken by the majority of the province.

For Rhodes and UCT, being monolingual English institutions since establishment, there is a commitment towards multilingualism and the recognition of isiXhosa and Afrikaans as provincial languages. The pace at which these institutions are moving regarding the language question appears to be moderate.

From the six selected institutions, UKZN is the only institution pursuing a bilingual language of learning and teaching policy where the entire focus of both the Language Policy and Language Plan is on developing isiZulu and placing it on an equal footing alongside English. This gives practical meaning to the language demographics of the province, where the overwhelming majority, recorded in Table 1 of chapter six of this thesis, 77.8 percent of the province, speaks isiZulu as their mother tongue.

The point I am conveying links back to discussions in chapter two of this thesis concerning decolonisation and transformation at institutions of higher learning. Applying the definitions and theoretical underpinnings of decolonisation, in chapter two of this thesis to the language policies of universities, advanced in chapter six of this thesis, UFS, UP and Stellenbosch would in my opinion fall short. The term ‘decolonisation’ in itself directly refers to colonialism, it is thus nonsensical to adopt a monolingual English language policy, where English was the language of the colonisers. There is undoubtedly a skewed interpretation of what decolonisation at universities should be. This skewed interpretation and rationalisation would then preclude the language question and only concern, name changes and other symbolic statues. Kaschula’s (2016) proposal that the term Africanisation rather be used in place of decolonisation, is a sound one, where language is then included and the focus is on the African principles rather than colonialism. In almost all the interviews I conducted, I asked the interviewees (see the Appendices) whether in their opinion decolonisation and or transformation included the use of African languages, to which I had affirmative responses. Focusing on universities, Motinyane (2019, Interview: Appendix P) in the context of UCT, explained, the #FeesMustFall and #FreeDecolonisedEducation Campaigns in 2015 to 2017, placed emphasis on the removal of statues and other symbols including slogans ‘decolonise

the curriculum' where there was a plea to exclude 'western' textbooks and research, but the language question failed to feature prominently. In a forthcoming publication, Motinyane (2020) expanded on these views, whereby she argued that attitudes towards language played a major role in the protests. The protests swept across universities, with calls to decolonise the curriculum, however it was concerning and questionable to see protest placards written in English rather than in African languages. The point can be elaborated upon further where I asked three interviewees (Dlali, 2019 Interview: Appendix J; Motinyane, 2019 Interview: Appendix P; and Nosilela 2019 Interview: Appendix Q) whether there had been an increased number of students registering in African languages at these respective institutions (Stellenbosch, UCT and Rhodes). Neither indicated so, and maintained that the numbers remained high but there was no sudden increase following the protests.

From a bottom-up approach there was no voice permeating through these protests by students on the right to be taught in their mother tongues and the power of their languages in decolonising and transforming the universities. Similarities can be sought with the power associated with English, during the Soweto Uprisings of 1976 in South Africa, and how schoolchildren in protesting against the use of Afrikaans failed to mobilise power around their mother tongues (African languages) and opted for English instead.

7.11 Language as part of the LLB curriculum

With the legal system, transforming, one would expect that the LLB curriculum would be reflective of the changing landscape. Depending on the view taken, that may well be the case where both the legal system and universities are moving towards English only language policies forsaking their collectively responsibility of social justice and abandoning the constitutional ideals.

In chapter two of this thesis I made mention of the 2017 proposal by then chairperson of the Parliamentary Justice and Corrections Oversight Committee, Mathole Motshekga, that all LLB students pass one of the indigenous languages before being awarded a law degree (Ndenze, 2017: 4). The proposal was made with the aim of transforming the legal system. Debate raged on for months, with many voicing their dissent at the proposal on a number of grounds including the practical relevance of doing so and how learning a language as part of an LLB degree was irrelevant and time consuming in an already onerous law curriculum. As I have argued in this thesis, law is not a profession that exists in isolation of broader society

where interaction with other people is minimal or non-existent; it is in fact the complete opposite for legal professionals who practice the law.

The proposal would require university language policies to create mechanisms for ensuring all students graduate with an African language, i.e. register for the subject and major in it either, at mother tongue of second language level or complete the vocation specific course if offered as part of the LLB programme. The specifications would need to be determined by every university if not dictated by policy at national level. This would require collaboration between the various African language departments as well as the law faculties at universities. To gain insight on whether any discussions of this nature took place and if what materialised from the discussions following the proposal, I asked the interviewees (Corder, 2019 Interview: Appendix I; Dlali, 2019 Interview: Appendix J; Khumalo, 2019 Interview: Appendix M; Motinyane, 2019 Interview: Appendix P; and Nosilela 2019 Interview: Appendix Q). The interviewees indicated that such discussions had not taken place and that it was voluntary to register to study an African language with the exception of UKZN. In the case of UCT, Motinyane (2019, Interview: Appendix P) explained to me that there were certificate courses or conversational classes that took place outside of the formal curriculum and that these essentially detracted from students registering to complete degrees in isiXhosa or major in the language alongside legal theory or law based course at undergraduate level.

The question then arises as to where such course would fit into the curriculum. There is a constant defence mechanism that the curriculum is already full. At Rhodes University, for example students completing the two-year LLB degree having completed an undergraduate degree, majoring in Legal Theory are required to do a course called legal skills. The legal skills course is amongst other objectives aimed at equipping students with practical aspects of practice. As part of the course, there are a number of components including a writing course, maths skills and the practical component of working for a semester at the Rhodes University Legal Aid Clinic. Having completed my degrees at Rhodes University, including my LLB, the following is somewhat of a personal account dating to 2014-2015.

The legal skills course is undertaken in penultimate year of the two-year LLB degree. The class of students is divided into two groups, with each group working in the Rhodes University Legal Aid Clinic for a semester. You are signed to smaller groups at the Rhodes University Legal Aid Clinic under the tutelage of an attorney. The short of it, is that you are then required to consult with the indigent people seeking legal advice on civil law issues.

During my semester, my group comprised of three of us, one was a foreign student, the other from outside the Eastern Cape Province (where Rhodes University is located) and myself, who was proficient in isiXhosa. My student colleagues would require interpretation, as would the vast majority of the entire class, given that they could not communicate in isiXhosa. There was no legal interpreter of any sorts and either the receptionist or person who attends to the cleaning needs would be called in to 'act' as an interpreter during consultations. In my instance, communication was direct in isiXhosa and the client appeared to be at ease and communicate freely and appeared to trust me immediately. Somehow, the power relations appeared relaxed or non-existent given the absence of language barriers. My point is that it would be of immense benefit for both the students and more specifically the clients accessing the services, to communicate directly in their mother tongue, which is primarily isiXhosa and Afrikaans.

As part of the LLB curriculum, elective courses are offered in the final year of the LLB degree one of which is isiXhosa for Law. It is a vocation specific course aimed to equip students with legal terminology and language skills to communicate effectively in isiXhosa. All electives are however voluntary during final year where a specific number is to be undertaken. IsiXhosa for Law is not offered to students who have majored in the language or who are mother tongue speakers of the language. The positioning of the course as an elective in final year offers no benefit to the legal skills course in penultimate year. This speaks about the positioning of the course and the need for management structures of both the Law Faculty and African Languages Departments to act positively on the language question. If this is compulsory for other degrees such as journalism and pharmacy, why is law excluded? The bottom line in my opinion is the intention of those in authority and their commitment towards the African languages and graduating students who are linguistically aware and competent.

With reference to UCT, Corder (2019, Interview: Appendix I) acknowledged that it would be beneficial and that there could be overlap with their legal aid clinic on the UCT campus. Simply put, collaboration is needed and the curriculum question in light of decolonisation and transformation needs to be revisited. By formulating these courses in professional contexts, universities will contribute to terminology development and thus the intellectualisation of the African languages. This terminology would be central for a legal system, where it was stated in the case law in chapter six of this thesis, that there is no language corpus in the African languages for use in the legal system, where terminology was lacking. This speaks to the role of universities in society and the intersections between language, law and in this case higher

education. This also speaks to the broader mandate of universities concerning the language question which Alexander (2005: 30) summarised:

> The basic idea is that a university or group of universities would be given the task of developing specific languages such as isiZulu, or isiXhosa, or Sesotho, or Setswana and over a period of 10 to 15 years…a step-by-step development and implementation plan should be formulated…such that…it will be clear when they will be able to be used as languages of tuition in specific disciplines. The decision, however, about when to begin using the languages for specific functions will be the prerogative of the relevant institutional community.

In tandem the judicial officers I interviewed (Bloem, 2019 Interview: Appendix G; Froneman 2019, Interview: Appendix K; and Hartle 2019, Interview: Appendix L); all agreed that the proposal by the Parliamentary Justice and Corrections Oversight Committee chairperson, Mathole Motshekga in 2017 to graduate linguistically competent LLB graduates, was a good one but would need to be well thought during the formulation stages. Froneman (2019, Interview: Appendix K) went a step further and said that he believed it begins with basic education and educating children in their mother tongues while learning English as a subject and thus acquiring good English skills and mastering your mother tongue. Froneman (2019, Interview: Appendix K) furthermore stated that African language speaking legal academics and legal practitioners needed to dedicate the time to producing research in their mother tongues, where textbooks were written in the African languages. According to Froneman (2019, Interview: Appendix K) this was not impractical nor impossible and if the Afrikaans speaking academic community could do so why is the same intention not shared by African language academics. The latter points speak to transforming the curriculum, where content is in your mother tongue and making it more accessible for all. This is true for many students entering universities who have limited reading and writing skills in English. At a recent forensic linguistics colloquium, hosted at Rhodes University under the theme 'new courtroom' languages' where the book *Forensic Linguistics New Themes and Perspectives in Language and Law in Africa and Beyond* (Ralarala *et al*, 2019) was launched, an isiXhosa mother tongue Masters student in forensic linguistics, explained the difficulty she continuously experiences when engaging with academic texts. The student provided an emotional account of how she has to read books and journal articles multiple times to firstly understand the English before comprehending the concepts. She explained that the aforementioned book lessened the burden considerably given that the level of English was

accessible. She advocated for knowledge and research to be produced in the African languages for students to have equal access to English mother tongue speaking students. The injustice plaguing South Africa's legal system can thus be traced back to universities and as Froneman (2019, Interview: Appendix K) states that it begins in schools.

From a point of practice McConnachie (2019, Interview: Appendix N) fully agreed with the proposal by the Parliamentary Justice and Corrections Oversight Committee chairperson, Mathole Motshekga in 2017 to graduate linguistically competent LLB graduates. Having studied isiXhosa at university, he too states the valuable contribution it makes in practice, given that he is positioned as the Director of Legal Resources Centre, offering legal services to indigent people, the majority of whom are isiXhosa mother tongue speakers. Turner (2019, Interview: Appendix R), however noted that there should rather be an emphasis placed on acquiring an African language more 'generally' at university level rather than learning legal terminology through a vocation specific course. Turner (2019, Interview: Appendix R) explained conversational skills are needed to communicate with witnesses, and that this should be factored in when developing a course of this nature. Maseko (2008 and 2014) has advocated for vocation specific courses in professional contexts at university level, where the language question is far more deep rooted than merely learning and teaching in a language. When taking account of the demographics presented in chapter six of this thesis, the majority of people, being African language speakers do not exist in a vacuum separate to their culture and identity, which is essentially informed through language. Maseko (2008) summarised this point:

> Part of this transformation deals with the notion of identity negotiation. The challenge at most South African universities is to negotiate an identity of belonging for students. Language and culture are important in this process, and acknowledgement thereof can create an environment conducive to inclusivity rather than exclusivity. Furthermore, an individual's self-identification through language opens up interaction with other cultures, thereby deepening a unified sense of voice rather than voiceless silence and cultural alienation. Developing mother tongue and second-language vocation-specific courses is integral to fostering this sense of acceptance and inclusion.

Kaschula (2016: 208) contextualised the importance of vocation specific courses in South African universities in the transformational age taking into account previous discussions I have advanced linking, language, law, power and the economy:

> When it comes to the teaching of African languages as second languages, generic first additional language or second-language courses do have their place. However, there needs to be a more integrated social approach to the teaching of these languages as part of transforming university curricula and culture, creating the "mindfulness" discussed earlier in this article. Furthermore, the development of vocation-specific courses is vital at this time in South Africa's socio-political history. There remains little evidence of a normalised, integrated, transformed, multilingual society, at least from a linguistic point of view. Instead, what exists now is a "linguistic fault line" which divides the "haves" and the "have-nots" into a three-tier economic system, based on those citizens who are communicatively competent in English, those who have a partial knowledge of the language, and those who speak no English at all.

This excerpt takes cognisance of the language question at universities in relation to the diversification of the universities spectrums where universities are no longer exclusively, for what has been, stereotyped, as English speaking students who are mother tongue speakers of the language.

7.12 A critique of selected university language policies

The above discussions highlight the importance of the language question in higher education as part of transformation and Africanisation. The practical insights provided, alert one to the many issues that continue to exclude students on grounds of language and point to the half hatched graduates being produced, who in the case of the legal system, will not be able to give effective meaning to the constitutional language rights besides be reflective of the language demographics. The language policy framework must be in place in order for law faculties and African language departments to positively change the curriculum as indicated above.

From a legislative and policy perspective, the HEA (1997) through Section 27(2) thereof provides the enabling authority for the drafting of university language policies. The HEA (1997) provides no further directives on the drafting of language policies and merely states that university language policies not be inconsistent with the Ministerial Policy.

In chapter six of this thesis, I advanced the relevant provisions of the Revised Language Policy for Higher Education (2018). This language policy is very clear on the university mandate, when formulating a language policy. The entire policy in acknowledging the

marginalisation and resultant underdevelopment of indigenous official languages in South Africa, accords the positive obligation on universities to affect language policies to change this linguistic landscape. Sections 31 and 34 are of particular importance in the context of the research at hand. Section 31 obligates universities through the word 'must' to, "… diversify languages of instruction to include indigenous official languages". Universities thus enacting language policies where English is the sole language of learning and teaching would be acting contrary to this obligation where the university language policy would be inconsistent with the Revised Language Policy for Higher Education (2018). Having said this, as I noted in chapter six of this thesis, the Revised Language Policy for Higher Education (2018) came into effect on 1 January 2019, following the formulation of the monolingual university language policies. These university language policies have already been challenged legally with two cases being decided unfavourably in the Constitutional Court, being the apex court. The Revised Language Policy for Higher Education (2018) will however not be obsolete and will serve to regulate other universities in revising their language policies. This mandate is clarified in Section 34 of the Revised Language Policy for Higher Education (2018), where universities through their language policies are to revise their previous language policies and language plans "… to accord greater importance…" to using African languages not only for teaching and learning purposes but for research and scholarship as well. This speaks to the role universities have to play in intellectualising the African languages. Section 34 goes further to obligate universities to put strategies in place to promote multilingualism and transformation. These strategies are to be included in universities' language policies. The latter holds universities to account through the inclusion of strategies, where the language policy is not theoretical, but establishes how the objectives will be achieved. There is also the linkage between language and transformation, which is important, given the discussions above, where language has not been identified as a tool to transform. What follows is an engagement with each of the six university language policies in relation to the HEA (1997) and Revised Language Policy for Higher Education (2018).

Rhodes University began revising their language policy in 2018 and completed the process in 2019; I specifically mention the dates, given the gazetting of the Revised Language Policy for Higher Education (2018). Compliance with the later was thus mandatory. Taking cognisance of the extracts from the language policy of Rhodes University, in chapter six of thesis, there are three points, which immediately stand out. Firstly, the policy states that English is the language of learning and teaching, and fails to "diversify the languages of instruction…" with

the inclusion of for example isiXhosa as a language of learning and teaching, in accordance with Section 31 of the Revised Language Policy for Higher Education (2018). I fully acknowledge that there are arising legal implications for a university to include (an) other language(s), however efforts need to be made on including other language(s) as for teaching and learning purposes, where such implementation is incremental. It is therefore important to include strategies and mechanisms of how the policy will be implemented and over what period of time and the cost and staffing implications. This is precisely what Section 34 of the Revised Policy for Higher Education (2018) requires.

The positive attributes in congruence with the provisions of the Revised Policy for Higher Education (2018) include the recognition of the need to promote multilingualism and further the development of isiXhosa as an academic language. This is however qualified by the phrase 'where necessary'. It is discretionary and given that there are no time lines for implementing this, the enforceability is minimalized. The same applies to the inclusion of vocation specific courses, being subject to university resources. The Rhodes University Language Policy does recognise the importance of producing graduates "… who can function in a multilingual professional environment". There are many positive developments made in Rhodes University's Language Policy and if mechanisms and time lines are included, the policy through its future revisions could include isiXhosa as a language of learning and teaching, that is if the university is committed to a transformational programme that includes the language question.

From a language policy perspective in comparison to Rhodes University, UCT falls short with equating the African languages alongside English. A positive attribute in Rhodes University's Language Policy is the inclusion of translanguaging for students to use as a means to express themselves in their mother tongue without excluding monolingual students. UCT's Language Policy in recognising the needs to use all South African languages as languages of scholarship pledge to developing languages, so "… in the medium to long term…" the languages can be used as languages of instruction. As with Rhodes University's Language Policy, UCT recognises English as the only language of learning and teaching and therefore states that one objective is to ensure students acquire 'good' English. UCT is yet to revise their language policy following the gazetting of the Revised Language Policy for Higher Education (2018).

Presently UCT must also be acknowledged for implementing isiXhosa for medical students, a compulsory vocation specific course in which all students have to pass prior to obtaining their medical degree. Wits has introduced an isiZulu medical course. The course equips medical students with critical language skills that can be used in practice when communicating with isiXhosa or isiZulu speaking patients. Corder (2019, Interview Appendix I) stated that the vocation specific course is an excellent idea, and would need to be implemented in the Law Faculty. In saying so, he acknowledged that logistical issues such as curriculum space, staffing and collaboration between the African Language Department would need to take place. He explained as with Rhodes University, that there was an elective but students instead opted to learn foreign languages rather than the indigenous South African languages. The same applied to the undergraduate LLB curriculum, where students are required to learn an addition language, and rather opt to learn Spanish or French rather than isiXhosa (Corder, 2019 Interview: Appendix I).

The universities need to strike a balance between the provincial languages and English, where English is maintained for international and communicative purposes while not foregoing the constitutional and legislative responsibility of developing the African languages. A University, which has/is managing to achieve this, task, is UKZN. UKZN's language policy was formulated and signed by Council in 2014, prior to the gazetting of the Revised Language Policy for Higher Education (2018). UKZN's language policy differs from all the other selected university language policies in that isiZulu is a language of teaching and learning alongside English. The language policy in its entirety is devoted to advancing isiZulu. By stating that isiZulu is a language of learning and teaching the language policy and language plan, acknowledge that in order to achieve this throughout all colleges (faculties) staff capacity be developed. This according to the policy will be achieved by ensuring current staff are equipped with isiZulu through various language courses and new appointees, depending on the nature of the post be competent in isiZulu to function accordingly in the academic space.

UKZN's language policy is accompanied by a well formulated language plan which envisages that the objectives in the language policy be achieved through two phases. Each phase is accorded specific timelines for realisation and implementation. The phases outline proactive strategies and mechanisms to achieve the objectives and are constantly reviewed to account for the changes in budget and so forth. The language plan furthermore creates employment opportunities where isiZulu as an African language is used as an incentive in

employing tutors and relevant persons for the vocations specific and other language related courses.

A key attribute of the language policy is the development of an isiZulu corpus in which terminology can be disseminated and the language be intellectualised to be used in high status domains and professional contexts. I have stated earlier this is critical for the use of African languages as languages of record in courts. This can also be juxtaposed to the judgment of *Damani* (2016) where a lack of terminology was cited as a reason to maintain an English only language of record policy for courts.

Furthermore, as opposed to the other five selected universities, UKZN has made it compulsory for all students regardless of their degree to pass isiZulu prior to graduating. This applies to both mother tongue and non-mother students (Khumalo, 2019 Interview Appendix M). This has been validated through the policy, based on, Section 6 of the Constitution. As well as affording students, their right to be taught in their mother tongue as espoused in Section 29(2) of the Constitution and recognising the fact that the majority of people in Kwa-Zulu Natal speak isiZulu as their mother tongue (see demographics in chapter six of this thesis).

UKZN's language policy has come under criticism, the specific aspect of all students having to pass isiZulu before graduating. On 31 March 2019 the Sunday Times Newspaper (Bhengu, 2019), reported as a front-page headline: "Zulu module takes students of course", referring to the compulsory isiZulu module at UKZN. The article focused on a journal article (Murray, 2019) published by a UKZN academic in the sciences is grounded on a statistical analysis of student's marks in the isiZulu module as opposed to their marks across other courses. Upon closer engagement with the article (Murray, 2019), problematic points of discussion can be highlighted. Each of these points forms the basis of Murray's (2019) article.

The first point identified is the six-month module does not provide students with proficiency at academic level; this is according to a student as per the newspaper article (Bhengu, 2019). There is no possible way in which any language course for a six-month period could provide a student, with full academic proficiency in that language. The student should be posed with a question, of whether taking a law module for six months results in you becoming an attorney or well versed with all components of the law? The simple answer is no. Why then when languages are concerned students are of the idealistic and misinformed perception that learning isiZulu for a period of six months results in full academic proficiency in that

language. There is a notion that as mother tongue speakers an easy credit can be sought by learning that language at university level. The argument that Murray (2019) provides, that mother tongue speakers are prevented from taking alternative courses, as a result of the isiZulu module is baseless, given that isiZulu mother tongue speakers are exempt from registering for the compulsory course and can do so voluntarily. Murray (2019: 2) goes further to argue that students spend time learning a new course is time wasted for other courses. The statement presents a one sided view. As with any course, time needs to be invested by each student in order to achieve results. It is inaccurate and unfair to blame a language module for student's time management and poor performance. The study fails to advance proof that the language module is to blame. The student quoted in the newspaper article (Bhengu, 2019), provides her own perception of the course and one student alone does not mean the entire course is a failure. It is concerning that; mother tongue African language students are only interested in studying a six-month module for an easy credit. This undermines not only the status of African languages but also portrays an image that African language modules and degrees are not worthy of academic study and should be an 'easy' credit. One would rarely find an English mother tongue student studying an English module at university level saying they are there for an easy credit, nor would the difficulty or intensity of the module be questioned or blamed for a lack of performance in other courses.

There is no evidence to suggest that African language mother tongue students are underperforming as they are battling to use English, the medium of instruction, as Murray (2019) states. The entire article both (journal and newspaper) portrays isiZulu in a negative light, with factual inaccuracies and perceptions and English emerges as a unifying language to solve all problems. In fact, Murray (2019: 3) makes no qualms about suggesting that English be made compulsory for all African language mother tongue speakers. The point is that this form of criticism needs to be dealt with internally and addressed. Based on the contents of UKZN's language policy, there are mechanisms for reviewing implementation to address practical challenges when the arise.

The remaining three selected university language policies present a negative outlook of non-inclusion and non-development for the African languages. As I indicated in chapter six of this thesis, each of these three universities have opted to move from a bilingual position to a monolingual English only policy on the basis of transformation, and equal access. I will also address each of these language policies in the following part of this chapter, through the case law discussion.

The language policy of Stellenbosch University, ironically states that the policy aims to give effect to Section 29(2) as well as Section 29(1) (b) and Section 9 of the Constitution. After engaging with the policy, it is clear that access to higher education is according to the policy achieved through English as the primary language of learning and teaching with Afrikaans used in certain domains. This enables 'equal' access and does not discriminate against a potential student on grounds of language. Again, this speaks to an earlier point I made regarding the skewed understanding of equal access and discriminating fairly against everyone. Yet English mother tongue students are not discriminated against, fairly or unfairly.

The language policy in promoting the importance of multilingualism recognises isiXhosa as an 'emerging formal academic language', which will be implemented incrementally, in selected domains. In essence, there is then a qualification to the implementation of isiXhosa as a language of learning and teaching. As opposed to UKZN's language policy, the University of Stellenbosch in its language policy, fails to accrue timelines and strategies on the implementation of this objective. Further noteworthy inclusions as with the other university language policies include vocation specific courses for students as well as staff courses for isiXhosa.

The language policy of UFS, also entrenches English as the primary language of instruction at undergraduate level. As seen in chapter six of this thesis, the language policy makes the exception at post-graduate level subject to the head of department/ dean's discretion. This is contrary to Rhodes University where, for example at post-graduate level regardless of the faculty in which the student is registered in, a thesis can be completed in any language. English as a primary language of instruction is further strengthened given that it must be used in all lectures, study materials and examinations, at undergraduate level. It is ironic then that the language policy states that language must not be a barrier to access, and that the policy only speaks to the African languages in the context of promoting isiZulu and Sesotho on the three campuses.

The University of Pretoria in their language policy went a step further by stating therein that financial and other resources be made available to facilitate the learning of English. This, in support of English as the primary language of learning and teaching. The same financial support is not afforded to Sepedi, which the language policy says must be developed.

In the following part of this chapter, I will critically engage with the language policy courts cases, presented in chapter six of this thesis.

7.13 Analysis of the higher education language policy cases

This discussion is limited to an analysis applying to all cases concerning the language policies of universities, as discussed in chapter six of this thesis. The purpose of this discussion is to draw together the overlapping issues relevant to this thesis from the judgments in relation to selected author's works. This, discussion as with the entire chapter informs the conclusions and recommendations in chapter eight of this thesis.

What emerges from the cases in chapter six of this thesis is that, University management structures are propelling English only language policies under the guise of transformation, which in my opinion is the complete opposite of what a university transformational agenda should be enabling. In the *Gelyke Kanse* (2019) case the costs argument weighed heavily on arguments and the determination of the standard of reasonable practicability with the implementation of Section 29(2) of the Constitution. The court held that it was not the burden of a university to develop or sustain a language. I disagree with this point in light of the reasoning throughout this entire thesis. In addition UKZN, as seen in chapter six of this thesis have been it abundantly clear in their language policy that universities have a central role to play in developing the languages in accordance with the constitutional mandate so that the African languages in particular can be used in all domains in society. Froneman J (2019: 66) comments on this issue and raises the important point of the need to identify whose responsibility it is do so:

> The first judgment candidly declares that "[e]ndorsing the University's 2016 Language Policy as conforming with section 29(2) comes at a cost. Our judgment must acknowledge it". It recognises that the "flood-tide of English" is real threat to minority languages, including Afrikaans. It proceeds then to state that this risk not the Stellenbosch University's burden, nor is the fact that Afrikaans has all but vanished as a language of instruction at other tertiary institutions.

In terms of accessing education in your mother tongue as Section 29(2) enables, will now be significantly diminished based on the judgments in chapter six of this thesis, it is also concerning that the CC through its majority judgments have endorsed this position, as Froneman J (2019: para 75) also pointed out in the, *Gelyke Kanse* judgment. Alexander

(2013: 84) stated that as a result of English, enjoying a hegemonic position globally would not guarantee educational equity at tertiary level if it is the language of instruction. In fact, the scales will be tipped in favour of the already privileged mother tongue speakers and proficient second language speakers of English. Thus, the vast majority will remain disadvantaged, as Hendricks J correctly pointed out in the UFS judgment (2016) of the court *a quo*. I therefore disagree with Kollapen J in the UP judgment, who held that everyone will be unfairly discriminated against with English as the primary language of learning and teaching.

Secondly, what is glaringly disturbing in Mogoeng CJ's judgment in the *UFS* (2017) case, is the constant reference to Afrikaans as a medium of instruction fostering racism. Froneman J pointed out that this would imply that all other official languages (African languages) other than English divides a university along racial and ethnic lines. Froneman J appeared to have reiterated this point in the *Gelyke Kanse* (2019: para 76) case. A point of critique is that Mogoeng CJ in the *UFS* (2017) case failed to engage with the sentiments on the point of language, race and ethnicity outlined by Alexander (2013: 84), who stated:

> An Afrikaans-dominant or a Zulu-dominant university does not have to be an ethnic university. Because an entire university community is Zulu speaking, they cannot be said to be ethnicist or even racist. The language of tuition does not determine whether or not a course or a university is racist or tribalist. It is what is taught that is decisive.

The majority in both CC judgments as well as Kollapen J in the UP case are clearly conflicted as to whether African languages will have any relevance in the transformation of higher education and society more broadly. It is also concerning that African language voices/ organisations have not been vocal on these issues and have not considered joining proceedings as *amicus curiae*. The latter is also a suggestion that Froneman (2019, Interview Appendix K) made, where the African language voice is heard on issues, that directly and indirectly affect both the status of African languages, the development thereof and the use in high status domains. I also picked up on this point in chapter eight of this thesis in relation to recommendations from this research. The dissenting judgments and differing reasoning offer positive glimpses that there is hope for all official languages to be treated equally. Furthermore, the dissenting judgments, in the South African context, in chapter six of this thesis can be equated with those of Wilson J in the Canadian case study presented in chapter five of this thesis.

7.14 Conclusion

In this chapter, I began by thematically engaging with the data presented in chapter six of this thesis. The chapter engaged with the constitutional language rights and general language provisions, and highlighted the internal limitations thereof through vague and discretionary terms and phrases. Nevertheless I argued that the framework remained in place and applying the sentiments of Cameron (2013) that the Constitution is only guide requiring further interpretation, the rights were established and were to applied in practice. Drawing on the work of Leung (2019), I acknowledged that in a multilingual legal order such as South Africa, interpretation and practical implementation is dependent on the intention of those implementing or interpreting. Applying the case law, this chapter found that a narrowed interpretation was applied with this creating an alternative right to interpretation for African language speakers and Afrikaans speakers, in courts, given the issues plaguing the interpretation profession.

This in my opinion as I argued was a 'lesser' standard of justice for those who cannot speak English. The disadvantage did not end then and is perpetuated or rather enabled through legislation and policies that fail to regulate the language of record in courts, given that it is an executive decision. The legislation fails to deal with the language question for legal practitioners, judicial officers and interpreters. The Legal Practice Act (2014) in supposedly creating a framework for a transformed legal system fails to address the language question and its role in legal transformation. The overall picture is bleak with no legislative language requirements in place, and universities supporting this model of English only across higher education, and ultimately affecting professional contexts such as the legal profession. The universities, with the exception of UKZN, are abandoning their responsibility towards the development the African languages in favour of an English only agenda, endorsed by the judiciary at its highest level. The chapter that follows contains conclusions and recommendations.

CHAPTER EIGHT

CONCLUSIONS AND RECOMMENDATIONS

8.1 Introduction

This chapter provides an overview of the thesis in its entirety in relation to the goals and objectives as outlined in chapter one of this thesis. Furthermore, this chapter provides seven recommendations that are informed by the discussions put forward in this thesis. The chapter ends with an overall conclusion to the thesis.

8.2 Overview

This thesis commenced with the objectives of critiquing the monolingual language of record policy directive by the Heads of Courts against the constitutional and legislative language rights frameworks. In doing so, the objectives drew parallels between higher education language policies in affecting the language of record through the graduation of multilingual LLB students. The objectives were formulated in the context of the research problem as outlined in chapter one. The research was furthermore established within the parameters of the discipline of forensic linguistics, importantly so given that it is a relatively 'new' discipline in Southern Africa.

This research developed in providing an historical account of the development of the language of record in South Africa, where the relationship between language, law and power was highlighted. The historical account traced the language of record in courts in the pre-Apartheid era where the indigenous languages of the South African people were excluded in favour of Dutch and English. The political power of the elite dominated and influenced the use of language and the marginalisation of the indigenous languages. With time, this research illustrated that the linguistic exclusion and discrimination was perpetuated during Apartheid where once again political power influenced the language policies of the day. The dominance of the official languages at the time were also entrenched at universities and ultimately led to the development and use of the languages at an intellectualised level.

This research explained the unfortunate lack of political will for the inclusion and advancement of the African languages during the CODESA talks. The negotiated settlement appeared to have included the previously marginalised African languages as reflected in the Interim Constitution and the Final Constitution, but this was obviously not the case. The

research has illustrated that there were numerous missed or intentionally missed opportunities to deal adequately with the language question in South African and in the courts in particular. This was the constant outcome given the lack of implementation dating back to LANGTAG (1996). The resultant effect was the continuous cycle of English and Afrikaans usage in courts and at universities. Legislation and language policies mimicked this cycle and although language requirements were removed for legal professionals, this failed to remedy the position with the non-inclusion of African languages.

This thesis transitioned from the theoretical discussions concerning South Africa in which all issues were highlighted, to the comparative African case studies on Kenya, Morocco and Nigeria, which illustrated that South Africa was not unique on the African continent by following an English only model at universities and in the legal system. Each of the African case studies illustrated the effects of the political situation on the language question in courts and at universities. The case studies, particularly Nigeria, highlighted the issues of interpretation in the courts where English was the language of proceedings and record.

Chapter five comprising the international case studies focussing on Australia, Belgium, Canada and India, again illustrated the marginalisation of indigenous languages. This was inherent in Australia and India, where indigenous people were excluded from, or unfairly disadvantaged in courts and from accessing justice as a result of language. In India, the situation is compounded by the fact that English is a minority-spoken language in a multilingual country. The issues though, are deep rooted as illustrated in the chapter, where a political elite are pursuing an agenda in India that continues to divide the country. Canada and Belgium are clearly models to emulate in enacting bilingual/multilingual language policies for courts and universities and these countries provide much needed guidance and hope of linguistic inclusivity and equality for the languages and the speakers thereof. I will return to Canada and Belgium further on in this chapter as part of the recommendations.

The research culminates in chapter six of this thesis, where the data is presented in the form of legislation, language policies, case law, language surveys and statistics for both the legal system and higher education. The supposed transformative framework in the form of the Legal Practice Act (2014), language policies enacted in accordance with Languages Act (2012) and the language policies of universities (with the exception of UKZN) support an English only agenda contrary to reflecting and giving meaning to the constitutional

provisions as well as the language statistics presented in chapter six. Chapter seven of the thesis engages further with the empirical data as part of an analytical approach.

8.3 Recommendations

The discussions below comprise of seven recommendations being identified and explained. Each of the seven recommendations are interlinked, as is the theme throughout this thesis, which will become apparent with the advancement of each recommendation.

8.3.1 Declaratory order

The Constitution is the starting point, given that it is the supreme law of the country, providing the framework upon which legislation and policies be drafted to ensure the successful implementation of the language rights and other language provisions including Section 6. As I advanced in preceding chapters of this thesis, the constitutional provisions need be given further meaning through legislation and when being interpreted and applied in practical situations. Thus, there is a level of ambiguity in the form of discretionary words and phrases detracting from the implementation thereof. Perry (2004: 131) has critiqued this, encapsulating the sentiments of Sachs who states further that the provisions of Section 6 are "... messy, inelegant and contradictory." The case law presented in chapter six, has advanced conflicting interpretations of the constitutional language provisions and language rights more specifically. The point is that there needs to be clarification on the parameters of the language rights.

A declaratory order is a constitutional remedy. Constitutional remedies according Currie and de Waal (2013: 177) are:

> The remedies flowing from a direct application of the Bill of Rights to law and conduct governed by ss8 and 38 of the Constitution.

I have previously advanced the provisions of Section 8 of the Constitution while Section 38 of the Constitution is also relevant in advancing this specific recommendation, whereby anyone has the right to approach a court, alleging that a right in the BOR has been infringed or threatened, to which the court may grant appropriate relief, including a declaration of rights.

This research has presented a negative outlook on the current situation concerning language rights for accused, arrested and detained persons in Section 35 of the Constitution. This was

exacerbated by the monolingual language of record announcements in the form of 'directives'. Simply put a language of record policy for courts will not only adversely affect one individual, but also society as a whole. The same applies for the constant limitation of Section 29(2) of the Constitution, where through the case law, monolingual teaching and learning language policies are endorsed as being constitutionally sound. A constitutional remedy would therefore address these issues in providing clarity. Currie and de Waal (2013: 181) capture this point in the following excerpt:

> The harm caused by violating constitutional rights is not merely a harm to an individual applicant, but a harm to society as a whole; the violation impedes the realisation of the constitutional project of creating a just and democratic society. Therefore the object in awarding a remedy is not only to grant relief to the litigant before the court but also to vindicate the Constitution. The judiciary therefore bears the burden of striking effectively at the source of the infringement.

This positive, forward looking remedy and explanation thereof by Currie and de Waal (2013: 181) in the quotation above, brings into question the intention of the heads of courts. In the first place, they had no authority to determine the language of record policy for courts and then proceeding nonetheless to limit the constitutional rights of society by furthering an English only elitist agenda.

In explaining the reasons for granting a declaratory order Currie and de Waal (2013: 196) stated that it is both a flexible and valuable remedy in a constitutional democracy "… as it allows the courts to clarify and declare a right on the one hand while leaving the decision on how best to realise the rights to other branches of the state".

Therefore, a declaratory order comprises of the court establishing the parameters of rights and provisions as explicated in chapters six and seven of this thesis. Muller (2015) explained that a declaratory order is an order by which a dispute over the existence of some legal right or obligation is resolved. The right or obligation can either be existing or prospective (Muller, 2015). With an existing right or obligation, the declaratory order would be brought to seek clarification (meaning), from the court. With a prospective right abstract review is provided where interpretation may be unclear.

The declaratory order is not enforceable unless the applicant also applies for an enforcement order such as an interdict. In the context of this thesis, the declaratory order would describe

with precision what the breach or infringement of a right is and through inference what the parameters of the right is.

Lourens (2012: 275) advanced that although the declaratory order needs to be coupled with an enforcement order, the state would be bound by the provisions that would have been clarified. This in my opinion would be important, given the failure to determine adequate language policies that provides clarity on the language question and provides further for the implementation of the language rights for all and not a minority English elite. As seen in chapters six and seven of this thesis, the Language Policy of the Department of Justice and Constitutional Development (2019), fails in this mandate, leaving the language of record for courts to be undecided and for the Heads of Court to take it upon themselves without the requisite authority to determine the policy.

Depending on the ambit of the application for a declaratory order, it would be interesting and important to see the function of PanSALB explicated further. To this end, I refer to the role of PanSALB to play an active role in advancing the use and developing the African languages in accordance with Section 6(2) of the Constitution. Furthermore the role of PanSALB in ensuring that effective language policies be drafted in creating a linguistically inclusive legal system. It is my opinion that PanSALB should be playing an active role in challenging monolingual language decisions and policies through legal and other engagement forums. The latter is discussed further with the recommendation for meaningful engagement.

8.3.2 Purposive interpretation

One of the reasons for recommending a declaratory order is to ensure judicial officers do not adopt restrictive interpretations of the constitutional language provisions, given its ambiguity that enables such interpretation. As seen in the case law presented in chapter six of this thesis, judicial officers interpreted the language rights provisions restrictively. The exception was the case of *Pienaar* (2000), where the court adopted a purposive approach in giving meaning to the constitutional language rights in a practical situation. Restrictive interpretation and the courts shying away from interpreting the constitutional language provisions is not confined to South Africa. This was also evident in the Canadian model presented in chapter five of this thesis, with the interpretation adopted in the trilogy of cases. Specifically the case of *MacDonald* (1986: 462), where the SCC held it is "... not the court's responsibility under the guise of interpretation, to improve upon, supplement or amend this historical constitutional promise." This in my opinion is contrary to the role of the courts in providing a purposive

interpretation to ensure the rights are fully realised. It is my opinion further that the courts' narrow interpretation is contrary to Section 8(3) of the Constitution, which obliges a court to apply and develop the law where necessary.

As I explained in chapter five of this thesis concerning the Canadian model, the courts eventually moved on from the trilogy of cases and began adopting a more purposive approach to the language rights and other language related provisions. Simply put, the Canadian jurisprudential model shows that purposive interpretation is possible, following years of exclusion and restrictive interpretation. Simply put, South Africa, must emulate the Canadian model where judicial officers have clarified the importance of interpreting language rights purposively. This was evident in Wilson J's (1986: 463) dissenting judgment in *MacDonald* (1986), where he explained that discretionary words such as 'may' and 'either' was inserted not for the state to hold that there is a discretion on the state to choose the official language in which to conduct the case; rather on the litigant before court to choose the official language to be tried in. In this light, South African judicial officers, when interpreting the constitutional language provisions, must adopt the reasoning in the Canadian case of *Beaulac* (1999: 770) where the court held that interpretation must be guided by the preservation and development of official languages. Noting importantly that language rights are substantive and procedural in nature. This is the complete opposite of what judicial officers interpreting language rights in South Africa have and continue to do, where the language right in Section 35(3) (k) is seen as a procedural right, one which forms part of the substantive right to a fair trial. As seen in chapter six through the case law, on grounds of language, appeals and reviews were upheld, based on the fact that it resulted in a procedural irregularity. Purposive interpretation is therefore recommended for future interpretation of language rights and legislative provisions regulating the use of language in the legal system and for higher education.

8.3.3 Language Audit

In chapter six, the statistics provided do not represent and record the language demographics of legal practitioners. More specifically the NPA does not have in its possession statistics that concerning the language competencies of their prosecutors nor does the judiciary have statistics recorded on the language competencies of judicial officers. The absence of these statistics was seen in the case law presented in chapter six, specifically the cases of *Damoyi* (2004), *Damani* (2016) and most recently in the case of *Gordon* (2018). In the case of

Damoyi (2004), I advanced that Yekiso J made an enquiry at provincial level where some form of language demographics was provided. In the case of *Damani* (2016) as advanced in chapter six, the pilot project referred to issues of dialect that would also need to be considered in the undertaking of a language audit. In the case of *Gordon* (2018), Thulare J stated that this would result in 'shopping' for judges, except his reasoning saw him confining language to race. Furthermore as I argued in chapter seven of this thesis, that will not be the case, where judges are discriminated against. The same model as with Canada and Belgium will apply and this would be implemented incrementally in phases as UKZN have done in the context of higher education. The language survey conducted by de Vries and Docrat (2019) is precisely what is needed but not as voluntary exercise. The Department of Justice and Constitutional Development at national level will need to facilitate this audit/ survey. There is no reason why the various organisations such as the NPA, the Law Society of South Africa, General Council of the Bar and the Chief Justice's office can individually conduct the survey and submit the findings to the Department of Justice for further consolidation and to be publicised. Throughout this thesis, I have illustrated the importance of collective efforts to avoid duplication and simultaneously ensure that all stakeholders are participating and aware of the audit and the purpose thereof.

This language audit/survey will then provide precise statistics of the language competencies of legal practitioners and judicial officers and the levels of competency for each language spoken and can be recorded. As seen in chapter five, Belgium follows this model, and South Africa could emulate this. This statistics will be vital in the drafting of bilingual/multilingual language policies for courts in each province. The drafting and amending of existing policies discussed as the following recommendation in this chapter.

8.3.4 Amendment of existing legislation and policies

As advanced in this thesis, South Africa has many statutes and policies that either duplicate mandates, fail to give effective meaning to the constitutional provisions or in many instances not implemented. The failures to appropriately address the language question begins with the SAPS Draft Language Policy (2015) language practices which exclude or disadvantage people on grounds of language. A collective effort is needed where experts (forensic linguists) assist in the development of policies and training programmes for the police. I will expand on the latter point below in this chapter. This is important, as I explained in chapter seven of this thesis, where the criminal justice system commences with the SAPS.

With the legal system, there is a failure in addressing the language requirements of legal practitioners. This is highlighted through the entire thesis and discussed directly in chapters six and seven of this thesis. Given the failure to include African language requirements in the Attorneys Amendment Act (1993) and the Admission of Advocates Amendment Act (1994) there is an inherent need to include language requirements, where legal professionals are competent in at least one of the indigenous languages. This should have been dealt with in the Legal Practice Act (2014), given its mandate.

The absence of language requirements for legal practitioners is supported through the failure to deal with the language of record for courts in the Language Policy of the Department of Justice and Constitutional Development (2019). The executive must therefore seek to amend this position with immediate effect through the implementation of a series of actions that I am outlining as part of these recommendations but also the broader thesis. The executive must act swiftly and positively in changing this position of a monolingual language of record. The Canadian model is one which South Africa can emulate in this regard, especially the legislative and policy framework of the Province of New Brunswick.

Again, as I have indicated in this thesis, the entire system needs and overhaul, given that the statutes and policies for the legal system directly affect higher education and vice versa. As with the legislation and policies governing the legal system, the HEA (1997) does not provide much directive besides the fact that universities must adopt a language policy as discussed in chapters two, six and seven of this thesis. Until the gazetting of the Revised Language Policy for Higher Education (2018), the language policies and numerous reports on the language question in higher education, advanced in chapter two of this thesis, were not implemented or the mandate was duplicated. Simply put, the Revised Language Policy for Higher Education (2018) provides much-needed directive for the implementation of the African languages as languages of learning and teaching in addition to languages of research and scholarship. It will result in the development of the African languages and the intellectualisation of the previously marginalised African languages and place them on an equal footing with English. This however requires that universities implement this policy through their respective institutional language policies. As chapters six and seven illustrate, the selected universities with the exception of UKZN are extremely slow in doing so and may be accused perhaps of paying lip service to the Revised Policy for Higher Education (2018) by promoting the use of African languages and the development thereof. Worse off however is the situation at the

universities of UFS, UP and Stellenbosch where English only language policies have been formulated on the basis of being transformative and enabling equal access for all.

The recommendation is that there is an urgent need to revise these language policies through understanding whose interpretation of transformation is actually being pursued. The university language policies need be reflective of the language demographics of the provinces in which they are located and the broader language demographics of South Africa. Universities through their language policies have to facilitate a process through which graduates leave university with a sound knowledge of another language (particularly an African language) that equips them to function in that language in various professional domains such as the legal system. This will ultimately support the language policies of the Department of Justice and Constitutional Development in instituting language requirements as well as formulating a language of record policies for courts on a provincial basis, taking into account the language demographics. Each province for the Magistrates' Courts and High Courts can have language have either bilingual or multilingual policies formulated where the African languages and or Afrikaans is a language of record alongside English, given that there are majority spoken languages in each province. Translation services can be employed as with the Canadian model to translate the record for appeal and review processes. This is a long-term recommendation that needs to be formulated by all relevant stakeholders identified in this thesis.

Within university structures, the LLB curriculum needs to be revised in factoring in language and the need to graduate linguistically competent professionals as UCT is doing with medical students. This would also require collaboration between the respective law faculties and African languages departments in formulating courses that are of benefit to students in a professional context.

Universities also have a further role to play in ensuring proficient and academically qualified interpreters are graduated. There is a need to offer legal interpretation and translation courses to produce interpreters specifically for the courts. This will assist with improving the quality and consistency of legal interpretation in courts and assisting the police, given the discussions in chapters six and seven of this thesis, where the SAPS Draft Language Policy (2015) includes interpretation services. I expand on the point of legal interpreters further on in this chapter.

Having a bilingual language policy at universities, where that language is an African language is possible and UKZN is a model that can be emulated as Canada can be for the legal system. Indeed these policies would need to be incrementally introduced as UKZN is doing through their extensive language plan, implemented through two phases. Further to UKZN in South Africa, Belgium is a further module that universities could emulated. As presented in chapter five of this thesis, universities' geographical position determines the languages of learning and teaching and the languages in which LLB students must graduate. The Belgian model is one that can be applied in the South African context and can be reflected in policy and legislative works.

8.3.5 Meaningful Engagement

Following on from the recommendations above thus far there is a need for legal reform. Given the recommendation to amend existing legislation and policies, it illustrates that the legislature at national level has failed to address the language question, and instead a top down approach has been adopted in the legal system and higher education. As chapters six and seven illustrate statutes and policies are formulated without taking into account the language demographics of the country and are imposed on the people (litigants) and students. What is needed is a bottom up approach as discussed in chapter two of this thesis with reference to Alexander (1992). There needs to be common ground sought and these ill-informed policies need to be redressed, where experts, persons affected by these policies and those drafting and implementing the policies, find solutions.

The concept of meaningful engagement originated in the socio economic rights cases of *Joe Slovo Community Western Cape* v *Thubelisha Homes* (2010) and *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg* v *City of Johannesburg* (2008: 212). Meaningful engagement is defined as a two-way process in which government and the affected persons are required to find a common understanding in terms of which issues can be addressed and solutions and or agreement achieved. Meaningful engagement is grounded on effective consultation and mediation. Meaningful engagement is to occur in good faith, transparently, with mutual understanding and sympathy and the necessary skill to achieve the stated objectives (Chenwi and Tissington, 2010: 4).

These definitions and explanations of meaningful engagement make the concept a good in the context of language planning. As with socio-economic rights, language planning involves a fair level of emotiveness, given that it concerns who we are as a people. The concept of

meaningful engagement as a tool was expanded upon and developed in the realm of language planning in ensuring the realisation of the constitutional language rights. Docrat and Kaschula (2015: 4) encapsulate the applicability of meaningful engagement in relation to language legislation in the reasoning below:

> Applying the concept of meaningful engagement to language legislation to support the language reality within the country and promote the... goals of the legislation is both necessary and desirable. The concept of meaningful engagement builds on Alexander's (2013) observation that in the case of language policy and implementation, if we cannot provide negotiated solutions we should not criticise.

As part of the process of meaningful engagement, and building on the definitions of meaningful engagement, forensic linguists will have a central role to play in informing the amendments, drafting of new legislation and polices where necessary from both a theoretical and practical perspective. This was acknowledged by Turi (1993) who states that legislation must be drafted by experts with an understanding of law and language. Meaningful engagement will be vitally important in engaging with the Heads of Courts or the Chief Justice in fleshing out the issues from a point of practice, where from an academic and practical side solutions can be found. PanSALB will have an important role to play in facilitating the process of meaningful engagement with all these stakeholders identified in this research.

8.3.6 Forensic Linguists as expert witnesses in South African courts and linguistic training programmes

This research in critiquing the monolingual language of record policy directive by the Heads of Courts and the solidifying directive by Judge President Hlophe, has highlighted the need for forensic linguists in South Africa to advise in the process of formulating sound policies. The case law has also illustrated the need for expert evidence to be led concerning the language rights in courts. This research has illustrated that the language question either is an afterthought or considered insignificant. Expert evidence led in court is confined to ballistics, entomology and pathology amongst others with the exclusion of forensic linguists. There is a misconception when it comes to language, the analysis of language through documents, text messages, language rights, and other forms of evidence, that every police officer, legal practitioner and judicial officer is an expert in the field and possesses the necessary expertise to assume the role of a forensic linguist. This is again evident in the case law presented in

chapter six as well as the monolingual language of record and the discussion following therefrom in chapter seven of this thesis. A further point of substantiation of this point of critique is the fact that judicial officers believe language proficiency of witnesses/ accused persons can be 'tested' and determined by asking them is they understand in English.

As I recommended above, forensic linguists have a meaningful and important role to play at the beginning of the criminal justice system with the SAPS and their training and investigative techniques. This is being done successfully in Australia, where support and advise is offered to police, during investigations in formulating and refining techniques for questioning accused persons, analysing statements and other evidence. In the United Kingdom, the Forensic Linguistics Centre at the University of Aston provides critical support during investigative stages in analysing evidence and providing expert evidence in courts. Simply put, the point being conveyed is that these are only two countries, which are maximising all efforts and expertise in the legal system through language and the specialised field of forensic linguistics. Thus, there are models, which South Africa can follow. The research area of forensic linguistics is continuously growing in South Africa and with universities developing this field; the legal system can benefit therefrom which will have a positive impact on the lives of citizens relying on their constitutional rights.

Having said this, I recommend that in the interim, while the long term recommendations presented above are being further discussed and implemented, training programmes commence for police officers, prosecutors and judicial officers. Training programmes are needed in sensitising these professionals to the linguistic and resultant cultural barriers experienced on a daily basis. Secondly the need to unpack the complexity surrounding the use of language in courts of law. Thirdly the effects of interpretation on oral evidence and ultimately the record. Fourthly the importance of interpreting language rights and provisions in a purposive manner where the rights are realised rather than limited, where English is the threshold. Fifthly, enlightening these professionals to the research area of forensic linguistics and the role of forensic linguists in assisting during investigation and providing expert evidence in courts.

8.3.7 Linguistic Justice

Each of the recommendations above are aimed at ensuring linguistic equality for the official languages and the speakers of these languages as well as ensuring the attainment of linguistic justice. Linguistic justice is a concept that was first coined by Philippe Van Parijs, a Belgian

political philosopher and political economist. In the context of South Africa, based on this research in this thesis, linguistic justice favours those with competency in English as opposed to the majority of South Africans. Given the recent CC judgments concerning university language policies, linguistic justice appears to be an unattainable myth for African language speakers and currently for Afrikaans speakers too. I am therefore recommending that as part of the meaningful engagement discussions, training programmes and long-term policies the concept of linguistic justice be part thereof.

This foremost, requires an understanding of the concept, which Van Parijs (2002) did in relation to other societal influencers, including, the economy, political power, societal social circumstances and an individual's mother tongue.

What is clear from this research is that linguistic communities/speakers of languages other than English are treated indifferently. The level of indifference is often determined by a multitude of accompanying social, political and economic factors. The situation is no different in South Africa as discussed in this thesis. According to Van Parijs (2002: 60), a person's linguistic competency affects their life chances and earning power. This links to two discussions in this thesis, firstly the language and economics argument by Grin (2010) and Kaschula (2004 and 2019), and how this ultimately affects the level of education attained where language policies promote English only.

According to Van Parijs (2002: 60) linguistic justice must be seen as "… a form of intercommunity cooperative justice. This in my opinion needs to take place in South Africa from a community perspective and if the legal system and higher education language policies are adopting top down approaches, they need to lead by example and act in the best interests of all. An inclusive community based approach was also referred to by Froneman J in the *Gelyke Kanse* case (2019: para 96) who stated the following:

> Imagine a Stellenbosch University where the current emotional and often odious public oppositional discourse is displaced. Imagine a Stellenbosch University where there is a community working together to ensure that the university alumni and other sympathetic supporters raise awareness of the plight of less-resourced isiXhosa and black and brown Afrikaans speaking communities that need access to its academic excellence. And then do something "reasonably practical" about it, by raising funds for the progressive institutionalisation of isiXhosa, Afrikaans or English as their choice of medium of instruction on an equal basis.

The quotation above, speaks to achieving linguistic justice, where proactive measures are adopted and pursued where separate treatment on the basis of different mother tongues is excluded (Van Parijs, 2002: 70). This is what is needed at all institutions and in the legal system, for linguistic justice to be achieved through community based concerted efforts. This is obviously not limited to higher education, where the legal system, and in particular the judiciary can play an active role promoting the use and development of the African languages by writing judgments in their mother tongues alongside English. Froneman J also proposed this in the *Gelyke Kanse* case (2019: 97):

> And imagine a Constitutional Court where judgments are written not exclusively in English, but in a variety of the indigenous official languages, with simultaneous translations in English in the column next to it, as in the Canadian law reports.

In the South African context, judgments have been written in isiXhosa and isiZulu as seen in chapter six of this thesis and with ongoing terminology development programmes at UKZN and other institutions this can surely be a reality, one that will become the norm, where the constitutional provisions are fully realised. This would be the true attainment of linguistic justice where fairness is the primary criterion (Van Parijs, 2002: 71).

8.4 Conclusion

This interdisciplinary thesis, located in the research area of forensic linguistics, in critiquing the monolingual language of record policy directive for courts, has identified that the executive has failed in their duty to determine the language of record through legislative and policy means. This thesis has illustrated that from the post-Apartheid era (1994) to the present there has been a continued game of avoidance employed where the language of record was constantly overlooked. This pointed to the gaps this research has identified and highlighted with regard to the systemic failure of language legislation and policy implementation failures.

With the executive failing in their mandate, I have through this research proved that the Heads of Courts decision under the leadership of Chief Justice Mogoeng Mogoeng has acted without the requisite legislative and administrative authority to make a directive on the language of record. There is also no authority under which Judge President Hlophe or any other Judge can determine the language of record. The monolingual language of record policy is a blatant abandonment of the constitutional values and provisions and unfairly limits the

language rights of African language and Afrikaans speaking litigants in favour of English speaking litigants. This decision/directive has a ripple effect on the status, use and development of African languages as warranted through Section 6 of the Constitution.

The sole use of English in courts and the legal system more broadly has resulted in the promotion and elevation of English to a 'super official language'. This is supported by the growing trend in universities with the exception of UKZN to retain English only language policies, paying lip service to multilingualism and the African languages. Universities are abandoning previous bilingual language policies in favour of English as the sole medium of teaching and learning under the intentional guise of transformation and equal access. The reasoning of 'everyone being fairly discriminated against' is a shallow excuse that illustrates the true intention of promoting English only, at the expense of the African languages.

This research has illustrated that people in authority tasked with upholding the Constitution are failing in their mandate to do so and the silence of our people and those who should and can hold them to account endorses the English only position. This silent endorsement is contributing to the continued undermining of the African languages and the exclusion of African language speakers from mainstream society, accessing and attaining justice and being afforded equal opportunities to participate at universities and obtain equal access to education (Kaschula, 2016: 201). The costs are both intellectual and cultural in nature, a loss which cannot be recouped, if we continue on this path.

Organisations such as the PanSALB, Black Lawyers Association, Advocates for Transformation and the African language membership organisations such as the African Languages Association of Southern Africa, by failing to challenge the status quo and legislative and policy means are benefiting from an unequal system. There is no reason why these organisations cannot join as *amicus curiae* for the position of African languages to be considered and be made known. We cannot expect Afrikaans speaking litigants to litigate on behalf of African language speakers as well, when there are organisations who have this mandate and the resources to do so but not the intention.

In South Africa, when the language question is to be considered of merely mentioned, it is problematized. I have substantiated this point throughout this research, where this form of problematizing is evident in the legal system and higher education. There is a cloud of negativity in attitude that accompanies discussions concerning language and in particular the African languages. These negative attitudes are captured in the survey by de Vries and Docrat

(2019). There is lack of willingness to act regardless of the fact that the Legal Aid Survey (2016) and Census language statistics prove that the majority of South Africans speak an African language as their mother tongue and do not speak, read, write or understand English at a minimal level of proficiency.

In South Africa language is seen as a problem and not a right or a resource (Ruíz, 1984). Language planners therefore need to engage with Ruíz's (1984) three orientations to language planning, of language as a problem, language as a right and language as a resource. This will allow the costs defence to be addressed through the work of Grin (2010) and Kaschula (2004 and 2019) in relation to language planning and the economy. Only the limitations are highlighted and endorsed by the judiciary under the discretionary constitutional phrases of 'where practicable' and 'reasonably practicable'. In this research I have explicated the economic advantages under the fourth tier of language planning, namely opportunity planning (Antia, 2017). As part of the recommendations in chapter eight of this thesis there are numerous employment opportunities that can be created by the legal system and universities through the establishment of curriculum reform for legal interpretation and translation degrees that will positively affect the rights of people in the pursuit of justice. There is a further need for the development of forensic linguists in South Africa to assist the police and legal system as well as play an active role in the formulation of legally and linguistically sound language legislation and policies. There is therefore a correlative need for universities to develop this research area in South Africa that can serve to assist the continent as whole.

This is achievable where the intention to do so is rightfully positioned. The African case studies in chapter four of this thesis have proved that there is a need for South Africa to lead from the forefront in charting a new course of social justice and linguistic inclusivity. The International models in chapter five serve as a basis of what to avoid, how to overcome challenges and how to achieve a linguistically inclusive legal system supported by universities who graduate multilingual professionals.

I do not think all hope is lost, but it is no longer about finding ways to "… sjambok the people to paradise" as Alexander (1997: 90) rightfully pointed out. What has happened instead is that collectively as a society and as South Africans we have failed to realise our constitutional aspirations, and consider what we have not achieved since 1994 (Alexander, 2013). Instead, there is an incessant justification of why English is practicable rather than

how the African languages can be used in practice. As South Africans we are fooling ourselves by thinking that we are pursuing a transformative agenda, when the very statute, the Legal Practice Act (2014) fails to even mention language in its provisions.

> Sadly, few lawyers and judges have embraced this vision of a transformative constitutional project. While most pay lip service to the need for transformation and claim to endorse the transformative vision of the Constitution, it is as if the old had colonised the new by co-opting them in the oppression of the majority of citizens. The concept of "transformation" is now often used - so it seems to me - as a Band-Aid to hide and legitimise the continued injustice and inequality that is perpetrated by the old business elite and the new political business elite (de Vos, 2010).

De Vos (2010) through this quotation summarises the current position in a concise, factually sound and unapologetic manner. We are the silent voice who are benefitting from an unjust system and we need to acknowledge this, break the silence and challenge a status quo that benefits an English elite at the expense of our African languages.

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Rules of Court:

Uniform Rules of Court, 2013.

APPENDIX A

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NRF SARChI Chair: Intellectualisation of African Languages, Multilingualism and Education

7 January 2019

Dear Prof Corder,

This is to confirm that Ms Zakeera Docrat, student number g10d0229, is a registered student at Rhodes University. Ms Docrat is presently studying towards her PhD Degree in African Language Studies under my tutelage and supervision.

Ms Docrat is presently embarking on research pertaining to her thesis, entitled: *a critique of the language of record in South African courts in relation to selected university language policies.*

Ms Docrat's research has been approved by Rhodes University, where she has obtained ethical clearance to request permission to conduct interviews.

In order to pursue and conduct this research she request to engage with you, for your expert opinion. This would be of great benefit to Ms Docrat's research, given also that she has an LLB degree and a Masters degree in African Languages with distinction.

I hope you can find the time to answer Ms Docrat's questions. Thanking you in advance and with kind regards.

Sincerely

Professor Russell H Kaschula
SARChI Chair: Intellectualisation of African Languages, Multilingualism and Education

APPENDIX B

RHODES UNIVERSITY
Grahamstown • 6140 • South Africa

English Language and Linguistics • School of Languages
Joint Research Ethics Committee

Zakeera Docrat
School of Languages & Literatures
P.O. Box 94
Rhodes University
Grahamstown 6140

Dear Ms Docrat,

ETHICAL CLEARANCE OF PROJECT 14729

This letter confirms your application for ethical clearance with tracking number 14729 and title, 'A critique of language of record in South African courts in relation to selected university language policies', served at the SoL/Ling Joint Research Ethics Committee of Rhodes University on 22 March 2018. The project has been given ethics clearance.

Please ensure that the SoL/Ling Joint REC is notified should any substantive change(s) be made, for whatever reason, during the research process. This includes changes in investigators.

Yours sincerely

Prof Patrice Mwepu, Chairperson a.i. of the SoL/Ling Joint REC.

APPENDIX C

Administration

NATIONAL PROSECUTING AUTHORITY
South Africa

Enquiry: Ms Z de Bruyn
Email: zdebruyn@npa.gov.za
Phone: 012 845 6267
Date: 06/06/2019

Tel: +27 12 845 6000

Victoria & Griffiths
Mxenge Building
23 Westlake Avenue
Weavind Park
Pretoria

P/Bag X752
Pretoria
0001

Ms. Z Docrat
Per email: zakeerad@gmail.com

RE: Approval of Request to Conduct Research in the National Prosecuting Authority

Dear Ms. Docrat

Thank you for showing interest in conducting research in the National Prosecuting Authority (NPA). The purpose of this memorandum is to inform you that your request to conduct research within the National Prosecutions Service (NPS) division has been approved.

The NPA appreciates that Rhodes University's Joint Research Ethics Committee has approved the thesis topic.

Please consider and/or adhere to (whichever is applicable) to the below-mentioned in support of your research:

1. The NPS division of the NPA supports the request however, it should be noted and understood that information about the work can only be utilised with the NPA's explicit written approval and permission.
2. The research request focuses on **"A critique of language of record in South African courts in relation to selected university language policies"**, and should be in line with all relevant policies and acts that govern NPS and the NPA.

3. Permission to conduct research is limited to interviewing one (1) selected prosecutor, Adv. Nickie Turner, a Senior State Advocate situated at the Director of Public Prosecutions' office in Grahamstown. This is in accordance with your application request received 7 May 2019[1].
4. Upon completion of the research project, it is requested that a copy of the report be sent to the NPA for perusal and approval. This is specifically to prevent the inappropriate interpretation and publication of the latter mentioned information.
5. It is furthermore suggested that in the event of the author publishing an article on research which contains NPA information, it be approved by the NPA.
6. Please inform the Director of Public Prosecutions (DPP) of the province where the selected prosecutor is stationed of your intent to conduct interviews before approaching her.

In your case, there will be no need to complete FORM A, which is the request for access to records of a Public Body, Section 18(1) of the Promotion of Access to Information Act, 2000, since you indicated that your research study only involves an interview with a single participant.

Kindly keep the NPA informed about further developments on this research and please send your response to the NPA Director: Research Management on the following details:

Name:	Ms Marthi Alberts
Telephone number:	012 845 6275
E-mail address:	MAlberts@npa.gov.za

Adv. Nomvula Mokhatla
Acting Deputy National Director: Administration and
Office of Witness Protection
Date: 6/6/19

[1] Research Proposal: Zakeera Docrat. (Undated, p8). Email received from Kefentse J. Mojaki-Moremogolo (Kmojaki-moremogolo@npa.gov.za) send to Zelda de Bruyn (zdebruyn@npa.gov.za) dated 7 May 2019.

APPENDIX D

OFFICE OF THE JUDGE PRESIDENT
WESTERN CAPE HIGH COURT

PRIVATE BAG X9020
CAPE TOWN
8000

Telephone number: +27 21 480 2564
Fax number: 086 6424753
Email: lpotgieter@judiciary.org.za

TO	:	THE LEGAL PROFESSION AND OTHER STAKEHOLDERS
FROM	:	HLOPHE, JP
SUBJECT	:	OFFICIAL LANGUAGE OF RECORD OF THE COURT
IMPLEMENTATION DATE	:	28 FEBRUARY 2018

DIRECTIVE

OFFICIAL LANGUAGE OF RECORD IN ALL COURTS WITHIN THE WESTERN CAPE

WHEREAS on 31 March 2017, the Heads of Courts Forum resolved that English must be the official language of record in all courts in the Republic of South;

AND WHEREAS no national directive has been issued by the Office of the Chief Justice as to the application of this resolution;

ACKNOWLEDGING that the dynamics of each Division of the High Court/ Region differ in as far as it relates to predominant languages spoken and therefore the way the different stakeholders are currently applying the relevant directive of English being the official language of record in all courts;

AND WHEREAS the commitment by all the role players to ensure adherence to the national resolution applicable to both criminal and civil cases in all courts, will result in speedier and more efficient adjudication and finalisation of ALL cases.

THE ROLE PLAYERS ARE THEREFORE, HEREBY, DIRECTED TO ADHERE TO THE FOLLOWING:

COURT DOCUMENTS:

ALL court documents submitted to courts in both criminal and civil cases and which will form part of the eventual court record **SHALL** be submitted in English.

The only limited exception permitted to the said directive will be the submission of witness statements in a language other than English and only if the witness is not sufficiently conversant in English.

COURT PROCEEDINGS:

Court proceedings should as far as possible be conducted in English.

In order to comply, the presiding officer should ideally at pre-trial stage or if not possible, after the witness has been sworn in at trial stage, enquire as follows:

"IN TERMS OF A NATIONAL DIRECTIVE BY THE HEADS OF COURTS, THE OFFICIAL LANGUAGE OF RECORD IS ENGLISH. ARE YOU CONVERSANT IN ENGLISH? DO YOU HAVE ANY OBJECTION TO THE COURT PROCEEDINGS CONTINUING IN ENGLISH?"

Should the witness not have an objection to the evidence being led in English, the court should continue as such. Should the witness not be conversant in English the **leading of evidence only** may be conducted in any other language. In such cases an interpreter should as far as possible be utilised to interpret the evidence into English.

It is advisable that this enquiry be conducted at pre-trial stage before a matter is certified trial ready. This will enable the administration at the court to make adequate arrangements for interpretation services, if needed, to avoid unnecessary postponements.

In such cases where there is no interpreter available and there is an indication that the matter is to proceed to appeal or review, the presiding officer should, for the purposes of the court record to be in English, order the Administration of the Office of the Chief Justice and/ or the Department of Justice and Constitutional Development to have the portions of the evidence led in any other language **simultaneously translated into English whilst it is being transcribed**. The translated version of the evidence will form part of the court record.

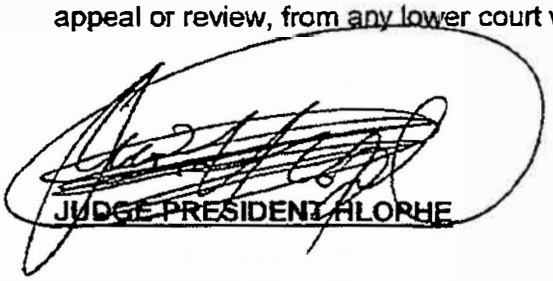
The order should read as follows:

"IN TERMS OF THE HEADS OF COURTS RESOLUTION DATED 31 MARCH 2017 RELATING TO THE OFFICIAL LANGUAGE OF RECORD BEING ENGLISH, THE COURT HEREBY ORDERS THE ADMINISTRATION OF THE OFFICE OF THE CHIEF JUSTICE AND /OR DEPARTMENT OF JUSTICE TO HAVE THE EVIDENCE LED IN ANOTHER LANGUAGE TRANSLATED INTO ENGLISH, SIMULTANEOUSLY TO IT BEING TRANSCRIBED."

Although evidence may have been led in a language other than in English, the Presiding Officer should render all verdicts/ outcomes/ sentences in English. An interpreter should be utilised for the translation into another language should the parties /accused not be conversant in English.

SUBMISSION OF COURT RECORDS TO THE HIGH COURT:

All records whether criminal or civil submitted to the High Court either by means of an appeal or review, from any lower court will only constitute the English record.



To be issued to:

The Magistracy;
The National Prosecuting Authority;
Legal Aid South Africa;
Western Cape Bar Association;
Cape Law Society;
NADEL;
BLA;
South African Police Services;
Department of Justice and Constitutional Development;
Department of Correctional Services;
Department of Social Services;
Department of Health;
Any other Court Official not mentioned above

188, 14th Road, Noordwyk, Midrand, 1685
Private Bag X10, Marshalltown, 2107
Tel: +27 10 493 2500 (Switchboard) | **E-mail:** info@ judiciary.org.za
www.judiciary.org.za

HEADS OF COURT RESOLUTION ON THE LANGUAGE OF RECORD IN SOUTH AFRICAN COURTS

In February 2003, the Heads of Court established a committee tasked with preparing a report on the usage of the various official languages of the country in the courts, to determine whether there are any issues with its usage and offer recommendations, if necessary. The view of the Heads of Court is that changes are necessary in the use of the various official languages in the courts, as not all languages are currently afforded the same status. Only English and Afrikaans enjoy the status of official languages and the other nine are handled in exactly the same manner as foreign languages.

The question that therefore arises is how can the need for an increase in the usage of all official languages in the courts be recognised, when only Judges who speak a certain language end up adjudicating cases where the parties involved are from the same language group? An appropriate balance must be struck among the various cultural interests by addressing the need for factors such as the following:

- Providing for our constitutional imperatives on official languages, whilst taking practicality and expense into cognisance;
- Developing and advancing the official indigenous languages, with particular regard for the development of legal terminology in all official languages;
- Ensuring fair trials and hearings to make sure justice is served and access to justice is promoted, and
- Accommodating reasonable and legitimate expectations of all language groups in our country, within the severe constraints of various resources.

The Committee recommended that, for reasons of practicality, English should be regarded as the language of record for all courts. This should not deny the litigant, witness or legal practitioner the right, where practicable, to address the court in the language of his or her choice. In instances where a language other than English is used during court proceedings, it must be translated

contemporaneously into English. Where contemporaneous translation is not available, the court record, or portions of the court record in a language other than English, must be translated into English.

At the Heads of Court meeting held in March 2017, it was decided that the recommendation that English be the language of record at the Superior Courts must be implemented in the absence of a policy decision from the Executive in this regard.

APPENDIX F


Instaculture
by Wayne Quilliam
NAIDOC WEEK 2019
Djilba
Cold
(Noongar Language)
NAIDOC WEEK 2019
Instaculture
by Wayne Quilliam

APPENDIX F


nstaculture
by Wayne Quilliam
NAIDOC WEEK 2019
Baarramirri
Cool, getting warmer
(Yolngu Language)
NAIDOC WEEK 2019
Instaculture
by Wayne Quilliam

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NAIDOC WEEK 2019
Goray'murrai
Warm and wet
(D'harawal Language)
NAIDOC WEEK 2019
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NAIDOC WEEK 2019
Wari
Cooler
(Anangu Pitjantjajara Language)
NAIDOC WEEK 2019
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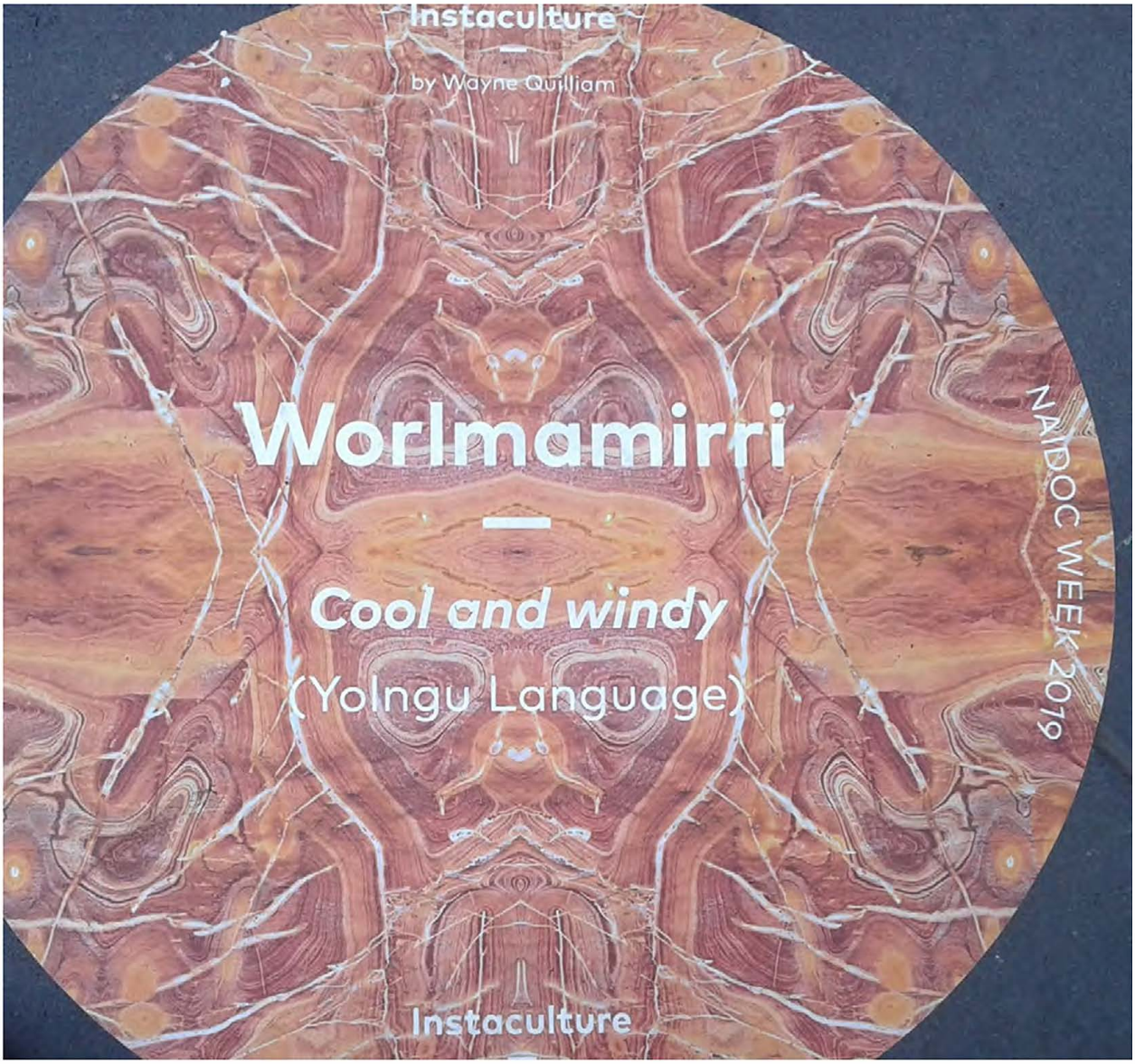
NAIDOC WEEK 2019
Dhaarratharramirri
Wet becoming cooler
(Yolngu Language)
NAIDOC WEEK 2019
Instaculture
by Wayne Quilliam

APPENDIX F


Instaculture
by Wayne Quilliam
Worlmamirri
Cool and windy
(Yolngu Language)
NAIDOC WEEK 2019
Instaculture

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Instaculture
by Wayne Quilliam
NAIDOC WEEK 2019
Inuntjji
Warm and wet
(Anangu Pitjantjajara Language)
NAIDOC WEEK 2019
Instaculture
by Wayne Quilliam

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Instaculture
by Wayne Quilliam
NAIDOC WEEK 2019
Mai Wiyaringkupai
Cool, getting warmer
(Anangu Pitjantjajara Language)
NAIDOC WEEK 2019
Instaculture
by Wayne Quilliam

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Instaculture
by Wayne Quilliam
NAIDOC WEEK 2019
Bunuru
Hot and dry
(Noongar Language)
NAIDOC WEEK 2019
Instaculture
by Wayne Quilliam

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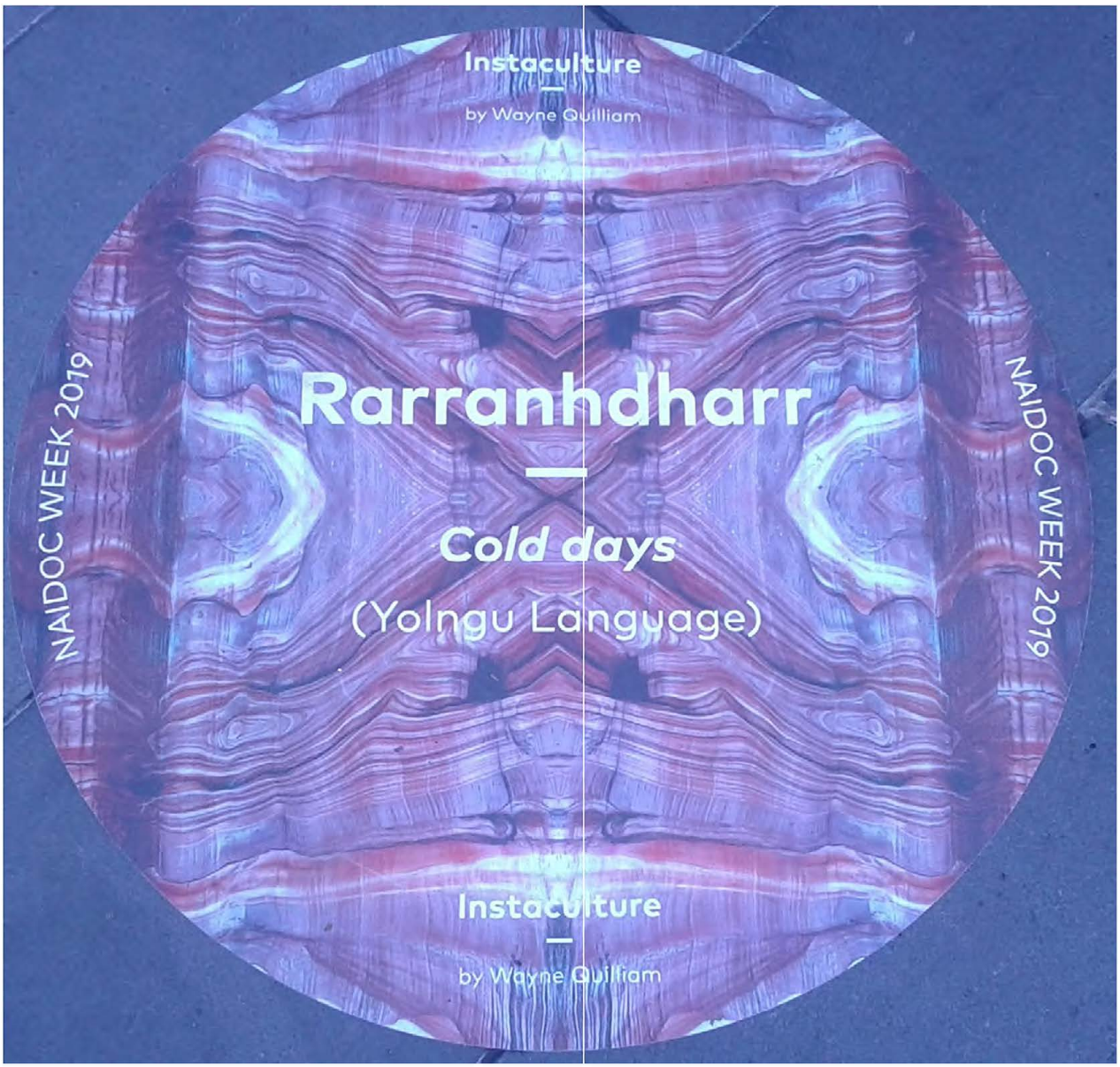
Instaculture
by Wayne Quilliam
NAIDOC WEEK 2019
Rarranhdharr
Cold days
(Yolngu Language)
NAIDOC WEEK 2019
Instaculture
by Wayne Quilliam

APPENDIX F


Instaculture
by Wayne Quilliam
NAIDOC WEEK 2019
Piriyakutu
Cold, frosty, short days
(Anangu Pitjantjajara Language)
NAIDOC WEEK 2019
Instaculture
by Wayne Quilliam

APPENDIX G

Interview

Name of interviewee: Judge Gerald Bloem

Occupation: Judge of the High Court (Eastern Cape Division, Grahamstown)

Date: 31May 2019

Time: 11h00

Duration: 1 hour

Place: School of Languages and Literatures, Rhodes University

Recording: Digitally recorded and transcribed

Questions:

It is my understanding that Section 6 (1) of the Constitution by conferring official status on nine African languages, attempts to redress the past discrimination. There is also the instructive provision of subsection (2) to take positive and practical measures to elevate the status and advance the use of African languages.

1. **In 2017 Honourable Chief Justice Mogoeng Mogoeng stated that English would become the sole official language of record for transformational purposes. In 2018, Hlophe JP released a directive for the Western Cape division calling for the implementation of the CJ's announcement of English being the sole official language of record in all high courts.**

   1.1 What is your opinion on the matter? Do you believe the English is the most practical option for the legal system currently? If so, what are your reasons?

   If everyone speaks isiXhosa for example in the Grahamstown High Court and the case proceeds in isiXhosa that would be great, but I pity the judge in the matter who would then have to write his/her judgment in isiXhosa and the judge was trained in English. The issue arises on appeal where the record, judgment appears in isiXhosa and the full bench cannot speak isiXhosa.

   1.2 Do you think that the directive is contrary to the Section 6 of the Constitution?

   It is great that all eleven languages have been conferred with official status, however it is impractical to use all eleven as official languages in our courts. If we take the Eastern Cape, Kwa-Zulu Natal and the Northern Cape as examples. Assuming it is a criminal case the main parties must understand the same language. It does not all always happen where the judge, prosecutor, defence attorney, witness and accused speak the same language.

1.3 In your opinion how does the elevation of English a language with a colonial history serve as a language of a legal system at the expense of the African languages?

English is the most practical solution at the moment in the legal system.

1.4 How can a directive of this nature be transformational? Would the inclusion of African languages not be part of transforming the legal system?

There was a matter in which I was once involved with, where council for the applicant drafted his heads of argument in Afrikaans and council for the respondent drafted her heads in isiXhosa. The judge was an isiXhosa mother tongue speaker. He could not exclude either party and came to the conclusion that English be used to draft both sets of heads. It was most practical.

Follow up question: Does this not speak to the need for linguistic transformation?

Yes, you are correct. There is a need for transformation but we are too far down the line to be teaching judges new languages. You cannot teach me isiPedi or isiZulu. The solution is to teaching children bilingually in their mother tongue alongside English as a subject; starting from their first year at school. The first six years lays the foundation for them to be bilingual. I was taught in Afrikaans up to grade ten and English was taught as a content subject through the medium of Afrikaans.

1.5 In your opinion does the directive not limit the right in Section 35(3)(k) of the Constitution? (If the language of record is English, all proceeding must be in English where an accused is for example isiXhosa speaking with minimal or no proficiency in English, the accused will have an interpretational right and not a language right as opposed to an English mother tongue speaker)

The second half of the right in Section 35(3)(k) is equivalent to being tried in a language the accused person understands.

1.6 What is your experience of interpretation from a judge's perspective?

It depends on the interpreter in each case and the complexities surrounding the case. There are cultural barriers that I have experienced while practicing as an advocate. Where I was briefed by Legal Aid to represent an accused who was charged with rape and murder. The instructing attorney was female. When we consulted with the accused he would not go further and provide any facts concerning the alleged sexual acts, as he was not comfortable doing so in the

presence of a woman. I had to explain why she had to be present. There might have been many more that I must have been oblivious too.

Interpretation in South African courts remains a grave concern that needs to be addressed where resources are allocated for training interpreters and ensuring qualified interpreters are employed. I did a case where the accused was Afrikaans, council was isiXhosa speaking and the witnesses were Afrikaans speaking. I had to interject on many occasions during proceedings where the interpreter's interpretation was of a poor quality. I gave my judgment to the interpreter beforehand as it was written in English, to prepare the terminology and so forth. Unfortunately, the interpreter faulted all the time and I had to correct him in court.

There are some exceptional interpreters, but unfortunately, they are in the minority. This is the biggest problem we are facing in our legal system. Financial resources needs to be provided and minimum qualifications for interpreters needs to be established.

2. **The directive to make English the sole official language of record, seems to have had a domino effect, given the latest English only decision by the Legal Practice Council.**

   It follows the fact that students are graduating with their LLBs through the medium of English.

   2.2 In your opinion do monolingual legal practitioners not limited the right conferred in Section 35(3)(f) and (g) of the Constitution? (In the case of *State* v *Pienaar* the court held that Section 35(3)(f) and (g) provided for an accused to communicate directly with a legal representative in a language they fully understand unless exceptional circumstances exist.

   2.3 As former chairperson of the bar council did you discuss the use of language in practice and the need to ensure linguistically competent advocates? More specifically, was language identified as part of the transformation of the legal system?

   2.4 As an advocate what were your experiences when communicating with clients (during consultations) who had no or limited communicative skills in English?

In my practice, when consulting with an isiXhosa speaking client who could not speak any English, I would use an interpreter to interpret. If the attorney could speak isiXhosa they would act as an interpreter. I understand isiXhosa, but I would use an interpreter for the sake of consistency.

3. **What is your opinion regarding the proposal by the Chair of the Parliamentary Justice and Corrections Oversight Committee, Mathole Motshekga, to ensure all LLB students first pass one or other of the indigenous languages before being awarded a law degree?**
   It must begin at schools and then continue throughout.

APPENDIX H

Interview

Name of interviewee: Prof Michael Cooke

Occupation: Director: National Accreditation Authority for Translators and Interpreters, Australia

Date: Questions sent on 31 August 2019

Answers sent on 2 August 2019

Time: NA

Duration: NA

Place: NA

Recording: Interview conducted via e-mail

Questions:

1. **Please could you briefly outline the historical marginalisation of aboriginal languages in Australian courts?**

   1.1 Were there specific constitutional and legislative developments that precluded the use of Aboriginal languages in Australian courts?

   It wasn't so much that Aboriginal languages were marginalised, but that evidence from Aboriginal people was not admissible because they could not swear an oath because they were "ignorant of a Supreme Being". (p203 of my thesis)

   By the way, you need to know that until 1900 Australia was group of unfederated states or colonies — and not one country. So, to continue on, Western Australia legislated to accept Aboriginal sworn evidence in 1842. (also p203 of my thesis)

   So once Aboriginal people started giving evidence the matter of how they communicated became relevant. Quite often Pidgin English was used. I give an example in a paper I wrote some time ago — see page 5 of "Indigenous Interpreting Issues for Courts": http://www.naclc.org.au/cb_pages/files/Cooke%20-%20Indigenous%20interpreting%20issues%20for%20courts.pdf

   This example was from the 1880s. There was no prohibition on the use of Aboriginal language if that's all the person could speak and if an interpreter was available. Unfortunately, I can't tell you the first time an Aboriginal language interpreter was used in an Australian court.

   However, in the following article Russell Goldflam points to a murder trial in 1885 where the defendants were discharged because no interpreter could be found for them (half way down page 2).

http://www.supremecourt.nt.gov.au/about/documents/r_goldflam_ngayulu_nyurranya_putu_kulini.pdf

In fact, this conference paper goes on to address your other questions about the rights of Aboriginal language speakers in relation to interpreting assistance — and the question of who pays (at least in the case of criminal trials).

In Australia, each state and territory has its own courts — criminal and civil. However, there is also a federal court and the High Court of Australia (i.e the top court in the country) listens to appeals arising from state court proceedings. I'm no expert on how each state looks at interpreters for civil matters but if you look at the following webpage concerning the state of Queensland you will see that for civil proceedings in Queensland you need to engage the interpreter yourself and pay yourself. I suspect this is the same everywhere for civil matters.

https://www.courts.qld.gov.au/services/getting-an-interpreter

2. What is the current status of Aboriginal languages in Australian courts?

2.1 English is the language of record, correct?

2.2 With English as a language of record in courts, are Aboriginal litigants/ witnesses in both the criminal and civil systems supplied with interpreters at the state's expense?

Yes, English is the language of record but I don't think this is stated in the constitution. In fact, the constitution is silent on the matter of the official language of Australia. The notorious White Australia Policy of Australia (which officially ended in the 1960s I think) had a dictation test which could be inflicted on anyone of non-European background/origin who wanted to stay in Australia. It could be administered in any European language. I've attached a document (2005_vol5_13pdf.pdf) to the email that accompanies this which explains further.

In the previous section I answered some of the queries you have about the rights to an interpreter. The following document sets this out in terms of the federal court.

http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/policies-and-procedures/interpreters

There's also something I should point out in regard to the use of Aboriginal languages in official contexts. I remember when we had our brief conversation at the airport, that I mentioned the case of an Aboriginal parliamentarian who was seeking

to use his language in parliament. This was controversial. The following two webpages detail all this.

https://nit.com.au/yingiya-mark-guyula-makes-history-addressing-nt-parliament-in-language/

https://theconversation.com/the-english-only-nt-parliament-is-undermining-healthy-democracy-by-excluding-aboriginal-languages-105048

3. **Are there any constitutional and legislative developments for the use and protection of Aboriginal languages in courts?**

There are protocols and legislation for police and courts in dealing with Aboriginal suspects/defendants (and to some extent, witnesses) that serve to accommodate their non-English language needs (where applicable). It's not about protecting Aboriginal languages but about ensuring the fair administration of justice.

In respect of police interviews, the so called "Anunga Rules(/Guidelines)" spell out how suspects are to be dealt with. These rules have been incorporated into legislation in many (if not all) jurisdiction and in some cases have been extended to serve the needs of other people of a non-English speaking background. I've give a bit of a history/explanation of these guidelines on pages 93-6 of my thesis.

In respect of court proceedings, protocols governing the use of interpreters serve to protect the interests of participants in proceedings regardless of their language (Aboriginal or otherwise). The following document sets all this out. Interestingly, on page 27 there is a specific statement that English is the language in which court proceedings are conducted.
https://www.naati.com.au/media/1680/mca04694-national-standards-web-171025pdf.pdf

4. **At the IAFL conference, you spoke about 'Bush Courts'. Could you provide a brief description thereof?**

   4.1 Do the Bush Courts operate separately to the civil and criminal systems?

   Bush courts are circuit courts. Magistrates sit in the major centres and they go on tour to hear cases in remote communities. The following webpage gives a detailed explanation of some of the issues involved:
   https://www.abc.net.au/news/2019-02-16/background-briefing-northern-territory-bush-court/10817642

5. **Please could you share your views on the quality of interpretation in Australian courts with reference to Aboriginal language speakers.**

Yes, I've written about this twice. I've attached a PDF (j08_v019_JJA_pt01_cooke.pdf) to the email that accompanies this. It details my concerns as of a few years ago.

Then, the following conference presentation from this year explains how progress will follow on from more intensive training of Aboriginal languages interpreters.

https://az659834.vo.msecnd.net/eventsairaueprod/production-aapevents-public/39e39f6fae9f4a1fa07a2509fb33c8ce

Finally, I should point out to you that the indigenous languages of Australia include the languages of the Torres Strait Islanders as well as the Aboriginal people. They are culturally distinct groups. The Torres Straight Islanders occupy a series of islands at the northern tip of Queensland (bordering Papua New Guinea).

APPENDIX I

Interview

Name of interviewee: Professor Hugh Corder
Occupation: Dean: Faculty of Law, UCT
Date: 6 March 2019
Time: 11h30
Duration: 48 minutes
Place: Kramer building, Faculty of Law, UCT
Recording: Digitally recorded and transcribed
Questions:

1. **Section 6(2) of the Constitution clearly states that the African languages must be elevated in status through the use of practical and positive measures and advance the use of the languages. Read with Section 35(3)(k) which states that every accused person has the right to be tried in a language they understand. The importance of language in the criminal justice system is highlighted through the constitutional provisions. We saw in the case of *S* v *Pienaar* that the court extended the right in Section 35(3)(f) and ss (g) to include being assigned a legal practitioner who can communicate directly with the accused unless exceptional circumstances prevent this.**

   1.1 My question is thus, how does the UCT law faculty view its educational role in relation to these language provisions? Does the UCT law faculty strive to give meaning to these constitutional rights by ensuring their LLB graduates are responsive to these linguistic rights?

   From a personal perspective, I graduated with my LLB from UCT. I remember as a student the law reports were in Afrikaans. I studied Afrikaans, given that it was compulsory to do so alongside English and Latin. I then went on to begin my academic career at Stellenbosch University. Afrikaans has served me well. It is highly beneficial in my opinion to be multilingual. Linguistic ability is critical, because the connection between language and law is so strong.

   It has been interesting to see the drift over the last twenty-five years, where English has become far too dominant. English is an extremely complex language to learn as a second language, and I have seen the difficulties our second language English

speaking students have in expressing themselves. One has become tolerant of linguistic mistakes in assignments and exam papers.

2. What is the faculty policy on the use of languages other than English in lectures and tutorials?

There is no policy that prohibits the use of other languages to be used in lectures and tutorials, provided that there was interpretation available.

2.1 Are lecturers encouraged to use bilingual/multilingual approaches in their lectures?

To my knowledge, none of my colleagues use languages other than English in their lectures or tutorials. If a student was to address me in Afrikaans I would gladly answer, but I would then interpret into English in a class situation so the class could understand.

2.2 Are students permitted and encouraged to use languages other than English (where English is not their mother tongue) in lectures and tutorials?

To my knowledge, it has never been tried. The negative aspect at UCT relates to the classist nature of the student body. My observation is that there is a social stigma associated with using isiXhosa and rather speak English. There are mostly English speaking lecturers, a few isiXhosa speaking, and a few black non South African (isiNdebele) lecturers. We also have a significant number of students from neighbouring African countries. Since 2014, UCT implemented an admissions policy that went beyond race and financial standing by including language where you would then score additional points in admission for the indigenous languages.

The LLB undergraduate curriculum at UCT requires students to register for and pass additional language courses. You have to do an additional language other than your home language up to and including your second year. Some people choose Spanish or French, some people choose isiXhosa. We do allow isiXhosa mother tongue speakers to do isiXhosa at university level as part of this requirement.

3. **My questions above (2) arise from the fact that UCT among other HEIs has been at the forefront of student protests on transformation and decolonisation.**

   3.1 How does the faculty view transformation and decolonisation with reference to both attitude, lectures, and the curriculum?

   The Afrikaans speaking community developed Afrikaans legal terminology and that is what is needed to enable lectures and tutorials to be conducted in isiXhosa.

   3.2 Is language identified as part of the decolonisation and transformation processes in the faculty?

   See answer to 2.2 below.

4. **With UCT centrally located in Cape Town near the High Court and Magistrates' Courts, surely there is a need to graduate linguistically competent LLB students? The question arises based on the content of UCT's languages policy, recognising the fact that the Western Cape is a geographically multilingual area; and the language policy recognises the value of multilingual proficiency.**

   See answer to 6.2 below.

5. **In 2017 when the Parliamentary Justice and Corrections Oversight Committee chairman, Mathole Motshekga, made a proposal, that all LLB students pass one of the indigenous languages before being awarded a law degree, was this discussed between the law faculty and the department of African languages at UCT?**

   There is no vocation specific course for isiXhosa. Again, I think that this needs to happen and place needs to be found in the curriculum.

6. **As I understand it, there is an elective course offered to LLB students- is this correct?**

   There is presently no elective offered.

   6.1 Why then is the course not chosen by the students given the protest action on the need to transform and decolonise? Could you perhaps provide your opinion and insight on the situation?

   Not once was the language issue brought up in meetings. There was a sole focus on race and western values.

   6.2 Is the positioning of the course in the curriculum the reason why students do not take it?

There was a curriculum change working document (the group is made up primarily of students as well as the various deans) that has become a political football. The report is heavily focussed on race. One of recommendation is that certain courses only be taught by black people.

6.3 If so, has the faculty considered placing it elsewhere in the curriculum that would make it more viable?

When I was Dean I took isiXhosa lessons. I then employed someone to teach isiXhosa to the staff both academic and administrative staff in the faculty during lunch times for two years. It was twice a week for the two years.

6.4 Taking it a step further has the faculty considered making the course compulsory as the UCT medical school did? If not, what are the reasons for not doing so?

I recall when I was acting Deputy Vice Chancellor, Professor Mbulungeni Madiba made representations on implementing a similar course for the law students. I thought it was a brilliant idea, but I was not Dean of Law at the time and I was not on the planning committee. We were however met with a lot of upheaval from the foreign students and Afrikaans speaking students who said they are already bilingual, why must they learn a third language.

APPENDIX J

Interview

Name of interviewee: Professor Mawande Dlali

Occupation: Head of African Languages, Stellenbosch University

Date: Questions sent on 30 August 2019

Answers received on 3 September 2019

Time: NA

Duration: NA

Place: Interview conducted via e-mail

Recording:

Questions:

1. **Universities have been gripped by protest action under the banner of decolonisation. Have students at Stellenbosch advocated for the inclusion of African languages in lectures and tutorials?**
   Certainly, see the answer below.
2. **Has Stellenbosch had discussions on the role of African languages as a tool to decolonise the curriculum?**
   The view of Africa centeredness referred in regard to decolonisation also included the discussions of the promotion of African languages.
3. **As the African languages department do you see yourself at the forefront of leading the debate on decolonisation with regards to African languages?**
   I see the official University language policy available on the University website where this department of African languages is pertinently identified as playing an important role in the promotion of isiXhosa at the University.
4. **Given the protest action across campuses in South Africa, has there been an increase in numbers of students registering to study African languages at Stellenbosch?**
   The numbers of students studying African languages have been stable for the past five years. We have good numbers who study African languages and we are planning further programme offerings to attract students. .
5. **Have there been discussions between your section and the Law Faculty to make the vocation specific course compulsory for all LLB students?**
   We have an open academic offering to all faculties of the University.

5.1 In your opinion would a vocation specific course not contribute to further development of legal terminology in isiXhosa? This would contribute to the process of intellectualisation of one of the African languages.

We have extensive terminology for isiXhosa that has taken place at Stellenbosch for wide courses including law.

6. **In 2017 when the Parliamentary Justice and Corrections Oversight Committee chairman, Mathole Motshekga, made a proposal, that all LLB students pass one of the indigenous languages before being awarded a law degree, was this discussed between the African languages department and the law faculty at Stellenbosch?**

   We have an open offering for students of all faculties to take an African language. The particular required subjects are determined by programme committees.

7. **In your opinion what is decolonisation and is there a difference between decolonisation and transformation within higher education institutions in South Africa?**

   Decolonisation entails a process of greater African centredness reflecting the views of the African population staff and students at the Universities. Decolonisation and transformation are overlapping but not identical concepts. See the official Stellenbosch University vision (2040) and strategic framework (2019-2024) for my views on this question.

8. **I know that there is a current case before the Constitutional Court concerning the Stellenbosch University language policy.**

   8.1 What are your views on having a monolingual language policy at Stellenbosch?

   The whole university subscribe to the official multilingual language policy of the University available on the University website.

   8.2 What is your opinion on the removal of Afrikaans as a language of learning and teaching at Stellenbosch? In addition, how does this affect the argument for the inclusion of African languages as languages of teaching and learning?

   See the University's official multi-lingual language policy available on the website.

9. **Please share any other information and opinions you think are of relevance.**

   None

APPENDIX K

Interview

Name of interviewee: Justice Johan Froneman

Occupation: Judge of the Constitutional Court, South Africa

Date: Questions were sent on 14 October 2019

Answers were received on 16 October 2019

Face to face, interview: 21 October 2019

Time: 10h00

Duration: 30 minutes

Place: School of Languages Literatures, Rhodes University

Recording: Digitally recorded and transcribed

Questions:

It is my understanding that Section 6 (1) of the Constitution by conferring official status on nine African languages, attempts to redress the past discrimination. There is also the instructive provision of subsection (2) to take positive and practical measures to elevate the status and advance the use of African languages.

1. **In 2017 Honourable Chief Justice Mogoeng Mogoeng stated that English would become the sole official language of record for transformational purposes. In 2018, Hlophe JP released a directive for the Western Cape division calling for the implementation of the CJ's announcement of English being the sole official language of record in all high courts.**

   1.1 What is your opinion on the matter? Do you believe English is the most practical option for the legal system currently? If so, what are your reasons?

   There are two different issues at stake here.

   The first is what legal authority the statement and directive relies on for the competence to issue them. If there is none then they do not have legal force. I do not wish to comment on this aspect as it is one that you will have to research and come to an independent conclusion on.

   As to the second part: with eleven official languages it seems eminently practical to use the language that is most commonly used by all different speakers as their second language in courts, but that begs the question how to accommodate other official languages. So the practicality of using language must be viewed against the measures that still allows individuals to use their own language in courts. There are different ways of accommodating this and they need to be explored.

1.2 Do you think that the directive is contrary to Section 6 of the Constitution?

That is something you must research and reach a conclusion on. It is something that may well still have to be decided in the courts, so I cannot comment on it further.

1.3 In your opinion how does the elevation of English a language with a colonial history serve as a language of a legal system at the expense of the African languages?

Reinforcing the dominance of English on an institutional basis makes it more difficult for the survival of indigenous African languages.

1.4 How can a directive of this nature be transformational? Would the inclusion of African languages not be part of transforming the legal system?

Of course it would.

1.5 In your opinion does the directive not limit the right in Section 35(3)(k) of the Constitution? (If the language of record is English, all proceedings must be in English where an accused is for example isiXhosa speaking with minimal or no proficiency in English, the accused will have an interpretational right and not a language right as opposed to an English mother tongue speaker)

A constitutional legal question which it would be improper for me to comment on.

1.6 What is your experience of interpretation from a judge's perspective?

Translation in one form or another will be necessary, no matter what the initial or default language may be. I've seen and heard excellent interpreters, as well as bad ones. At this stage I am not sure of the level of training of interpreters at the different court levels.

2. The directive to make English the sole official language of record, seems to have had a domino effect, given the latest English only decision by the Legal Practice Council.

2.2 In your opinion do monolingual legal practitioners not limit the right conferred in Section 35(3)(f) and (g) of the Constitution? (In the case of *State* v *Pienaar* the court held that Section 35(3)(f) and (g) provided for an accused to communicate directly with a legal representative in a language they fully understand unless exceptional circumstances exist.

I am not aware of the statutory or legal basis for different institutions to determine their own language policies. Whether language rights are infringed by these kind of policies or individual cases will have to be decided in the courts if and when challenged. For the reasons already given I refrain from expressing an opinion on them now.

3. **What is your opinion regarding the proposal by the Chair of the Parliamentary Justice and Corrections Oversight Committee, Mathole Motshekga, to ensure all LLB students first pass one or other of the indigenous languages before being awarded a law degree?**
   I think it is a good idea, but a better one is to have that kind of requirement already from primary and secondary school levels.

4. **In your dissenting judgment in the UFS case (para 85) you spoke about a 'proper' interpretation of S29(2) taking place. By 'proper', do you mean establishing the parameters of the S29(2) right and would this be a purely factual determination? I'm just thinking along the lines of the sliding scale formula and applying that criteria?**
   I'd prefer not to comment on this legal issue at this stage.

5. **The point you made about Afrikaans being classified as a racist language is very important for my thesis. I am arguing that by racializing the languages we are dividing ourselves and this is not transformation, where positive change should be achieved. Do you think that the coloured/ brown community is conveniently being excluded as Afrikaans speakers to validate the decision to remove Afrikaans as a language on the basis of racism?**

   On a legal level I think proof is necessary before the inference of racism merely by use of language is made. It should be obvious from my dissent that I think an opportunity was missed to deracialise languages in that case. Multilingualism and unity in diversity was given a devastating blow.

6. **Engaging with para 115 of your judgment, I'm thinking about the point you make then that by using any of the other ten official languages or promoting the use of these languages, as languages of teaching and learning we would be 'guilty' of**

instilling racism and discrimination? Is this not contrary to the provisions of S6(2) of the Constitution?

I think that there may well be instances where the use of language is used as a means of discriminatory exclusion or racism. But to elevate it to a non-evidentiary principle of law is highly problematic, to say the least.

7. **Where do we go from here? How can we protect our indigenous languages (Afrikaans included) if the Constitutional Court tasked with protecting, implementing and upholding our Constitutional rights and values is endorsing English only language policies? Are we fighting a battle that we have ultimately already lost?**

   I think the battle has been lost. Destroying Afrikaans is, from a certain historical perspective, understandable. But that does not necessarily help other indigenous languages if English is further entrenched at their expense too. I hope I am wrong in this.

APPENDIX L

Interview

Name of interviewee: Judge Belinda Hartle

Occupation: Judge of the High Court (Eastern Cape Division, Bhisho)

Date: 20 June 2019

Time: 10h00

Duration: 1 hour 30 minutes

Place: Guest House, Grahamstown

Recording: Digitally recorded and transcribed

Questions:

It is my understanding that Section 6 (1) of the Constitution by conferring official status on nine African languages, attempts to redress the past discrimination. There is also the instructive provision of subsection (2) to take positive and practical measures to elevate the status and advance the use of African languages.

1. **In 2017 Honourable Chief Justice Mogoeng Mogoeng stated that English would become the sole official language of record for transformational purposes. In 2018, Hlophe JP released a directive for the Western Cape division calling for the implementation of the CJ's announcement of English being the sole official language of record in all high courts.**

   1.1 What is your opinion on the matter? Do you believe the English is the most practical option for the legal system currently? If so, what are your reasons?

   What happens is that we get instructions that are filtered down to us from the CJ's office about preferences, in the same way, as we have had to implement case management in the courts. Yes, it is not official but it seems to be good and practical that English is the language we proceed with as the official language of record at this time.

   1.2 Do you think that the directive is contrary to the Section 6 of the Constitution?

   1.3 In your opinion how does the elevation of English a language with a colonial history serve as a language of a legal system at the expense of the African languages?

   1.4 How can a directive of this nature be transformational? Would the inclusion of African languages not be part of transforming the legal system?

I saw that the directive was issued for transformational purposes and the only reason in my mind would be that English dominates rather than Afrikaans, given that Afrikaans has always been dominant in our courts and in the law. This is from my experience where I attended university at UPE (currently Nelson Mandela University, Port Elizabeth) which promoted itself as a bilingual university with English and Afrikaans and of course Latin for the law subjects but everything was in Afrikaans, including the lectures. It was thus difficult for me to interpret everything into English, so I ended up writing my assignments and exams in Afrikaans. I can understand the prejudice there, as you feel disconnected with what is taught. Listening to something first hand and taking it in is important in understanding concepts rather than reading it later. It was difficult for me and I gave up having to think what does that mean in English. Therefore, I basically had to reprogram my brain to hear it in Afrikaans and understand it in Afrikaans. The fortunate part for me was that we already had to learn Afrikaans at school, so by the time I reached university I was fully bilingual. Speaking Afrikaans was the norm and government at the time would engage you in Afrikaans and you would not dare to ask for something to be repeated in English.

English is practical and most of the legal representatives speak English and engage us as judges in English. From that point of view it seems to be a 'safe' language. You can always see when a legal representative is at a disadvantage from the papers they have drafted or their communication with you, where you have to tone down your own level of English where you are not understood. I therefore need to be conscious of the level of English I speak so the person I am communicating with is not disadvantaged.

1.5 In your opinion does the directive not limit the right in Section 35(3)(k) of the Constitution? (If the language of record is English, all proceeding must be in English where an accused is for example isiXhosa speaking with minimal or no proficiency in English, the accused will have an interpretational right and not a language right as opposed to an English mother tongue speaker)

In the context of the Eastern Cape, there are often issues arising where the statements or confessions of accused persons are the subject of scrutiny in courts. Most often, the police officers are isiXhosa speaking and will communicate with the accused in isiXhosa and then record the statement or confession in English.

Through this process, it is contorted. The police do not have linguistic training and are not translators and are not taught this. The right is compromised in this aspect. You will pick on the discrepancies in oral evidence. The police often do not see the discrepancies. This area is ripe for transformation where the police need training. There is a need for interpreters at the police station. It would also make sense for the primary source documents to be in the mother tongue of the accused and then have the English translation as the secondary document prepared by a translator specialist. When police officers come and testify in court they prefer to do so in their mother tongue, yet they are obliged to carry out their professional tasks in English. There are filters and these filters are most often subjective.

1.6 What is your experience of interpretation from a judge's perspective?

When I was at university there were many people studying translation studies, where emphasis was placed on the importance of translating between two languages and the level of accuracy. I expect that the interpreters in my court are proficient in the languages. In some instances an interpreter will point out that they are not proficient in the language. For example if there was an isiZulu speaking accused that required interpretation, we would ask our lead interpreter to find an interpreter who is proficient in isiZulu. We deal with interpretation on a practical basis as the need arises. In Bhisho it is largely interpretation between isiXhosa and English. In Port Elizabeth, there is a fair amount of Afrikaans interpretation required.

I am not proficient in isiXhosa, so I do not know if what is being interpreted is accurate. You can however pick up on these issues, where the interpreter is not interpreting accurately, where the legal representative who speaks the language will constantly interrupt proceedings and say that the essence of what is being said is not accurately captured by the interpreter. So there are ques that help us along as judges. It therefore helps having people involved in the trial who are proficient in the language.

Follow up question: in Bhisho what are the language demographics of the prosecutors?

The majority are isiXhosa speaking and this is easily identifiable in cases where they are able to pick up on any interpretational inaccuracies. There are also other

factors such as body language of the accused, where through gesticulation the accused may signal to their legal representative or moan or mumble. Even from the interpreters perspective with the line of questioning from the prosecutor or legal representative of the accused, where the interpreter shows a level irritancy. These are factors that as a judge you need to be aware of where you cannot speak or understand the language. This comes with experience but also having an open mind and wanting to ensure that there are no linguistic barriers to justice that can be avoided.

I think there are further language barriers where the public defenders are unable to explain what is driving accused persons to commit crimes and this obviously has an effect on the sentence.

There are instances in which I have postponed matters and I want the accused person to understand my reasoning for the postponement and I often provide a lengthy explanation citing all the reasons and the interpreter summarises it in one sentence. I know that what was interpreted was not what I said. This also depends on the relationship between the interpreter and the judge, and the interpreter's competence. We need to make it someone's issue to train legal practitioners.

2. **The directive to make English the sole official language of record, seems to have had a domino effect, given the latest English only decision by the Legal Practice Council.**

   2.2 In your opinion do monolingual legal practitioners not limit the right conferred in Section 35(3)(f) and (g) of the Constitution? (In the case of *State* v *Pienaar* the court held that Section 35(3)(f) and (g) provided for an accused to communicate directly with a legal representative in a language they fully understand unless exceptional circumstances exist.

   The Pienaar case advanced the unfair element of not fully explaining to the accused his rights to have another legal representative appointed who can communicate with him in his mother tongue. It also points to the fact that Legal Aid should perhaps formulate a language policy where legal representatives have to speak an indigenous language or they have interpreters employed to assist these legal practitioners.

2.3 As an attorney what were your experiences when communicating with clients (during consultations) who had no or limited communicative skills in English?

After graduating, I moved to Queenstown where I was a prosecutor, where all the magistrates spoke Afrikaans. At the time, many people spoke Afrikaans in Queenstown. I then moved to Grahamstown where there was more of a balance between English and Afrikaans. The Magistrates, however, who were employed by the Department of Justice spoke Afrikaans fluently and did so in the courts as well. I was still a prosecutor at the time. I made my submissions in Afrikaans.

When I was an attorney serving articles in Grahamstown, we did not employ an interpreter and the office assistant who was a mother tongue isiXhosa speaker would act as an interpreter. Again, I would not know how accurate this level of interpretation was. It is very difficult when preparing for a criminal trial to repeatedly go over the details with the accused where there is a language barrier. Language was often a barrier. With interpretation there is a difficulty in explaining concepts and the failure to go beyond these concepts.

3. **What is your opinion regarding the proposal by the Chair of the Parliamentary Justice and Corrections Oversight Committee, Mathole Motshekga, to ensure all LLB students first pass one or other of the indigenous languages before being awarded a law degree?**

3.1 In your opinion and as a bilingual judge, would you be favourable to vocation specific courses for current and future presiding officers?

I think there is most definitely a need for a vocation specific course. There is a trend that is evolving and therefore necessary to meet the needs of isiXhosa speaking people in the Eastern Cape Province, for example. For me, learning an additional language at university was most beneficial, but this is not the case for everyone. It would be worthwhile to have a course offered in the indigenous languages, where the student acquires a level of proficiency in that language. The mere fact of being able to exchange greetings and enquire about someone's wellbeing breaks down a barrier with that person. It definitely opens many doors. The language course must be embraced in the first year, as we had to do with prelim Latin. I support your vision that this will not happen overnight and that it will take a long time but we must begin somewhere to make it a reality. I recommend learning an additional

language if only to maintain an oversight in court, where you might miss things which are important if you are not understanding that language.

I would fully support the proposal of us as judges doing vocational specific language courses. We have ongoing legal training and there is no reason why we cannot include languages.

4. **As a judge, have you ever heard a case that concerned traditional/ cultural practices that were difficult to explain in English through interpretation? If so, were there any difficulties that you encountered and how were those dealt with?**

   There are different linguistic nuances that arise, especially with rape cases, where isiXhosa mother tongue speakers do not always use the English word 'rape' and rather use the word ukuzuma (associated with former president Jacob Zuma's rape trial). Young children who have been raped will often use euphemisms when referring to rape or children who use pet names for their genitals.

5. **As a judge in the Eastern Cape, you hear cases in different divisions, are their varying linguistic barriers that exist based on the language demographics of the area in relation to the court's jurisdiction?**

   It is predominantly isiXhosa and English. You have to be alive to the possibility of using other languages, especially the indigenous languages. Everyone needs to be consulted where relevant stakeholders' views influence the drafting of these policies. I am currently doing appeals and most of the cases allocated to me are Afrikaans as I am bilingual. I think we need to be more sensitised to the language diversity.

6. **Please share any other experiences and opinions concerning language usage in courts.**

   Judges need to be sensitised on language, class and gender and a multitude of other factors and equality. There is a need to be mindful.

   The civil law system has many language barriers especially with persons who have faltered on bond repayments. As you know, in the summons, they are provided with an opportunity to come to court and provide reasons why they have defaulted and so forth. The language barrier arises where these litigants cannot speak English and come to court unrepresented. If you require an interpreter you have to pay. People cannot afford

this so they decide to do it themselves. I think that a language practitioner should be assigned to the civil courts to assist in instances such as these. If a litigant wants to file papers in their mother tongue there should be translation services offered at government expense. The civil area is rife for transformation from a linguistic perspective. It is a legal dilemma that needs to be addressed. There are many instances in which people are traumatised and feel more comfortable speaking in their mother tongue. People are therefore placed at an unfair disadvantage on this basis.

The rules of court should be translated into all official languages. The rules of court is the first port of call for a litigant in explaining how to, practically go court and what papers need to be filed and by whom.

Our challenges are unique and we need to find ways to solve these problems.

APPENDIX M

Interview

Name of interviewee: Professor Langa Khumalo

Occupation: Director: University Language Planning & Development Office, University of Kwa-Zulu Natal

Date: Question were sent on 25 August 2019

Answers received on 15 October 2019

Time: NA

Duration: NA

Place: NA

Recording: Interview conducted via e-mail

Questions:

1. **Please could you briefly outline the function of your language planning and development office at UKZN?**

   The main function of the ULPDO is to operationalize the University's Language Policy and its Implementation Plan. The main import of the Language Policy is that it recognizes English and IsiZulu as the official languages of the university. The aim is to use the two languages in all academic and administrative matters. However, towards operationalization of the Language Policy, the ULPDO recognizes the fact that the two languages are not currently at par and therefore first accentuates the role of English as an academic language, while (secondly) advancing the status and role of IsiZulu (through an intellectualization programme) so that it becomes a language of teaching and learning, research, innovation, science and technology.

   So at a strategic level the office plans and implements the Language Programme at UKZN. At an operational level the office provides language translation, interpreting and editing services between English and IsiZulu to the entire university community. Further the ULPDO is seized with the development of IsiZulu National Corpus, Terminology Development for and in different scientific disciplines, Specialized corpora (The English-IsiZulu Parallel Corpus and the IsiZulu Oral Corpus), and most importantly the development of Human Language Technologies in IsiZulu as enablers in the intellectualization of isiZulu to be a scientific language of teaching and learning.

2. As I understand it every student regardless of which degree they are pursuing is to first pass isiZulu prior to being awarded their degree. Is this correct?

Yes, that is correct.

2.1 What was the basis for taking the decision to make isiZulu compulsory for all students?

The decision was based on demographic data. IsiZulu is by far the most spoken language in the KZN Province (cf. 90% of mother tongue speakers). It is also the major language spoken by most students enrolled at UKZN (of the approx. 45 000 students) about 67-70% of students are mother-tongue speakers of IsiZulu. To enhance social cohesion at UKZN learning isiZulu improves inclusivity and accessibility of the institution this a larger amount of student body. Again, as a result, most of the graduating students at UKZN take employment in the Province and a communication competency in IsiZulu enhances their specialist service provision.

2.2 Given the recent calls and protest action for transformation and decolonisation at our higher education institutions, how did the language question feature at UKZN given that isiZulu was already compulsory?

I think within our university we were spared the ire of the students in that sense because there was evidence of progress in the area of introducing an African language such as isiZulu to the academy as a language of teaching and learning.

2.3 What are the non-mother tongue students' attitudes towards learning isiZulu as a compulsory course?

It is difficult to tell because attitudes change, but the introduction of isiZulu stirred a hornet's nest. The was obvious anxiety, which is natural, but there is general acceptance that this is University Policy and therefore must be embraced. There is evidence to attest to this movement towards general acceptable. Since the introduction of the compulsory isiZulu module through the BR Rule 9 in 2014, the University Senate approved the DR9 Rule in 2017 that compels all submitting Doctoral student to submit their thesis abstracts in both English and IsiZulu. This Rule was viewed to have a symbolic and real impact in that it would show that the

IsiZulu language has the capacity to discuss a full range of complex epistemic discourses and a very high and specialized level.

2.4 What are the mother tongue isiZulu speakers' and other African language speakers' attitudes towards isiZulu as a compulsory course? (My question is to an extent premised on the Sunday Times article in which a mother tongue student held that there was no value to learning the course)

UKZN established a structure called the University Language Board (ULB), through a charter, as a subcommittee of Senate, that monitors and evaluates the work that ULPDO does in implementing the University Language Policy. This structure the (ULB) has representatives that represent all the divisions of the university. Importantly therefore, and to answer your question, the Student Representative Council (Central SRC) is represented through their President and Secretary General. It is in this sense that there are no adverse representation from the student body via the SRC that have been tabled to the ULB to complain, contest or criticise the University Language Policy. So there is no recorded dissent of negativity from students.

2.4.1. I presume there are different streams for mother tongue and non-mother speakers learning isiZulu as a compulsory course?

Yes, there are.

2.5 Are there vocation specific courses for the various disciplines rather than having general conversational courses?

I don't know any vocational courses. But profession courses and degrees are characteristic of a university such as ours.

3. What are the views of monolingual lecturers towards the compulsory isiZulu course?

3.1 Could you kindly provide your response to the views expressed by Murray (2019) that appeared in the Sunday Times based on his journal article?

No. I am sorry. As a custodian of the University's Language Policy's implementation, I want to stay clear from it. I would have been very happy to comment when the (Murray's) study was being carried out.

3.2 What support if any does your unit provide in assisting lecturers who have no or limited linguistic competency in isiZulu, with facilitating bilingual or multilingual lectures and tutorials?

In 2018 we started a formal programme of training tutors who will offer bilingual tutorials. This is a clear programme facilitated by Experts in Education Pedagogy.

3. **Could you provide some details concerning the terminology development for specific disciplines (the law faculty in particular)?**

   Please refer to Khumalo (2017) Lexikos 27: 252-264.

4. **In 2017 when the Parliamentary Justice and Corrections Oversight Committee chairman, Mathole Motshekga, made a proposal, that all LLB students pass one of the indigenous languages before being awarded a law degree, was this discussed between the African languages department, and or your unit and the law faculty at UKZN?**

   No. I have no knowledge of it.

5. **Do you view language as a transformative tool that can ensure inclusivity and access to justice in the legal system?**

   Language is central to all human activity, without any exception. This ranges from mundane to most complex scientific knowledge system. This includes the justice system. In the African system, language is a human right, and access to information including legal knowledge is fundamentally a human right. It is there important that the legal system provides legal processes that are sensitive to all languages in order for justice to be accessed by all linguistic communities in the country. A transformation process must therefore be initiated to alter the mono/bilingual system that currently subsists in the country.

6. **Why in your opinion is it important to graduate linguistically competent students?**

   The answer to 5 partly answers this question. Every human activity is enabled through language. So students must be taught language very well in order to be excellent professionals, whatever their field of expertise.

APPENDIX N

Interview

Name of interviewee: Mr Cameron McConnachie

Occupation: Director Legal Resources Centre (Grahamstown)

Date: 13 June 2019

Time: 14h30

Duration: 40 minutes

Place: Legal Resources Centre, Grahamstown

Recording: Digitally recorded and transcribed

Questions:

It is my understanding that Section 6 (1) of the Constitution by conferring official status on nine African languages, attempts to redress the past discrimination. There is also the instructive provision of subsection (2) to take positive and practical measures to elevate the status and advance the use of African languages.

1. **In 2017 Honourable Chief Justice Mogoeng Mogoeng stated that English would become the sole official language of record for transformational purposes. In 2018, Hlophe JP released a directive for the Western Cape division calling for the implementation of the CJ's announcement of English being the sole official language of record in all high courts.**

   1.1 What is your opinion on the matter? Do you believe English is the most practical option for the legal system currently? If so, what are your reasons?

   There is an ideal, where English would not be the only language of record, but getting beyond that point will be challenging. You do not want to put a price tag on rights, but there are limitations in what can be done. This is often done on a scale of priority and language would not be at the top of the list.

   I fully support the provincial language policies for courts. This at the moment will be easier in the Magistrates' Courts.

   In the short term I can see the practicality of having English as the language of record, but as a long term policy this might be disastrous.

   1.2 Do you think that the directive is contrary to Section 6 of the Constitution?

   The African languages need to be developed to be used alongside English in the courts.

1.3 In your opinion how does the elevation of English a language with a colonial history serve as a language of a legal system at the expense of the African languages?

See answer to question 1.1 above.

1.4 How can a directive of this nature be transformational? Would the inclusion of African languages not be part of transforming the legal system?

There are many benefits to using African languages including better access to justice.

2. What are your experiences of language usage in a trial when relying on an interpreter?

I do not do a lot of trial work; we primarily do applications. I have been involved with two trials. In the one case concerning cows in the road, my client was isiXhosa speaking and an interpreter was used. There was much confusion regarding the direction in which the cows were moving and which side of the road they were on. The interpretation was problematic.

The second case involved a land claim. There were three interpreters throughout the trial. The first interpreter could not adequately deal with terminology. I think a lot of issued arose from cultural difference or locality, where she was from an urban area and the witnesses were from a rural area. The second interpreter failed to interpreter. The third interpreter was more efficient and had more experience.

2.1 What is your experience of interpretation from a lawyer's perspective?

See answer to question 2 above.

2.2 Do you encounter communicative difficulties when communicating with litigants who are African language speakers and have limited or no linguistic competencies in English?

See answer to question 3.2 below.

3. What language difficulties do you encounter if any, when consulting with a complainant before trial?

See answer to question 3.2 below.

3.1 I understand that you deal primarily with persons who are indigent the majority of whom reside in outlying rural areas with limited access to English.

3.2 What are the language barriers you encounter, if any, when consulting with a litigant before trial if the said litigant is African language speaking? Do you find that the litigant is more hesitant and uncomfortable given that they are communicating with you through an interpreter?

All the candidate attorneys speak isiXhosa and are the first port of call when dealing with isiXhosa speaking litigants. I too have linguistic competency in isiXhosa. If I feel I am out of my depth, I will ask a colleague to assist me and confirm my understanding.

4. **Please could you share your linguistic competencies with me, specifically your linguistic competencies concerning isiXhosa and or other African languages?**
5. **What is the current language policy for the Legal Resources Centres?**

   We deal with people in rural areas and it is of great benefit to communicating with people directly. There is a level of trust that breaks down linguistic and cultural barriers.
6. **Do you think lawyers at Legal Resources Centres could benefit from vocation specific language courses?**

   See answer to question 3.2 above.
7. **Do you think language should be viewed as a tool to transform the legal system with the aim of ensuring access to justice for all?**

   See answer to question 1.4 above.
8. **What is your opinion regarding the proposal by the Chair of the Parliamentary Justice and Corrections Oversight Committee, Mathole Motshekga, to ensure all LLB students first pass one or other of the indigenous languages before being awarded a law degree? My question also relates to the recent decision by the Legal Practice Council that examinations be conducted in English only.**

   A vocation specific course will be good but would not be sufficient for the purposes of using the language in court. It would require people to learn the language in schools, and throughout university. There needs to be a policy put in place and this policy must be implemented.

   I would recommend that from the first year at university until the completion of the degree(s).

APPENDIX O

Interview

Name of interviewee: Ms Yoliswa Mbangi

Occupation: Senior Court Interpreter, Bhisho High Court, Eastern Cape

Date: Questions sent on 24 July2019

Answers received on 26 July 2019

Time: NA

Duration: NA

Place: NA

Recording: Interview conducted via e-mail

Questions:

1. **How many languages can you speak?**

   Two languages.

   1.1 Can you also read and write in these languages?

   Yes.

   1.2 Can you interpret into and from each of these languages?

   Yes.

2. **For how many years have you been an interpreter? In which courts/ area have you been an interpreter in?**

   28 years. I was appointed by the Department of Justice and Constitutional Development on the 4th of June 1991 as an Administration Clerk and placed at Mdantsane Magistrates' Court. I worked there for 17 years (until November 2008). In 2008 I applied for a transfer to Bisho High Court, because I had to relocate to Phakamisa Township near King William's Town in the Eastern Cape.

3. **What made you choose to be an interpreter? Could you describe your career path?**

   I never chose to be an interpreter as it was never in my dreams. I wanted to be a nurse but in the meantime applied everywhere. A group of us were appointed as administrative clerks, when the Chief Magistrate was welcoming us he told us that we should accept any duties given to us. Then we were placed in various sections and offices. I was placed in the office of the Clerk of the Civil Court. Two weeks later the Chief Magistrate called four (4) of us to his office and informed us that he had looked on our matric symbols for languages and decided to change duties from administration clerks to court interpreters.

I interpreted in the Civil court for 8 years and was later changed to Criminal court but also assisting in Civil court. Initially I was afraid but started enjoying it.

An interpreter starts working at the Magistrates court entry level 5, Senior court interpreter level 7, Principal interpreter level 8, Cluster Manager level 9 and Provincial Manager level 10. The requirements for Principal interpreter and above is a Diploma or Degree in Legal interpreting or equivalent qualification.

4. **What is the role of a chief interpreter?**

   Firstly I am not a chief but senior interpreter, supervising other interpreters. It is to communicate effectively the message from the source language to the target language. Place those who understand the source language on equal footing with those who understand the target language by conserving every element of information contained in the source language communication when it is rendered in the target language. Interpret accurately without altering, omitting or adding anything to what is stated and without explanation, unless permission for explanation has been given by the Presiding officer.

5. **What challenges, if any do you face as an interpreter?**

   Inability to hear the speaker: when he speaks very soft and I have to plead with him for several times. Cultural differences: I have the responsibility to not only understand the target language but also to fluently speak the target language. I must also have a deep-rooted sense of cultural awareness, regional slang and idioms. Social evolution provides new words and phrases on a continuous basis. So an interpreter should be able to deliver any given word or phrase accurately. No pre-prep or sight interpretation materials: very long judgments delivered without seeing it first or without the judgment given to look at while interpreting.

6. **Is there a sufficient number of interpreters in your area?**

   Yes.

7. **Would you want to see our Universities offering degrees in interpretation?**

   Oh yes, I would like that because my desire is to do a Diploma in Translation and interpreting in order to have a Translation business.

8. **What are the requirements to become a court interpreter?**

   Standard 10 / grade 12 for beginners. But one can also come with Diploma or Degree.

9. **Have you experienced any dialect issues, where for example some accused speak *isiBhaca* or *isiMpondo*? Do we have interpreters trained to speak these two dialects?**

   There is not much of that in my area but in the former Transkei (in the Eastern Cape). No training in those but in the 11 languages. We get these in the process in our trainings if there are interpreters from the former Transkei area.

10. **Do you have any statistics on how many criminal cases in Bhisho yearly require the services of isiXhosa interpreters?**

    Not in my possession now but every case requires isiXhosa because it is dominated by isiXhosa speaking people.

11. **Do you and your colleagues offer interpretational services on a private basis for civil cases?**

    No, we are not allowed to do so.

12. **Do you find as an interpreter you require sound knowledge of the law and legal terms and concepts?**

    Yes, and we learn every day. New Prosecutors usually get assistance from experienced interpreters.

13. **The 2017 language of record decision by the Heads of Court acting under the chairmanship of the Chief Justice, Mogoeng Mogoeng to make English the sole official language of record in my opinion provides English mother tongue speakers with a language right and African language and Afrikaans mother tongue speakers an alternative right where they are directly reliant on an interpreter.**

    13.1 What is your opinion on the language of record decision?

    In my opoinion, it is not the sole but common language and still allows everyone to speak their own mother tongue / language and be provided with an interpreter.

    13.2 Do you think African language speaking accused persons are disadvantaged in our courts?

    No, because they speak their own language and provided with an interpreter.

13.3 Do you think it would be practicable to conduct trials in isiXhosa where the judge/ counsel and accused speak isiXhosa for example? Would there not be a role for interpreters and translators, to translate the record into English if the case goes on appeal?

It would be easy but the problem would be when a need for transcription of the record arises for the sake of appeal or review. Translation of record would be a long route. We would first have to translate the record before sending it away for transcription and that would delay the process. While in the case of recording in English, the record is readily available as it was interpreted immediately as the case was proceeding. Bear in mind, there is a difference between interpreting and translation, interpreting requires one to give the meaning of what is said, and translation needs word to word. So translation of a document after a long trial would be very time consuming and unnecessary.

14. Please share any other information that comes to mind.

Interpreting is not a child's play; it needs one to concentrate, to be always sober from stresses and anxieties caused by authorities at work and other life challenges. As interpreters, we do sensitive cases especially in the High Courts where we deal with high profile cases. Interpreters need to be sent for counselling every quarter but there is nothing closer to that. Rape, especially of young children by fathers or relatives makes me sick, but I have to pretend to be insensitive for the sake of justice (my appearance should not add to aggravating circumstances that the Presiding officer has to observe). So sometimes I endure that pain until the court adjourns and then close my office and cry as much as I want. As a result I prefer murder cases, although some are so brutal to such an extent that one gets headaches and sometimes nightmares after interpreting.

Interview

Name of interviewee: Professor Mantoa Montinyane

Occupation: Head of Department: African languages, UCT

Date: 23 January 2019

Time: 16h30

Duration: 1 hour

Place: Coffee Shop, Victoria and Alfred Waterfront Shopping Mall, Cape Town

Recording: Digitally recorded and transcribed

Questions:

1. **Universities have been gripped by protest action under the banner of decolonisation. UCT is one South African University, which has seen student protests for decolonisation part of which was the fall of colonial symbols and statues. How has language (particularly the African languages) played a part in the protests?**

   There was multilingualism used on the placards. There was a need to dissociate from English and not just Afrikaans. There was however, the use of English on placards as well. The emphasis was placed statues and symbols. Language is an important part of the decolonisation process.

2. **Has UCT had discussions on the role of African languages as a tool to decolonise the curriculum?**

   This is an ongoing process, but language does not feature prominently in these discussions.

3. **As the African languages department do you see yourself at the forefront of leading the debate on decolonisation with regards to African languages?**

4. **Given the protest action by the students, has there been an increase in numbers of students registering to study African languages at UCT?**

   No there has not been an increase due to the protests. There has however been an increase in the number of students registering for the communication courses. The non-mother speakers are showing more interest than the mother tongue speakers of isiXhosa in terms of registering in African languages.

5. **Is there a vocation specific course offered to LLB students at UCT?**

   We have had further discussions on making the law and language elective compulsory but we were informed that this could only take place with the restructuring of the LLB curriculum. There is not enough interest and the curriculum developers are not recognising the need for an isiXhosa course for law students.

   5.1 If so, is this a compulsory course for all LLB students as with the medical students?

   See answer to question 5 above.

   5.2 If not, has there been discussions between your department and the Law faculty on the need to initiate a vocation specific course?

   A few years ago we did a trial run, where we visited the law clinic and observed so we could formulate a course that was relevant for the law students. We did this. We went as far as registering the course and it was approved and appeared on the list as a language and law course. It appeared as an elective for the LLB students who were allowed to take the course in their final year. The first time the elective was offered only two students registered for the course and that was not sustainable. We then urged these two students to register for the non-mother tongue isiXhosa course. There are multilingual glossaries with legal terminology that has been developed in isiXhosa.

   5.3 In your opinion would a vocation specific course not contribute to further development of legal terminology in isiXhosa? This would contribute to the process of intellectualisation of one of the African languages. If so, could the terminology development not be share with Rhodes University who have a vocation specific course for law students? This would be in line with UCT's language policy that calls for the promotion of African languages as languages of scholarship.

   See answer to question 5.2 above.

   5.4 With UCT centrally located in Cape Town near the High Court and Magistrates' Courts, surely there is a need to graduate linguistically competent LLB students? The question arises based on the content of UCT's languages policy, recognising the fact that the Western Cape is a

geographically multilingual area; and the language policy recognises the value of multilingual proficiency.

There is an undermining of the languages by stamping English on the African languages. Where the prefixes are removed from the languages. There is a selective agenda that is being pursued. I am trying to change this through the university language policy committee.

6. **In 2017 when the Parliamentary Justice and Corrections Oversight Committee chairman, Mathole Motshekga, made a proposal, that all LLB students pass one of the indigenous languages before being awarded a law degree, was this discussed between the African languages department and the law faculty at UCT?**

   See answer to questions 5 and 5.2 above.

7. **In your opinion what is decolonisation and is there a difference between decolonisation and transformation within higher education institutions in South Africa?**

   The problem at UCT is that the overwhelming majority of academic staff are non-speakers of African languages. There is a staff course for isiXhosa but this is not mandatory. The course is an introductory course. There have been staff members who have enrolled for the mainstream isiXhosa course at first year level.

   There are non-credit bearing courses taught in the residences that pull students away from the actual credit bearing courses. It also undermines our department and the courses we have developed.

APPENDIX Q

Interview

Name of interviewee: Mrs Bulelwa Nosilela

Occupation: Head of Section: African languages, Rhodes University

Date: Questions sent on 18 September 2019

Answers received on 21 September 2019

Time: NA

Duration: NA

Place: NA

Recording: Interview conducted via e-mail

Questions:

1. **Universities have been gripped by protest action under the banner of decolonisation. Have students at RU advocated for the inclusion of African languages in lectures and tutorials?**

   It depends from department to department. Since we are already an African Languages department, isiXhosa at undergraduate level has always been the language we have been using for teaching and learning. At post graduate level we use English to impart knowledge of the language theories but for practical aspect or for examples we include other African languages depending on the languages of our students. If the students use an African language that none of the staff members understand we outsource assessments to our colleagues in other universities except for literature which is done only in isiXhosa. We use this system mainly in Applied Linguistics. We have also started using bilingualism in our undergraduate classes where students can use both English and isiXhosa in the same class and lecture slides are in both languages.

   There are departments such as Politics and Economics and Drama who are working with us in practising translanguaging in their classes and tutorials. There are even more departments that have started engaging with us wanting to start using isiXhosa in their classes or to have isiXhosa terminology so students can have access to material in their languages for better access to language of teaching and learning and these are Accounting and English Literature. We also offer isiXhosa in professional courses for example isiXhosa for Journalism, isiXhosa for Pharmacy, IsiXhosa for Education and we have isiXhosa for Law even though in the past 2 years

we have not had enough numbers for this elective. All these courses are credit bearing courses which are at first year level and students can be incorporated into isiXhosa second year after finishing them.

2. **Has RU had discussions on the role of African languages as a tool to decolonise the curriculum?**

   Yes several times. We have been included in the transformation summit by the university. The Transformation Director before the formulation of Transformation Policy she consulted with ALS and now for its finalisation and its launch she met with the School of Languages & Literatures Section Heads. I know it has been discussed and amended by various people in the university.

3. **As the African languages department do you see yourself at the forefront of leading the debate on decolonisation with regards to African languages?**

   I think we should do this as a collective. Each department has a role to play in transformation of curriculum.

4. **Have there been discussions between your section and the Law Faculty to make the vocation specific course compulsory for all LLB students?**

   No, this is an elective and we would like to make it a choice of each student as they have several electives to choose from.

   4.1 In your opinion would a vocation specific course not contribute to further development of legal terminology in isiXhosa? This would contribute to the process of intellectualisation of one of the African languages.

   It has but other units in the country like Hansard Language Services Unit as well as DAC who have been creating legal terms. It is easier to do it at national level, as terms have to be standardised. We see ourselves having different terms used in different institutions and that does not help the development of the language.

5. **In 2017 when the Parliamentary Justice and Corrections Oversight Committee chairman, Mathole Motshekga, made a proposal, that all LLB students pass one of the indigenous languages before being awarded a law degree, was this discussed between the African languages department and the law faculty at RU?**

   No, as I think maybe it is because we already have the isiXhosa for Law course.

6. **In your opinion what is decolonisation and is there a difference between decolonisation and transformation within higher education institutions in South Africa?**

I think it is Africanisation of our curriculum. It is to put our education in context in a way that represent who we are and our ways of thought in a way that makes us to have access to new knowledge.

7. **Please share any other information and opinions.**

APPENDIX R

Interview

Name of interviewee: Adv Nickie Turner

Occupation: Senior State Advocate, DPP (Grahamstown)

Date: 17 July 2019

Time: 14h15

Duration: 45 minutes

Place: Director of Public Prosecutions offices, Grahamstown

Recording: Digitally recorded and transcribed

Questions:

It is my understanding that Section 6 (1) of the Constitution by conferring official status on nine African languages, attempts to redress the past discrimination. There is also the instructive provision of subsection (2) to take positive and practical measures to elevate the status and advance the use of African languages.

1. **In 2017 Honourable Chief Justice Mogoeng Mogoeng stated that English would become the sole official language of record for transformational purposes. In 2018, Hlophe JP released a directive for the Western Cape division calling for the implementation of the CJ's announcement of English being the sole official language of record in all high courts.**

   1.1 What is your opinion on the matter? Do you believe English is the most practical option for the legal system currently? If so, what are your reasons?

   Yes, in my view it is most practical to use English. All the documents, reports and statements are recorded in English and the docket is then submitted to our offices, if it is a high court matter. The language of our office is English. If someone writes to us in a language other than English. We respond to that person in English after it has been translated.

   There are a variety of languages spoken by judges, prosecutors and defence lawyers. The trial takes place in English. Each person is entitled to speak their language and we have to provide interpretation services. In certain instances there can be three or more interpreters depending on the languages understood by the witnesses/ accused persons.

The case record that goes on appeal is in English. We use international law reports because it is in English. Foreign courts use our law reports because they are in English.

The best we can do is use an internationally recognised language that is widely spoken internationally and that is English. The system is more complex in South Africa, because we have eleven official languages.

Even if all the parties to court and the judicial officer are isiXhosa speaking it would be complicated to have it translated into English as this is not the official record.

Appeals are not the only issue with the Chief magistrate having to review cases and there are other checks and balances. It will cause utter confusion to have multiple languages of record.

1.2 Do you think that the directive is contrary to Section 6 of the Constitution?

The Constitution makes allowance for the use of other languages through interpretation. I think that the Chief Justice actually made the best choice that there was, to make English the official language of record. It was a decision that had to be made and English was chosen as it is accessible to large numbers of people around the world.

1.3 In your opinion how does the elevation of English a language with a colonial history serve as a language of a legal system at the expense of the African languages?

1.4 How can a directive of this nature be transformational? Would the inclusion of African languages not be part of transforming the legal system?

2. What are your experiences of language usage in a trial when relying on an interpreter?

I have been prosecuting for twenty-eight years and the interpreters are superb. We have some interpreters who speak more than three languages. I am conversant in Afrikaans and I would pick up. There are only ever minor mistake. The errors are few and far between.

2.1 What is your experience of interpretation from a State Advocate's perspective?

Interpretation for me assists during the cross-examination. I do not see interpretation as an impediment. I suppose there are advantages to having linguistic competency in another language, but have no linguistic competency has no disadvantages.

2.2 Do you encounter communicative difficulties when conducting examination in chief or cross-examination or both?

See the answer to question 2.1 above.

3. **What language difficulties do you encounter if any, when consulting with a complainant before trial?**

I do not have any difficulties.

3.1 I understand that you deal primarily with cases concerning sexually based offences.

See answer to question 3.2 below.

3.2 What are the language barriers you encounter, if any, when consulting with a complainant before trial if the said complainant is African language speaking? Do you find that the complainant is more hesitant and uncomfortable given that they are communicating with you through an interpreter?

We do not have interpreters in our offices. We do not use high court interpreters to avoid conflict of interests. The investigating officer acts as an interpreter. I am more comfortable to use an investigating officer.

3.3 Is there not a further communicative barrier when the interpreter is a male, given the cultural 'taboos' of the amaXhosa people?

There are no interpretational barriers or cultural taboos surrounding the consultation.

4. **Please could you share your linguistic competencies with me, specifically your linguistic competencies concerning isiXhosa and or other African languages?**

The complainants are not looking to have a conversation with me in isiXhosa. I did isiXhosa at Rhodes University for a year and I only learnt the basics.

5. **What is the current NPA language policy for State Advocates?**

The language of the NPA is English.

6. **Do you think State Advocates could benefit from vocation specific language courses?**

It is not necessary as everything is conducted in English.

7. **Do you think language should be viewed as a tool to transform the legal system with the aim of ensuring access to justice for all?**

   You can use your mother tongue in court where an interpreter is employed to assist you.

8. **What is your opinion regarding the proposal by the Chair of the Parliamentary Justice and Corrections Oversight Committee, Mathole Motshekga, to ensure all LLB students first pass one or other of the indigenous languages before being awarded a law degree? My question also relates to the recent decision by the Legal Practice Council that examinations be conducted in English only.**

   It must confine you to the province, what if you would like to get a job in another province.