

**THE ROLE OF AFRICAN LANGUAGES IN THE SOUTH AFRICAN LEGAL
SYSTEM: TOWARDS A TRANSFORMATIVE AGENDA**

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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:

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ABSTRACT

This interdisciplinary thesis, partly located in the emerging discipline of forensic linguistics, seeks to investigate the status and use of African languages in the South African legal system and how language can be used as a tool to transform the legal system. The research commences with an overview of the development of African languages in the legal system, pre and post Apartheid. The research proceeds to an overview of scholarly literature concerning the role of legislation, language policy and planning in regulating the use of African languages in the legal system, in order to give effect to South Africa's constitutional provisions and enable linguistic transformation of the legal system. This research furthermore provides a critique of the constitutional language framework in relation to language rights of litigants in the legal system, when accessing justice through the medium of an African language. To this effect the research advances cases conducted in their entirety in an African language, illustrating that it is both possible and practicable.

This research engages critically with the legislative and policy frameworks of the legal system, where issues concerning the equal recognition and use of African languages are highlighted. Language demographics in the form of statistics are provided, illustrative of the fact that the majority of South African's speak an African language as their mother tongue. Additionally, the statistics provide that litigants in the legal system have poor proficiency in English, the language of record in courts. The research addresses the legislative and policy deficiencies of the non insertion of language requirements for legal practitioners and judicial officers that reflect the language demographics. Furthermore the need for linguistically competent legal practitioners and judicial officers is discussed in giving meaning to the constitutional language rights of litigants.

A Canadian comparative jurisprudential case study is advanced, that can be emulated by the South African legal system. The Canadian model offers a precise and effective constitutional, legislative and policy framework where language rights are purposively interpreted in cases conducted in the official languages of the country. Furthermore the Canadian model provides that legal practitioners and judicial officers are linguistically competent in the official languages of the province in which they practice. This thesis highlights the issues hindering real transformation of the legal system, and concludes with recommendations which are both legally and linguistically sound.

CHAPTER ONE

INTRODUCTION

1.1 Introduction

This chapter provides an introductory overview of the research undertaken in this thesis. The chapter focuses on providing a historical account of African languages and the role of these languages in the South African legal system. In advancing the history of African languages, the chapter introduces the legislation and language policies regulating the use of the official languages in the South African legal system. Furthermore, the chapter provides the context of the research, explaining the goals of the research. The chapter provides a definition of forensic linguistics, the research area in which this thesis is partly located. The latter half of the chapter, explicates the methodology adopted during the research of this thesis. The chapter identifies the methods, techniques and approaches used and the reasons why these were selected for the research at hand. In conclusion for purposes of clarity and structure a brief chapter outline is provided for this thesis.

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 four and five 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 English and Afrikaans legislative requirements conferred upon attorneys and advocates (Currie and de Waal, 2013). The practical effect and implementation of the right in Section 35(3)(k) is analysed in light of case law in chapter five of this thesis.

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).

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 Canadian jurisprudential model. The theoretical framework comprising of the comparative analysis is advanced in chapter three, 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 Canadian Constitution and legislative frameworks and the principles emanating from this Constitution can be drawn on and applied in the South African context to ensure language equality as part of the transforming legal landscape (Albertyn *et al*, 1998: 250).

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 four and five 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 doing so the comparative jurisprudential study is advanced further where Canadian language legislation and policy developments of relevance to South Africa is applied. This will ensure a precise, implementable framework, one which has been lacking since the onset on the constitutional era.

This thesis, in engaging with the constitutional, legislative and policy frameworks in relation to the historical position occupied by African languages in the legal system, argues for the inclusion of African languages within the transformation process. I argue that the role of African languages is central to transforming the legal system, thus the concept of transformation is discussed, as well as the nuances thereof with specific reference to the legal system. The discussion is advanced based on the definition provided by Wesson and du Plessis (2008: 2) who 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. Transforming the legal system as a whole is undoubtedly complex, however it should not be limited to race and gender with the exclusion of language, as "wholesale transformation of an industry" is needed (Garda, 2014). This could enhance the use and development of African languages. The transformational developments are of importance in assessing the successes and shortcomings of the implementation of transformation in light of the legislative framework (de Vos, 2010). 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, first utilised in socio-economic rights court cases (Muller, 2011). Meaningful engagement has 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).

In addition, I propose the adoption of a new language policy framework. This framework is formulated for purposes of interpretation and implementation of language rights by South African Courts. The purpose thereof is to ensure positive realisation of the constitutional and legislative rights framework, where a standardised approach is formulated, allowing for flexibility based on the circumstances of each case. This framework is grounded within the judgment of Desai J (2004) in the *Victoria and Alfred Waterfront v Police Commissioner of the Western Cape and Others* as well as by adopting the principles of the Canadian model in conjunction with the language demographics in chapter four of this thesis.

1.3 History of African languages in the South African legal system

A brief historical account of the role of language and the different languages in the legal system is important in understanding the conceptual linguistic issues currently plaguing the democratic legal system. Additionally the historical overview provides an understanding of the inherited legislative language position affecting all legal practitioners currently practicing in a democratic South African dispensation.

Historically language was influenced politically, where the position of those in power was exploited in entrenching a language on the people of South Africa. Evidence thereof was seen with the arrival of Jan van Riebeeck in the Cape in 1652, together with the Dutch language utilised as the official language. Given the colonial influence, the legislative position in the South Africa Act of 1909 recognised English as an official language in addition to Dutch. With the Act of 1909 resulting in the establishment of the Union in South Africa, 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.

Thus far it is evident that legislative recognition of African languages in the form of official, developmental status or use was 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. In effect African languages were being developed in the self-governing territories, through the schooling system. Simply put Act 110 of 1986 established the self-governing territories, and in doing so utilised racial segregation to achieve linguistic 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 1979. 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 requirement was removed, however the English and Afrikaans requirements remained unchanged. These language requirements were inherited unchanged at the onset of democracy.

It is evident that the political entrenchment of English and Afrikaans had a profound effect on the legal system, with the adoption of the official languages at the time. de Vos (2008) argues that 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.

1.4 Purpose of the study

The primary purpose of this research is to advance the importance of African languages within the legal system's transformational process. The research is aimed at laying bare the

exclusionary legal system that perpetuates the use of English and Afrikaans at the expense of African languages. This research was motivated by the lack of legislative importance placed on African indigenous languages in the transformation of the legal system. 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. My interest in both African languages and law has inspired me to undertake this research as well as my anticipated pupillage and subsequent admission to the Bar. Specifically my interest in language policies, legislation, and constitutional law, is an attempt to find a point of engagement for successful constitutionally sound drafting and implementation of legislation and language policies through legal reform. This is in order to heed the call of the late Neville Alexander in his last work *My Thoughts on the New South Africa* (2013), in ensuring that the legal system I enter as a legal practitioner is a linguistically transformed one.

In pursuing this primary goal the constitutional provisions are critically assessed, 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 (Kaschula and Ralarala, 2004). This constitutional framework in turn affects the contents of statutes and policies tasked with the implementation and realisation of the constitutional rights.

The research includes engaging with the constitutional provisions and the amended legislation regulating the legal system, as well as the effects of the unchanged language requirements in the amended statutes. The research seeks to examine the effects thereof by assessing whether the current legislative and policy frameworks enable equal access to the legal system, regardless of the linguistic capabilities of persons accessing this system (Currie and de Waal, 2005 and 2013). Relevant court cases are analysed to assess how the official languages have been utilised in giving meaning to both Sections 6 and 35(3)(k) of the Constitution. The research seeks to provide an analysis of the new amended legislative framework. Furthermore, this research assesses whether or not the framework recognises the importance of language within the legal system, while including language as part of the transformational agenda.

1.5 Forensic linguistics: A new research area in Southern Africa

This research is interdisciplinary, as it concerns the recognition, use and development of languages, particularly African languages in the legal system. More specifically the research pertains to language policy and planning, 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. What has recently come to the fore following the dissemination of research across countries and 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. This very broad definition is narrowed down by Olsson (2008: 3) who looks at the term through an applied linguistics lens. 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. Furthermore 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

As suggested in the title of this thesis the study area comprises of the entire legal system. For purposes of the research at hand the legal system in this context includes legal professionals and the various courts. The legal system comprises of a generic divide between the courts and legal professionals. The 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 of the Constitution has had a significant impact on the structure of the courts. 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.

It is of importance to comprehend the structure of the courts from the onset, given that the literature and data presentation and analysis is not limited to a specific court. Further exemplification of the point can be grounded in 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 process 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. This

introductory note on the doctrine of precedent is more apparent in the chapters that follow, where the data in the form of case law is advanced and analysed.

The courts highlighted above are administered by legal personnel. Similarly to the hierarchical court structure is a legal professional structure. Foremost 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.

A broad divide exists between legal professionals affiliated as members to either the Bar or Side Bar. The Bar comprises of advocates, specialist litigators, whilst the Side Bar includes all attorneys. A further divide is between private and state attorneys and advocates, with state advocates and attorneys acting on behalf of the state in their capacities as prosecutors. Cognisance must be taken of the fact that court personnel will be referred to for purposes of the research at hand and as such include interpreters, judicial clerks and stenographers.

All these legal professionals and court personnel are appointed and governed in terms of statutes, according language requirements therein. This point links the geographical positioning of the courts and the racial and linguistic demographics, where transformation in the entire legal system becomes relevant, given this interconnection (Lubbe, 2008: 380). Lubbe (2008) advances that transformation of the legal system cannot take place, where the current legislative and policy frameworks, do not centralise the importance of African language competencies within the broader transformational agenda.

In essence, two languages as reflected in the legislative framework for use in the legal system contradicts the constitutional language rights, thus creating an infringement, where the constitutionality of the legislation can be challenged. The legislative framework in turn creates a bottleneck effect within the transformational agenda. The legal system thus has to be linguistically equipped to accommodate all persons regardless of their language, as per the constitutional framework. This would require the legislative framework and legal system to undergo legal reform.

1.7 Research problem

With the linguistic deficiencies in the Apartheid legal legislative framework, adopted with the commencement of the constitutional democracy in 1994, the legislative framework contradicts the constitutional language rights. This point can be substantiated by court cases where restrictive approaches were adopted in interpreting and implementing the constitutional rights, as a result of the conflicting legislative framework. The issue is exacerbated by the non-existence of a language policy aimed at the legal system for practical implementation guidelines.

The aforementioned problem was inadvertently addressed in the judgment of *Lourens v President of the Republic of South Africa* (2013) in which the Court ordered that the state had failed in its constitutional mandate as per Section 6(3) to adopt practical and positive measures to ensure the implementation of Section 6 of the Constitution across disciplines. The court thus ordered the state to draft legislation to this effect, resulting in the drafting and enactment of the Languages Act (2012).

The Languages Act (2012) was drafted hastily by the state, without meaningful public participation, resulting in immense criticism being levelled at government, to the effect of mere compliance with the *Lourens* (2013) judgment. The FW de Klerk Foundation (2011) advanced that the top down approach of the Languages Act (2012) undermined the public participation process and would not give effect to the language rights of citizens. It was argued that in order for the Languages Act (2012) to be effective across disciplines as per the purpose of drafting and enacting such legislation a bottom up approach should have been adopted commencing within the education system, feeding through society (Alexander, 1992). Pretorius (2013) similarly argued from a constitutional point of view that the exclusion of the broader public, limits the effectiveness of the implementation of the Languages Act (2012). It was argued that it allows for government to implement within government structures, assessed by internal government structures, thus ensuring non-accountability to the citizenry. In light of these conceptual criticisms, the implementation challenges are addressed with reference to the constitutional framework.

These criticisms need to be engaged with, where solutions are framed within the legal reform process. This is of vital importance, given that the Languages Act (2012) affects society in its entirety. Simply put the role of African languages needs to be clarified, where development, promotion and use thereof is enabled through an all-inclusive meaningful statute, which the

Languages Act (2012), appears not to be. The emphasis for rectification in the form of amendments and the process thereof must be reflected in the National Language Policy, which is yet to be drafted, where focus on implementation strategies are proposed.

Based on the aforementioned, the language legislative framework on face value does not affect the legal system's language requirements of English and Afrikaans. Furthermore, a statute aimed at the entire legal system was required, given the divide of the various branches. In recognising this, the legislature drafted the Legal Practice Act (2014). The Legal Practice Act (2014) in stating that it is aimed at transformation and restructuring of the legal profession, I expected that this would include redressing the language requirements in the Attorneys Act (1979) and Admission of Advocates Amendment Act (1994), whilst providing further linguistic requirements and practices for the entire legal system. However there is a linguistic oversight, where yet again the role of language was excluded as part of the transformation process as well as the constitutional framework which the Legal Practice Act (2014) seeks to embrace, as reflected in Section 3(a).

Evident from the legislative framework, was the need for amendments and solutions, which were both linguistically and legally sound. It is against these problems identified above, that I felt obliged to investigate further, providing fair criticism. This requires one to grapple with the drafting and implementation fissures that need to be addressed where solutions are provided through the legal reform process.

1.8 Goals of the research

The purpose of my research is:

- To critically analyse the constitutional language framework;
- To critically analyse the language legislation and policies governing the South African legal system, in light of the implementation of the constitutional language provisions;
- To critically assess the South African legal system's language provisions of the amended legislation and policies;
- To examine court cases, where African languages have been utilised in conducting trials in their entirety;

- To engage in a Canadian comparative jurisprudential analysis in extracting approaches for successful language rights interpretation and implementation;
- To analyse what transformation has taken place and the need for language transformation in the legal system;
- To propose legal reform and transformative measures and recommendations to address issues to ensure effective legislation and policies are drafted and successfully implemented, in advancing the importance of African languages within the legal system.

1.9 Methodology

The sections below comprise of the methodology for which the goals will be achieved. The sections below set out in detail the methodological processes and procedures that were used in obtaining and analysing the data.

1.9.1 Research Approach

In the foregoing sections of this chapter, I have advanced the reasons for electing to discuss the legal system in its entirety rather than a branch thereof. I emphasis the point that this is to provide a holistic overview of the role of language, particularly the African languages within the legal system. Although the legal system is hierarchical in nature, all the branches are connected, through the appeal and review systems and the nature of the cases.

As part of the research approach, I have chosen to include a case study of the Canadian legal system, and the role of language therein. Huberman and Miles (2002: 5) state that a case study “...is a research strategy which focuses on understanding the dynamics present within single settings.” The primary reason for including a case study was to provide depth to the research and to provide a comparison, where the jurisprudential systems of Canada and South Africa are similar in nature. Section 39 of the Constitution, comprising the provisions of the interpretation of the Bill of Rights, states that:

- (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 freedom;
 - (b) must consider international law; and

(c) may consider foreign law.

With a constitutional directive obligating courts to use international law, when interpreting the BOR, the Canadian case study gives meaning to these provisions. Hartley (2004: 325) explained that a case study comprises of a detailed investigation, with the aim of an analysis of the context and processes illuminating the theoretical issues. According to Seshoka (2012: 100) it is not a research method but rather a research strategy.

The Canadian case study serves as an example, which can be replicated in South Africa, where the jurisprudence, shows a long developmental process which the country has undergone, similar to that of South Africa, particularly with reference to constitutional and legislative developments. What serves as a precedent for South Africa is the role of language within the legal system, where all official languages are treated equally and language rights are purposively interpreted by Canadian courts, in addition to ensuring all law graduates are linguistically equipped.

1.9.2 A qualitative or quantitative study?

The research is both qualitative and quantitative, as it comprises of both words and numbers (Huberman and Miles, 2002: 9). Hartley (2004: 325) defined qualitative research as the analysis of the context of the theoretical issues in the study area. Seshoka (2012: 104) explained that qualitative research is concerned with answering the ‘why’ not ‘how’ question of the research. In the thesis I have employed the qualitative method, by analysing the various language policies and legislation in existence within the legal system. As a result of the research being applied language policy research, the qualitative method was applicable. This method correlated with the goals and objectives, comprising of what Ritchie and Spencer (2002: 306) refer to as four categories of applied social theory, namely contextual, diagnostic, evaluative and strategic. The contextual category is applicable to what the current situation is concerning the role of African languages in the legal system. This includes identifying the views and experiences of legal practitioners, regarding the status and use of African languages in the legal system, which are obtained through interviews. This is discussed further in this chapter below.

The diagnostic category comprises of why decisions have or not been taken. The historical development of the African languages in the legal system, informs the understanding of how South Africa has inherited a linguistically exclusionary legal system. The historical

development furthermore explains how Afrikaans during Apartheid and English currently were and are languages of the political elite.

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’. The lack of implementation due to scarcity of resources is one of the primary reasons given for the lack of implementation of the constitutional language framework. The evaluative component in this regard is contained in chapters four and five of this thesis.

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

In applying the four categories identified by Ritchie and Spencer (2002: 307) the research is qualitative in nature. As intimated above, I have used the quantitative method in this research, in the form of case law and statistics. The South African and Canadian case law has been utilised for the purposes of illustrating the implementation and interpretation of the constitutional language framework by legal practitioners in the legal system more broadly. The South African case law is also inserted for the purposes of illustrating that cases can be conducted in an African language. The statistics included are primarily contained in chapter four, in graph and table form. The statistics provide evidence as to the language composition of South Africa. Language statistics in the form of the languages spoken by litigants across the criminal and civil law systems in South Africa, is also included. Therefore a quantitative approach was employed for purposes of analysing the statistical language demographics per province, in substantiating the argument that courts in the various provinces are to provide justice in the languages spoken by the majority of people in the specific province.

Given that both qualitative and quantitative approaches were utilised in conducting the research, Terrell (2012: 266) states that this was classified as a mixed-methods approach. According to Tashakkori and Teddlie (2008: 22) a mixed-methods approach is adopted where the studies are:

... products of the pragmatist paradigm and that combine the qualitative and quantitative approaches within different phases of the research process.

Furthermore Terrell (2012: 262) explains that the mixed-methods approach comprises of qualitative and quantitative data being collected and analysed. As part of the mixed-methods approach the qualitative and quantitative data is integrated during interpretation (Terrell, 2012: 262). This is evident in chapters four and five of this thesis, where qualitative and quantitative data is presented and analysed.

1.9.3 Research techniques

Three research techniques were used during the data collection phase of this research, namely interviews, legislative interpreting and document analysis.

1.9.3.1 Interviews

Differentiation can be drawn between structured and semi-structured interviews (Corbetta, 2003: 269). According to Corbetta (2003: 269) structured interviews, comprise of the exact questions in the exact sequence being applied to all the interviewees, while semi-structured interviews are non-standardised in nature. Corbetta (2003: 270) stated that in semi-structured interviews the interviewer, decides the order of the particular questions as well as the wording thereof. 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 that upon selecting semi-structured interviews as a research technique the interviewer has a list of themes, issues and questions, however noting that the order of the questions could be changed depending on responses from interviewees.

The interviewees were carefully selected before the interviews took place. These included a wide spectrum of people, legal practitioners, judges, retired judges and academics. In summation, I was able to interview judges, a legal practitioner and constitutional law experts, within academia. I selected all of these individuals as each one of them is knowledgeable in the field of law and language, and had the relevant expertise to contribute to the interdisciplinary research I was conducting. Each potential interviewee was sent an email, attached thereto was a letter from my supervisor (see 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 used to gain insight as to the practical happenings within the legal system, where it was evident that there was a difference between theory and practice. The interviews were conducted to gain a specialised understanding of the language provisions of the Constitution, language legislation and statutes governing the legal system and profession and whether this framework is enabling transformation or acting as a hindrance to linguistic transformation of the South African legal system. 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 and also for the legal practitioner, who had and is currently challenging the language status quo in South African courts.

The choice of semi-structured interviews as a research technique 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 for 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.

1.9.3.2 Document analysis

Document analysis according to Wharton (2006: 232) entails the analysis of documents in either written word or visual image. The definition raised concerns of whether or not the analysis of the relevant case law, which is essentially documents could satisfy the definition provided by Wharton (2006: 232). Indeed I referred to the South African language policy framework, evident from chapter two onwards where according to Seshoka (2012: 108) document analysis of language policies, is a research technique, in the analysis thereof.

Payne and Payne (2004) explained further that the documentary analysis technique is used in categorising, investigating, interpreting and identifying the limitations of physical sources. I have from chapters three, four and five engaged with the Canadian and South African case law, were I have analysed the judgments, in identifying the relevance of the selected cases to

the research at hand. I have also provided my interpretation of the effects of the judgments and the judges' interpretation of the legal and linguistic framework. In doing so, I have highlighted the issues facing the legal system in transforming the profession linguistically, through the promotion and use of African languages. Thus, in my opinion the analysis of case law satisfied the definition of document analysis.

There was a linkage between the document analysis and interviews. Following the document analysis upon perusal, prior to the interviews, I was able to ask questions pertaining to the reasoning behind the orders in the judgments and seek clarity on certain aspects of the cases, from the judges who had written the judgments. This also allowed me to analyse the cases subsequent to the interviews, before formulating my recommendations and conclusions in chapter six of this thesis.

1.9.3.3 Statutory interpretation

At the onset of this research, it must be noted that a full discussion of the types of legislation and the legislative drafting process is fully explicated in chapter two of this thesis. For purposes of statutory interpretation as a technique, I will advance the methods I utilised in adopting this technique to interpret the relevant statutes in order to provide analysis and also to comprehend the methods of statutory interpretation used by the judiciary within the relevant judgments for both legislation and constitutional interpretation.

Botha (2004: 1) states that the interpretation of statutes "... deals with the body of rules and principles used to construct the correct meaning of legislative provisions to be applied in practical situations." 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 bachelor of laws degree were applied when reading, interpreting and applying the provisions of legislation. 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, will depend on the facts, the interpreter's understanding which is not always objective in nature, and in most instances statutory interpretation requires subjective interpretation within practical situations. This is important to note for chapters four, five and six, 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*.

Two primary methods of interpretation are in existence, namely the literal method and the purposive method. The literal method, also known as the orthodox text-based approach, is where the interpreter concentrates primarily on the literal meaning of the provision to be interpreted (Botha, 2004: 47). Burger (2015: 25) explains that this method can be adopted when provisions and words are clear and unambiguous; by doing so interpretation may be 'harsh, unfair and inconvenient'. This overlaps with restrictive interpretation, when the letter of the law is applied directly without the interpreter applying it to the facts *in casu*.

The purposive or text-in-context approach is a stark contrast to the literal method as the purpose and object of the legislation is the prevailing factor (Botha, 2004: 50). As part of the holistic approach to interpretation, social factors as well as policy directives are taken into account when interpreting the legislation (Botha, 2004: 51). The purposive approach, allows for the legislation to be interpreted in light of the social and political climate at the time as well as the facts giving rise to the interpretation of the statute.

1.9.3.4 Constitutional interpretation

The purposive approach, is the all inclusive approach adopted by the Constitution, specifically in Section 39, advanced above. Burger (2015: 27) explained that the provisions of Section 39 of the Constitution mandate judicial officers to interpret the BOR in a purposive manner, taking into account the context in which the interpretation is taking place.

As stated at the onset of this discussion, the methods of legislative interpretation from a theoretical and practical perspective is discussed fully in chapters two, four, five and six of this thesis.

1.9.4 Data collection techniques

In conducting the research, two data collection techniques were used, namely voice recording and note taking. Voice recording was used for the collection of data emanating from the interviews. 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. This voice recorder was easily accessible in terms of the

transference of the recording to the laptop, as it has a universal serial bus (usb) connection directly into 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 faulted I would have another recording.

1.9.5 Data analysis

The data collected is analysed primarily in chapter five of this research. Yin (1984: 99) explained that data analysis consisted of "...examining, categorizing, tabulating or otherwise re-combining the evidence, to address the initial propositions of a study". The data analysis essentially results in the formulation of suggesting conclusions, which support the discussions I have advanced. The methods advanced above, were utilised in analysing the data collected.

1.9.6 Methodological challenges

There were challenges encountered during the research process. The first challenge was the non-responsiveness of potential interviewees, to the request for an interview. In one instance Judge President of the Western Cape (judicial clerk communicating on his behalf) said he was too busy to grant me an interview, in person, telephonically or via email. Legal practitioners, specifically Advocates for Transformation, did not respond to several email requests for an interview. As a result thereof I had to contact alternative potential interviewees to discuss the Legal Practice Act (2014). In one instance I received a response and a request to send the questions, after which I had no response. The former Honourable Deputy Chief Justice committed to granting me an interview at the onset of this research in 2016. Questions were provided and no response to follow up emails were received. A further challenge regarding the interviews was that there were delays encountered in conducting the interviews due to the schedules of the judges. All the interviews were however conducted prior to writing chapters five and six, where the data is analysed and conclusions and recommendations formulated.

Another challenge was accessing certain judgments delivered prior to 1994. Some of the cases are not available online due to the date at which the judgments were delivered. Although I had direct access to Rhodes University's law library and resources, in some

instances the law reports were not in the library. Fortunately, I was able to find the relevant case law, from surrounding law libraries.

1.10 Chapter outline

The chapter outlines of this thesis are as follows:

Chapter One: Introduction

The chapter introduces the thesis by providing an outline of the historical position African languages occupied within the legal system. The chapter furthermore provides the impact thereof on the current legislative and language policy framework. By doing so problems were highlighted in illustrating the reasons why the research is being undertaken, succinctly advanced through the research goals. The methods and techniques employed during the research process are clearly formulated in line with the goals of the research. The validity and reliability of the findings as well as the data from the interviewees is assessed. The methodological challenges experienced in collecting the data are noted and discussed.

Chapter Two: Literature Review

This chapter includes critical engagement with scholarly articles relating to the various stages of language policy and planning in addition to the process of legislative drafting and enactments. These frameworks are discussed in relation to the legislative and policy works affecting the recognition, promotion and implementation of African in transforming the legal system. The constitutional rights framework provides the backdrop for the critical analysis. In addition the chapter advances a definition of transformation in relation to the legal system. The chapter provides the theory underpinning the data presented in chapter four of this thesis. The chapter furthermore informs the analysis of the data, as seen in chapter five of this thesis.

Chapter Three: Canadian Comparative Analysis

The chapter advances a Canadian comparative jurisprudential case study, where a globalised view is sought on the role of languages within the legal system. The chapter focuses specifically on the Canadian province of New Brunswick, given that that the legal system is operated bilingually. The comparative analysis sets out a detailed overview of the role of Canada's official languages in the legal system 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. The Canadian case law illustrates the

similarities between South Africa and the methods of interpretation employed by judges and how this affects the language rights of litigants. The model is presented as one which South Africa can emulate.

Chapter Four: Data Presentation

The chapter presents the data in the form of the constitutional language provisions, legislation, policies, case law and language statistics pertaining to the legal system. Given the theoretical groundings advanced in chapter two, this chapter builds on the theory, providing practical substantiation in the form of case law. The South African language rights model is contrasted to the Canadian language rights models. The chapter essentially highlights the current issues plaguing the legal system in ensuring transformation and the role of African languages within this process.

Chapter Five: Data Analysis

Chapter five provides the analysis of the data presented in chapter four 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 in formulating my own opinions in assessing whether or language, specifically the African languages are used in the legal system and to what extent. In this light the chapter includes a discussion of the new transformative legislation and language policies and by doing so outlines the issues which persist. The chapter is a culmination of discussions in the thesis this far and informs the conclusions and recommendations in chapter six.

Chapter Six: 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 proposes legal reform of the legal system. In advancing legal reform in congruence with the brief discussion in chapter two, this chapter proposes the concept of meaningful engagement. Meaningful engagement is advanced as tool ensuring successful transformation of the legal system, where African languages are centralised within this process. In line with legal reform and with the application of the concept of meaningful engagement, the chapter

proposes solutions to the issues raised in this thesis. The chapter furthermore focuses on a new rights based approach grounded in constitutional law, which is both legally and linguistically sound, emulating the Canadian jurisprudential model.

1.11 Conclusion

This chapter provided a brief introduction to the research. Furthermore this chapter provided reasons as to why the research is being undertaken in light of the current legislative and policy framework concerning the role and use of African languages within a constitutionally based legal system. The chapter furthermore provided an overview of what the research seeks to engage with, as per the goals of the research. The chapter explicates through the methodology, how the goals were attained. The methodology outlines the methods, techniques and approaches used in the collection and analysis of the data. The chapter also acknowledges the challenges experienced in conducting the research and how these challenges were overcome. For coherency purposes and as a framework for the remainder of the thesis below, the chapter includes chapter overviews. The chapter that follows contains a literature review which underpins the thesis.

CHAPTER TWO

LITERATURE REVIEW

2.1 Introduction

This chapter presents a theoretical sociolinguistic perspective that supports the thesis. The chapter begins by defining language planning and policy and the various stages thereof. The chapter focuses on the language planning and policy framework since the advent of the democratic era in relation to the legal system. The chapter progresses by engaging with the theoretical underpinnings of language legislation and the effects thereof on the legal system. With a theoretical understanding advanced, the chapter assesses whether in fact the language policy, planning and legislative processes post Apartheid have and continue to contribute to the linguistic transformation of the South African legal system. In doing so I unpack the concept of transformation and define it from a legal point of view. The concept of transformation and language in relation to the legal system is discussed. The chapter comprises of critical engagement with relevant scholarly works.

2.2 Defining language planning

There is no definitive definition of language planning, as noted by Cooper (1989: 29). Cooper (1989) continues to provide a list of plausible definitions. Two of these definitions are in my opinion relevant to the research at hand and read as follows:

Firstly, 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. Secondly, language planning refers to the organised pursuit of solutions to language problems, typically at the national level (Cooper, 1989: 30).

The two definitions by Cooper (1989: 30) are important as they clarify and reaffirm that language planning is not an 'exclusively linguistic activity' hence the fact that often language related matters are considered irrelevant in the realm of other disciplines such as law. It is often questioned whether in fact it is the role of the legal system and the practitioners in this system to ensure that there is a language policy, which governs the profession. In my opinion distinctive lines have been drawn where language is confined to the Arts and Humanities disciplines, where in actual fact there is a greater need for interdisciplinary engagement

where the value and use of African languages in particular, has the power to include or exclude people from both joining the legal profession or accessing the legal system. This is beginning to emerge in Southern Africa, through forensic linguistics, a discipline briefly defined and discussed in chapter one of this thesis.

In addition, Cooper (1989: 30) in making reference to the political nature of language planning raises the point that language planning is in effect a reflection of the political order in the country at that specific period of time. For example, the first chapter of this thesis established that the use of English and Afrikaans in the legal system, was a result of the Apartheid political regime at the time. In turn, the current Constitution was a negotiated political compromise, illustrating the political nature of language planning, given the language provisions in Section 6 of the Constitution.

The second definition by Cooper (1989: 30) referring to language planning at a national level, substantiates the foregoing points that language planning is undertaken and reflects the political dispensation at the time. This point raises the discussion relating to the most effective way in drafting and implementing a language policy within the language planning process, which is discussed in depth below. However, for the purposes of defining the process of language planning, Alexander (1992) argued that a bottom up approach would be best, as this would allow the citizens whom the policy affects to participate in the process, which could lead to successful implementation. In addition, this would support the fact that language planning according to Cooper (1989: 30) in the second definition above, concerns the ‘pursuit of solutions for language problems’, as these problems are in actuality faced by the broader citizenry. In taking stock of the definitions provided by Cooper (1989), Docrat (2013: 14) states that the language planning process includes identifying the problems as well as finding solutions to the problems.

As stated above there is no single definition of language planning, thus definitions and views vary. Cooper (1989) provides broad definitions as seen in the above excerpt, which raises further points of discussion, as briefly undertaken. In contrast Eastman (1992: 96) defines language planning as the “...efforts in a socio-political context to solve language problems, preferably on a long term basis”. The definition although referring to the political nature of language planning confines language planning to the realm of language only, with no mention that language planning can take place in the various disciplines or affect such disciplines.

Reagan (1992: 420) refers to the political influence in language planning by stating that “...language efforts are in short, inevitably ideological in nature, and this fact must be taken into account to understand them”.

In my opinion, Kaplan and Baldauf (1997: 3) encapsulate the role of language planning in a precise, yet all encompassing definition 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.

The definition in my opinion provides a clear understanding of what language planning comprises. Furthermore, it illustrates that language planning is not a task limited to a specific discipline, while conveying further that the language planning undertaken affects communities.

With several definitions provided above, it can be said that there are certain commonalities among all the definitions, regarding political and historical influences in language planning. For the purposes of the thesis at hand, the definition adopted at this stage which informed the remainder of the chapter and the broader thesis, is that of Kaplan and Baldauf (1997: 3). The various stages of language planning are discussed below.

2.3 Status planning

As indicated in the above paragraph, there are four tiers to language planning. The first is status planning, which according to Cooper (1989: 99) is the “deliberate efforts to influence the allocation of functions among a community’s languages”. Kaplan and Baldauf (1997: 30) exemplify further explaining that status planning concerns:

Those aspects of language planning which reflect primarily social issues and concerns and hence are external to the languages being planned. The two status issues which make up the model are language selection and language implementation.

Kaplan and Baldauf (1997: 30) advance an extensive discussion on what is deemed to be language selection. For the purposes of the research at hand and in accordance with the definition of language planning, there are three emerging points of language selection of relevance. Firstly, language selection concerns the choice of languages selected by the political leaders for broader society. Secondly, language selection includes a language(s)

which the state can communicate in with its citizens. Thirdly, in selecting the languages of choice, the state must in addition select one or more languages for official purposes (Kaplan and Baldauf, 1997: 30).

The language selection model is in my view premised on the state making language decisions, which affect the broader citizenry. This points to the discussions above regarding the political nature of language planning and the fact that a top down approach is adopted in status planning, contrary to the arguments put forward by Alexander (1992) for a bottom up approach, given that the broader citizenry is most affected by such decisions. It is my opinion that the language selection model removes the participatory element of a democratic dispensation. Simply put, a social contract has been entered into and indeed the political leaders have been elected by the majority of the citizenry, however this does not mean as the citizenry our opinions are irrelevant, especially regarding language selection for the country. This, as I stated above, has the power to exclude or include us from the mainstream of society. In foregrounding this point Docrat and Kaschula (2015) developed a new model based on a socio-economic constitutional concept of meaningful engagement, which supports Alexander's (1992) bottom up approach. The process of meaningful engagement allows for the citizenry to participate in the language planning and policy implementation processes. Although the concept of meaningful engagement is discussed further in chapters five and six of this thesis, the point of relevance at this stage in the thesis is that society's collective voice is to be heard and duly considered in language selection, given that the social issues informing status planning emerge from the communities.

Language planning and in this instance language selection should not be undertaken without consultation with broader society. The consultation would enable issues to be identified where solutions are formulated. Kaplan and Baldauf (1997:32) as well as Kamwangamalu (2000: 51) unequivocally state that language planning does not exist in a vacuum. Further to this Kaplan and Balduaf (1997: 32) state that to avoid planning in a vacuum. The political leadership at the time of planning should be well versed with regard to the social and linguistic information concerning the language situation in the country, in order to make sound language selection choices (Kaplan and Balduaf, 1997: 32).

2.4 Corpus planning

The second tier of language planning is corpus planning. At the onset of this section it must be noted that both corpus and acquisition planning will not be discussed in great depth, given the nature of the thesis at hand.

Kaplan and Baldauf (1997: 38) defined corpus planning as "... those aspects of language planning which are primarily linguistic and hence internal to language". Corpus planning is essential to ensuring that with modernisation and globalisation, languages adapt accordingly. Simply put the development of languages needs to occur in ensuring that one language is not developed by a political elite at the expense of the other languages. A case in point is the use and development of Afrikaans during Apartheid, where a language was used and developed at the expense of the African languages. Cooper (1989: 135) describes this process as the ideology of standardisation, whereby the political elite exercises control and authority through a language.

The discussion creates a linkage between status planning and corpus planning, as language planners need to take note of the dangers in adopting a language or languages with the aim or potential aim of excluding the remaining languages. This becomes important in the case of democratic South Africa, which has eleven languages with official status. The question which arises here and below and is in turn dealt with in the proceeding chapters of this thesis, is whether one language, namely English is not being adopted by the political leadership at the behest of the elite, at the expense of the African languages. This point can be substantiated by the discussions in chapter one of thesis, where the languages of record in South Africa remains English, and to a lesser extent Afrikaans.

2.5 Acquisition planning

The third tier of language planning, namely acquisition planning is characterised by three goals, namely:

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 (Cooper, 1989: 160).

Cooper (1989) explained that acquisition planning was closely related to language policy in that the policy was the product of the language planning process, where acquisition of the language takes place. In this sense Cooper (1989: 160) stated that acquisition planning transcends all hierarchal structures from ministerial planning to basic community centred planning.

2.6 Opportunity planning

The three tiers above result in the formulation of a language policy. Antia (2017: 165) however states that it cannot be assumed, that implementation of language policies will occur naturally or as a result of a government directive. This point is of relevance to the discussions in this chapter, outlining the role and development of language planning in South Africa. Moreover it will become evident in chapter four of this thesis that language policies in the South African legal system are not implementable. This is a result of three reasons, firstly, language is seen as a problem rather than a resource in enhancing access to justice. Secondly, the implementation of a language policy which prescribes that African languages be placed on an equal footing to English and Afrikaans in both status and use, results in financial implications. Thirdly, such language policies would require linguistically competent legal professionals, who would have to learn an African language. These points are discussed further in chapters four, five and six of this thesis.

What is needed to address the points above is an implementation plan. Kaschula (2004: 14) proposed that an econo-language plan be draft. Simply put, according to Kaschula (2004: 14) this would include a language policy acting in cooperation with the national vision of the country in terms of the economy. Kaschula (2004:14) argues that it is a known fact that English along with French and Spanish are the global languages in which economics takes place at a macro-economic level. This is true for South Africa, with regards to English. However, this is not true for the micro-economy and job creation, which results in a 'second economy'. As evident from the statistics in chapter four of this thesis, the majority of South African's do not speak English as their mother tongue. In the legal system, the statistics presented in tables 15, 16 and 17 of chapter four, illustrates that litigants are not proficient in English. The point is that the majority of persons are excluded from the macro-economy on grounds of language. Kaschula (2004: 14) argues that at a micro-level of economies a language implementation plan can have real benefits for South Africans in accessing all sectors of society through their mother tongues.

An econo-language plan as termed by Kaschula (2004), has been developed by Antia (2017) into a fourth tier of language planning, namely opportunity planning. Opportunity planning would allow for marketing and reinforcement of the language policy. This according to Antia (2017: 166) will be in addition to the coercive legislation, which in certain instances does not heed results. Thus opportunity planning is “understood and offered as a framework that foregrounds implementation in language planning and policy” (Antia, 2017: 166). Simply put, opportunity planning provides strategies for the implementation of the language policy in the specific domain. In doing so opportunity planning addresses incentives on implementing the language policy; provides directives on implementing the language policy; infrastructure and training (Antia, 2017: 166). These characteristics are important for the legal system, where it is argued in chapter five based on the data presented in chapter four that there are no incentives for legal professionals to acquire an African language. Furthermore, opportunity planning will address the issues of budgetary constraints by implementing language policies in the various provinces for the legal system.

2.7 Differentiations of language planning

From the discussions thus far it is clear that a number of authors, including Cooper (1989) a main proponent of language planning adopts the four tier system advanced above. It is however important that similar to the three tier system other authors have varied views of language planning. Mclean (1992: 152) discusses four common ideologies underpinning language planning, namely pluralism, vernacularisation, internationalisation and assimilation.

Mclean (1992: 152-153) explained that pluralism relates to the majority of persons in the said society accepting and acknowledging linguistic diversity. In addition the government commits to the maintenance and cultivation of the various languages.

Vernacularisation, relates to the centrality of the indigenous language(s) in the language policies of the country (Mclean, 1992: 153). It is my understanding that this ideology determines the emphasis placed on the indigenous language(s), through practical implementation. This ideology is to a certain effect interrelated with pluralism, in that it determines whether or not the commitment made for the maintenance and cultivation of the various languages is in fact practically correct.

Similar to the existent linkage between pluralism and vernacularisation, internationalisation and assimilation overlap (Mclean, 1992: 153). Internationalisation pertains to the adoption of

a non-indigenous language for purposes of wider communication. In this light Mclean (1992: 153) refers to English. Assimilation, then is where broader society, regardless of their mother tongue is able to function effectively in the dominant language of the country for international purposes (Mclean, 1992: 153).

Mclean (1992) advances that the four ideologies illustrate that language planning informs the drafting of the policies and informs whether or not the policy is implementable. As such the language planning process although ideologically informed, has to be linked with sociolinguistic aspects of the given society, to ensure the appropriateness thereof (Mclean, 1992: 156).

In applying the four ideologies to South Africa, in light of the discussions in chapter one, it is my opinion that with pluralism the acceptance and acknowledgement of African languages has been and remains problematic. Simply put African languages were not acknowledged for use and developmental purposes by the Apartheid government. Indeed post 1994 the Constitution, reflects the commitment made by the state in elevating the status of African languages. However, the question is whether in fact this has happened, a question which forms one of the goals of this research with particular focus on the legal system. It is questionable whether South Africans have accepted linguistic diversity in practical terms of everyday life, given the maintenance of English and Afrikaans as the languages of record in courts.

There is a connection between the ideologies of pluralism, internationalisation and assimilation. In applying the internationalisation ideology, it would mean that English as the language of record currently being maintained is for international purposes of broader communication. Additionally through the assimilation ideology persons should then be in a position to competently and effectively communicate in English and in the case of South Africa's legal system in English and or Afrikaans. Theoretically, in applying the ideologies in a strict sense, it appears correlative of the legal system's language of record. In practice however this cannot be justified as becomes apparent in chapter four of the thesis, a mere 9.6% of the population speaks English, the internationally recognised language, while only 13.5% of the population speaks Afrikaans as their mother tongue (Statistics South Africa, 2016).

The point I am conveying in applying the ideologies, is theoretically the ideologies appear to be sound, however the sociolinguistic aspects of the society are then ignored, hence the

statistical data, supporting the need for informed language planning. The sociolinguistic point, although referred to by Mclean (1992) does not assume an in depth discussion. Conversely, Eastman (1992) focuses on the sociolinguistic aspect of language planning and the importance thereof. Eastman (1992) states that the primary aspect of language planning are the attitudes of people within the society, which in most instances adversely affects the success of the language planning process. More specifically it was advanced that the negative attitudes towards African languages negatively impacts on language planning and the implementation of language policies, resulting in the language planning process ultimately favouring the adoption and implementation of English. Eastman (1992: 108) thus proposes the ‘bottom up design’ aimed at reversing the negative attitudes towards African languages within communities and broader society, through initiatives where the discussions are fostered by political and linguistically equipped persons. This would account for the sociolinguistic information needed to inform language planning. Eastman (1992: 111) encapsulates the importance thereof stating that “the secret to good language planning is a sociolinguistic one.”

2.8 The emergence of a negotiated language settlement

With the chapter thus far having advanced the theoretical underpinnings of language planning in the formation of language policies, the focus now turns to the language planning landscape in South Africa. More specifically the role and nature of language planning during Apartheid and at the onset of democracy. The subheading of this section of the chapter suggests that a linguistic settlement was reached during the discussions from 1990 onwards until the drafting of the Constitution. It must however be noted that this section of the chapter discusses whether in fact a settlement was reached and in favour of which language(s) and the resultant effects thereof.

Heugh (2002: 450) stated that during Apartheid, language policy formulation was as a result of a ‘two-pronged logic’ to counteract the hegemony of English and pursue the principle of separate development. In advocating the separatist approach through language, language policies entrenching Afrikaans in the schooling system became widespread. This was at the expense of the African languages. Alexander (1997: 83) noted that what was most significant at the height of Bantu Education and the Soweto uprising in 1976, opposing tuition in Afrikaans, was the liberation movements’ leadership making a de facto decision to oppose Afrikaans in favour of English and not the African languages. Alexander (1997: 83) advanced

further that the leadership failed to consider the option of promoting the African languages alongside English. This was in Alexander's (1997: 83) opinion a result of the leadership's class aspirations, where the hegemonic position of English was entrenched amongst the black people of South Africa at the expense of the African languages.

With the Apartheid government having precluded the use and development of the African languages from mainstream society, they had in effect masterfully engaged in the language planning process with the success of firmly entrenching Afrikaans. In addition the failure of the liberation movement's leadership to pride themselves on the African languages, contributed to undermining the value and status of the African languages amongst the speakers thereof.

It was anticipated that during the transition from Apartheid to democracy, from the period of 1990 onwards, that the leadership would resume the language debate with the purpose of revitalising the African languages within mainstream society, in assuming a rightful space alongside English, the internationally recognised language. The intent during negotiations from the National Party (NP) was ever apparent ensuring Afrikaans maintained its position as an official language (Heugh, 2002: 456). In contrast the African National Congress (ANC) did not prioritise the language discussion and more importantly failed to take the opportunity in illustrating the leadership's intent of reclaiming what the majority of South Africans had lost, their right to participate fully in all facets in society through African languages (Heugh, 2002: 456). The language question in all sincerity was not accorded the time and space or attention, instead playing second fiddle to the removal of symbols representing Apartheid (Heugh, 2002: 456).

Orman (2014: 63) argued that during the negotiations between the NP and the ANC, the language question was dominated by the Afrikaans middle class, who fought strongly for the maintenance of Afrikaans retaining official status. The point being conveyed is that the Afrikaans community did not leave anything to chance in advocating the importance of their language. On the contrary, the African language mother tongue speakers allowed, and to a large extent, placed their trust in the ANC to ensure fair and equitable decisions were taken which would affect all black South African's positively in reversing the effects of Apartheid (Orman, 2014: 63). How can we as black South Africans and speakers of African languages in South Africa blame ourselves for the lack of importance bestowed on the language question in the language planning process? It is my understanding that when a political party

is chosen by the people, such party must in all circumstances ensure that the best interests of the people are advanced. Orman (2014: 63) argued that this did not happen and as a result the political agenda of the ANC needed to be reconsidered, as a political elitist agenda was being espoused at the expense of African languages.

Reverting to the subheading of this section of a negotiated settlement, in light of the discussions of the relevant authors' works, it can be questioned whether in fact there was a negotiation at all and whether the ANC represented the best interests of the people. Based on the arguments advanced by Orman (2014) the NP certainly walked out of the talks in the same favourable linguistic position they entered the negotiation in, by reaffirming the official status of Afrikaans. It can be argued that the ANC leadership also exited the negotiations having achieved their goal of what appeared and remains as the adoption of English for all intents and purposes across society.

2.9 Language planning: The English obsession

Given the discussion above, it is clear that English was the preferred language of the liberation's leadership both during Apartheid and after. Alexander (1997: 87) advanced the basis for choosing English and English mainly policies as directly influenced by economic and ideological sources. This point finds substantiation in the foregoing sections of this chapter where scholars have noted the ideological and political influences in the language planning process. Heugh (2002: 451) engaged with the issue of language politicization within language planning, she explained that the resultant language policy was in most instances a reflection of complexities comprising of "overt political ideology and the more covert aspects of the political economy." Explicating the point Alexander (1997) made regarding economic influences, Heugh (2002: 451) stated, the hegemonic position of the western economy has a direct effect on emerging economies in developing countries. Linking this to language and more specifically attempting to understand the leadership's reasoning in advancing English, finds resonance in Heugh's (2002: 451) explanation that a western economy is often accompanied by "linguicism which places high status on English and low status on other languages."

If one is to accept the reasoning of these scholars then a broader understanding of how the promotion and elevation of English is maintained without any opposition by African language speakers is understandable. These scholars have explained that the people in this instance the majority, placed their trust in the ANC to make sound linguistic decisions. Both

Alexander (1997) and Orman (2014) raise points explaining how the ANC has cemented and justified the use of English in South Africa. Alexander (1997) emphasises the political and ideological reasoning behind the selection of English as an elitist decision that serves an elitist function of power. Alexander (1997) questioned why the ANC did not propose and implement a language policy where the African languages were placed alongside English. By not doing so he explained that the majority of persons in South Africa would remain marginalised from mainstream society, where meaningful participation in public life can only occur in a language the majority understands (Alexander, 1997: 90).

Orman (2014) linked the entrenchment of English to the education system, wherein the English argument is grounded. Simply put the ANC's justification of English, is firmly grounded in the understanding that English results in greater accessibility for the majority of persons at both basic and higher education levels (Orman, 2014: 65). This would entail that both the higher education system and broader society will be racially representative of South Africa's demographics (Orman, 2014: 65).

2.10 South African language policy landscape

In imparting the discussions thus far relating to language planning it is clear that policy formulation is part of the language planning process. Furthermore it is also evident from the discussions above that the ANC's stance was the promotion of English across disciplines with the argument of enhanced accessibility for all. This position appears to be contrary to the ANC's Reconstruction and Development Programme, which according to Reagan (1997: 426) included the call of the development of all South African languages, with particular emphasis placed on the 'historically neglected indigenous languages'. It is my understanding that the ability to change the language landscape in South Africa, lies in the nature of the language policy and the accompanying implementation plan, without which the language policy remains a statement of intent (Bamgbose, 1999: 19).

In formulating language policies, Reagan (1997: 241) quotes Kerr (1976) who established four tests, in assessing when a sound policy is drafted. These are 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 effective? Does it achieve its objectives?

(4) The tolerability 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) advances that language policies in South Africa would need to be balanced in addressing three primary issues, national political concerns; programmatic and pedagogic concerns as well as issues relating to social justice.

Instead of establishing tests in assessing the applicability of the language policy, Alexander (2014: 1) engaged with what a language policy can do. Simply put the possible role of the language policy can be drafted with the aim of maintaining a social order, reforming a social order or transforming a social order. In explaining the relevance of the social order in relation to language policies and language planning in general, Alexander (2014: 4) stated that language policies and language planning should be utilised as mechanisms, which reinforce other social policy initiatives with the primary purpose of reforming or transforming the society. These points are firmly within the scope of the research at hand, given that Alexander (2014) notes language policies and language planning is not circumscribed to linguistic disciplines and in fact informs the broader social order of a society, thus infiltrating all disciplines, with the objective of transformation. This can enable transformative change of the Apartheid language status quo, which marginalised African languages. This is pursued further in chapter five of the thesis.

Similar to Alexander (2014), Bamgbose (1999) explicates the point of language planning and policy formulation affecting broader society. Moreover according to Bamgbose (1999: 17) language planners are oblivious to the effects the policy they drafted has on broader society. Within this state of oblivious, is the fact that policy making is only concerned with the drafting of the policy and not the implementation thereof, which Bamgbose (1999) notes as a problem unique to language planners in Africa. Bamgbose (1999) terms the lack of implementation, 'implementation avoidance strategy'. This involves the formulation of policies by policy makers with no intention of implementation, or knowing that the drafted policy cannot be implemented. This is achieved through the insertion of escape clauses, unspecified time frames and no measures to ensure compliance (Bamgbose, 1999: 17).

Kaschula (1999: 2) focussed on the practicalities of drafting a language policy for South Africa. Kaschula (1999: 2) espoused that a language policy drafted post Apartheid requires

ample thought, given that during Apartheid language policies were drafted and enacted for the sole purpose of ‘divide and rule’, resulting in discrimination and marginalisation. Kaschula (1999: 2) advanced further that language policy drafters in applying their minds during the drafting stages must avoid a similar reaction to the 1976 Soweto Uprisings. Simply put, a policy must not impose on the people a language or languages, which the people are not receptive of, hence the need for citizen participation in policy making. Against this backdrop Kaschula (1999: 3) proposed a language policy which is ‘flexible’, one which would allow for amendments to be made reflective of the changes in society. This, Kaschula (1999) argues permits language planning to take place at all levels including at the citizenry level, where language policies are not drafted in isolation to those it applies to.

With regard to Kaschula’s (1999) reasoning pertaining to the need to draft a ‘flexible’ language policy informed through citizenry participation, Alexander (1997) spoke to the role of the Language Plan Task Group (LANTAG) established in 1995. What was significant about LANTAG is that it comprised of an advisory committee informing the Minister of the Department of Arts and Culture and Science and Technology, as it was known then, about the processes to be followed and highlighted issues which needed to be addressed, in order for an acceptable language plan to be drafted for South Africa. In my opinion the nature of LANTAG was significant in that language practitioners and linguistics were informing political structures. This is well placed within the broader language planning frameworks, where almost all the authors above have advanced the importance of engagements between the necessary persons when drafting language policies, which are informed by extensive planning by experts in association with the relevant communities in highlighting the issues. It is my understanding at this stage of the research that language policies address language issues in a particular discipline or in broader society.

The first national language policy framework was the National Language Policy Framework, enacted in 2002. It highlighted the areas pertaining to language, which needed to be addressed through implementation strategies (Kaschula, 2004: 5). Kaschula (2004) advanced that the policy merely highlighted issues, while the manner in which these issues were to be dealt with was left open.

Subsequently on 12 February 2003, the Language Policy Implementation Plan (Implementation Plan) was enacted in giving effect to the National Language Policy Framework (2002). Kaschula (2004) critically analysed the scope and objectives of the

Implementation Plan (2003). In doing so Kaschula (2004: 7) stated that the Implementation Plan was convoluted where, three separate bodies were to be established, these included language units, a national language forum and a language practitioner's council. These entities each had a specific mandate of ensuring the implementation of the National Language Policy Framework (2002). This however did not take place, and instead of working towards the primary objective of implementation, the entities were consumed with infighting and corruption (Kaschula, 2004: 7).

The criticism finds resonance, in Bamgbose's (1991) arguments that policies in most instances are not to be blamed but rather the implementation process. The point was expressed concisely by explaining that the planned implementation of African languages is accepted on paper in the form of the policy, however no implementation takes place, thus resulting in the 'do nothing policy' (Bamgbose, 1991: 56).

The critique clearly highlights the fissure between the policy and the implementation thereof. In this sense du Plessis (2014: 380) stated that in some instances the policy statement is sufficient and could in actual fact be more important than the implementation phase. It is my understanding that the point being advanced by du Plessis (2014) is that if the implementation fails this does not necessarily mean that a new policy is to be drafted. Docrat (2013: 20) states further that in these instances the implementation strategy needs to be revised by understanding what the issues were during implementation that resulted in the failure of implementation, and then attempting to develop a new implementation plan aimed at the specific context.

2.11 Language planning and policies in the South African legal system

The discussions under the preceding section focuses on the generality of language planning in South Africa, where the national language policy framework (2002) and implementation plan (2003) was aimed at the country as a whole. However due to the fact that the research at hand focuses on the role of African languages in the South African legal system, it is necessary to hone in on the language planning processes of the legal system.

Post Apartheid, the Constitution changed the language landscape by establishing language rights, which are discussed in detail in chapters four and five of this thesis. What is important to extract for the purposes of the discussions at hand is the relationship between the Constitution and language planning in the legal system. Stewart-Smith (1993: 248) at the

onset of regime change encapsulated this relationship by stating that the notion of rights in the Constitution is a crucial aspect of language planning.

Writing during the transitional phase, Stewart-Smith (1993) mapped out the possible language issue in the legal system. He advanced that South Africa would be faced with the dilemma of deciding which languages are conferred with official status. According to Stewart-Smith (1993: 252) if this is not carefully considered it could create divisions along racial and linguistic lines, in which the policy will then be as 'decisive' as the Apartheid policy. There would thus be two options or categories, either pluralism or assimilation, similar to the language planning theories formulated by Mclean (1992) discussed above. If assimilation were to take place, Stewart-Smith (1993: 252) stated that this would be English as the dominant language. In light of chapter one, stating that English and Afrikaans remain the languages of record in South African courts, it can be said that assimilation was clearly the chosen process, even though the Constitution, conferred official status on all eleven languages, nine being African languages.

The above suggests that language planning moved from the bilingual position of English and Afrikaans to a more inclusive multilingual process (Stewart-Smith, 1993: 255). This would require that the legal system, conform to these multilingual language planning practices, by incorporating greater language flexibility through legislation and language policies (Stewart-Smith, 1993: 255). Language flexibility can be achieved, according to Stewart-Smith (1993: 255) where the legal system retains English, but introduces an African language or languages alongside English. This accordingly can be determined by the language demographics in selecting an African language or languages most spoken in the region. The importance of language demographics is clearly central to the language planning process for the legal system. In acknowledging this, I present and discuss the demographics in chapters four and five of this thesis. Without digressing however, the point I want to highlight from Stewart-Smith (1993) is the need for language planning in the legal system, not only for purposes of redressing the effects of Apartheid, but for the current purposes of ensuring greater access to justice, without being excluded on grounds of language.

Recently de Vos (2008) to a certain extent building on the sentiments of Stewart-Smith (1993) writing at the onset of democracy, stated that the Constitution through the languages provision of Section 6 requires a language policy to give effect to such provisions. de Vos (2008) advanced further that the language policy should be formulated for the courts based on

the linguistic demographics of each area. According to de Vos (2008) this would enable lawyers, magistrates and judges to communicate in their mother tongues, and not be restricted to communication in English and Afrikaans only, as the languages of record. This would be reflective of South Africa's demographics (de Vos, 2008). This point reinforces the importance of data collection in the form of the language demographics, for language planning. Moreover, the point supports the reasoning by du Plessis (2014) that language planning if informed by data collection, the nature of which determines the scope for language legislation and policy implementation.

2.12 The relationship between language policy and legislation

With theoretical underpinnings of language planning, which includes the drafting of language policies discussed above, a constant challenge which arises is the implementation of such policies. This connection between language planning and more pertinently language policy and legislation is relevant when implementing the language policies. According to Bamgbose (1999: 22) legislation is the most viable means through which language policies can be codified and implemented. In explaining what is meant by codification, Bamgbose (1999: 22) stated that new language policies need to be codified in order to ensure the reversal of the status quo. Without such codification, the old policy remains in place on a continual basis (Bamgbose, 1999: 22).

Legislation in a broad sense, is according to Burger (2015: 10) a tool which confers benefits or imposes liabilities within a society. Bamgbose (1999: 22) classified language legislation as an instrument of change. Turi (1993: 5-6) defined language legislation as the legal determination and establishment of the status and use of designated languages by means of legal obligations and rights. Simply put, according to du Plessis (2012: 197) it is legal regulations concerning language. It is my understanding, that statutes contain the laws which govern a society, thus containing the rules and regulations and in some instances, depending on the type of legislation sanctions for transgressors of such rules and regulations. There are distinct forms of legislation, however in various statutes language can form part of the statute. This was encapsulated by du Plessis (2012:197) who stated:

In many cases... regulations occur in the form of language provisions contained in legislation which does not necessarily deal primarily with the status and use of designated languages.

2.13 The legislative process

Burger (2015) advanced an extensive discussion on the legislative process. The legislative process is relevant to thesis at hand in terms of the statutes presented and discussed in chapters four and five. The legislative process is commenced by a Minister acting in their ministerial cabinet position, where in their opinion there is a need for legislation pertaining to their ministerial portfolio (Burger, 2015: 7). A proposal to this effect is drafted in the form of a green paper, which invites comments from interested persons. The following step is the drafting of the white paper containing the broad statement of government. A draft in the form of a Bill is drafted and submitted to cabinet for its approval (*ibid*).

If consensus is reached with cabinet, the Bill is introduced to parliament, after which, Parliament constitutes a portfolio committee or ad hoc committee comprising of members of various political parties (*ibid*). The Bill is discussed and may yet again invite public submissions and hearings on the proposed contents thereof. Once finalised with a majority of political party representatives in agreement the Bill is sent to the National Assembly (NA) for debate followed by the submission of the Bill to the National Council of Provinces (NCOP) (*ibid*). An aside to note, is that the procedure may differ where the Bill affects a province directly. In this instance Burger (2015: 7) explains that the Bill would be referred to the NCOP prior to the NA. The Bill will only become law, when it is signed by the President of the Republic and promulgated in the Government Gazette as an Act of Parliament (Burger 2015: 8).

There are two types of legislation, namely primary and secondary legislation (Burger, 2015: 10). Primary legislation is as a result of the process explained above. Primary legislation is passed by parliament and follows the procedure of the President needing to first sign the legislation after which it is promulgated and published in the Government Gazette. Primary legislation is legislation which authorises the drafting of further legislation, thus it is empowering or enabling legislation. This is important to comprehend for purposes of the Languages Act (2012), discussed in chapters four and five of this thesis, given that it empowers the drafting of secondary legislation.

Secondary legislation also referred to as subordinate or delegated legislation carries the same authoritative purpose as primary legislation, however it is drafted and enacted by bodies which are of a less significant power than parliament (Burger, 2015: 10). Burger (2015: 10) provides a brief list of examples of secondary legislation which includes:

Proclamations by the President;

Regulations by the President or Minister

Regulations by authorised persons or statutory bodies;

Rules of court that regulate court procedure

Cognisance must be taken of the list of secondary legislation provided by Burger (2015: 10), above, specifically the last example of rules of court. This is important for the purposes of the thesis, in chapters four, five and six where I have advanced the relevant rules of court, the effect and importance thereof.

In applying the legislative classification to language legislation, du Plessis (2012: 197) stated that primary language legislation, would be a languages act. Since the time he published this article, a languages act has been drafted and enacted in the form of the Use of Official Languages Act 12 of 2012. He noted further that language legislation could also be in the form of discipline specific acts, which included provisions on language in that discipline (du Plessis, 2012: 197).

du Plessis (2012: 198) argued for the drafting of national or primary language legislation. Subordinate language legislation can include regulations, ordinances and strategic documents that regulate the status and use of the designated languages in either specific disciplines or in broader society.

2.14 The need for language legislation and types of language legislation

The broad distinction drawn between primary and secondary legislation and the various types of legislation under each of these categories, applies to language legislation as stated above. Thus what follows below, is a discussion specifically aimed at unpacking the nuances of language specific legislation. In this light according to Turi (1993: 5) the primary objective of all language legislation is to:

resolve, in one way or another, the linguistic problems arising from those linguistic contracts, conflicts and inequalities by legally determining and establishing the status and use of the languages in question.

From the excerpt it is evident that the legislation and the legislative drafting process is one which is legal in nature. However this process is underpinned by sociolinguistics as defined

in chapter one. The drafter would need to comprehend fully the relationship between law and language. This point finds resonance in the writings of Burger (2015: 10), who explained that the legislative drafter is not merely confined to the drafting of law in the form of the legislation; in fact to undertake this task sufficiently the drafter has to have a ‘sound knowledge of law’ and the various sources relevant to the statute being drafted. This is important as the legislation being drafted is in most instances aimed at bridging a gap in the law or solving a problem (Turi, 1993). The legislative drafter’s knowledge informs the contents of the statute and determines whether the statute is practicable and workable for implementation purposes. Encapsulated succinctly in Burger’s (2015: 10) words:

It is an oxymoron to state that a country has good laws but they are poorly implemented. The implementation of the law must flow from the law itself. To ensure that it is effective, it should be thoroughly researched.

Following on from the importance of drafting the legislation, there are two different types of language legislation, firstly legislation which deals with the official usage of languages and secondly legislation that deals with non-official usage of language (Turi, 1993: 7). Moreover language legislation can be divided into four categories, which is dependent on its function and can thus be official, normalising, standardising or liberal (Turi, 1993: 7). Turi (1993: 7) explained that language legislation, which satisfies all the functions would be classified as exhaustive language legislation, while other language legislation is then classified as non-exhaustive.

Turi (1993: 7) advanced that official language legislation is:

... legislation intended to make one or more designated, or less identifiable languages official in the domains of legislation, justice, public administration and education.

According to Turi (1993: 8) merely making languages official in domains does not entail significant legal consequences. Instead the legal implication and scope of the statute is determined by the status of the language in society and what legal treatment is accorded to the language. Turi (1993: 8) states further that in certain contexts where designated languages were made official, this may only be declaratory by nature, therefore having nothing more than a psychological impact, which may be important. Turi (1993: 8) links the aforementioned point to that of the legal treatment of language itself in the society. For example where the legality of ‘official’ means that is the only designated language that can

be used for official texts (Turi, 1993). This point will become more relevant in the forthcoming chapters of this thesis concerning the specific language legislation in South Africa in relation to the constitutional language provisions of Section 6 as well as the case of *Lourens v Speaker of the National Assembly and Others* (2015) concerning the languages in which all legislation must be published.

Normalising language legislation is to a certain extent linked to the official languages above. It involves legislation establishing the designated language(s) as ‘normal, usual or common languages’ in unofficial domains, which includes but is not limited to ‘labour, communications, culture, commerce and business’ (Turi, 1993: 8). Standardising language legislation involves legislation making one or more of the designated languages standard for use in specifically defined domains (Turi, 1993: 8). Liberal language legislation is legislation designed to enshrine legal recognition of language rights. Simply put it relates to the right to use a language(s) in both official and unofficial language domains (Turi, 1993: 8).

What is important according to du Plessis (2012: 197) in taking cognisance of the different types of language legislation namely, the four functions as advanced by Turi (1993), is that language legislation contains both sanctions and penalties for the contravention of the provisions contained therein. This will provide for possible successful implementation and legal recourse where necessary in ensuring accountability.

The discussions advanced thus far, are theoretically premised on the complexities of drafting legislation, and for purposes of the research at hand, language legislation. After engaging with the writings of du Plessis (2012), Turi (1993) and Burger (2015) there are many issues and nuances to be considered. This for me is important given that language is emotive and as seen briefly in chapter one, can be utilised in excluding people from mainstream society in specific domains such as the legal system. Furthermore, it is my opinion that these theoretical underpinnings of language legislation become more apparent and clear when the statutes are engaged with in chapters four and five of this thesis. This also provides the groundwork for assessing whether there is a disjuncture between the statute on paper and the statute in practice.

2.15 Transformation

This chapter has thus far focussed on the theoretical components pertaining to language planning and the drafting of language policies in South Africa, as well as the theories relating

to the drafting and successful enactment of language legislation. These discussions form the theoretical framework against which the data is premised in chapter four and the critical engagements that flow there from in chapter five. Moreover, it is a primary objective of this thesis to take stock of language planning and policy initiatives and the language legislation relevant to the legal system in identifying the issues and providing reformative measures and recommendations in response thereto. Thus in conformity with this structure, the remaining sections of this chapter pertain to the theoretical groundings of transformation of the South African legal system.

2.16 Defining the concept of transformation

The term transformation has and continues to arise in all spheres of society across disciplines, it is a word that has become common. de Vos (2010: 1) stated that:

Transformation has become a buzzword that is much bandied about and much abused, but few people explain what they mean when they use the word.

Therefore, the starting point was to first understand what transformation means and whether this term can be used as a blanket term regardless of the discipline or topic it is being used for. Wesson and du Plessis (2008: 2) define transformation as a "... change from a state of affairs that existed previously." Furthermore it was stated that transformation cannot and should not be understood to carry one static meaning (Wesson and du Plessis, 2008: 2). This informed my understanding that the word transformation related to change, change which could take place in any discipline, and this change would be different depending on the nature of the context.

According to Kaschula (2016: 199) when it comes to using language as part of transformation there are still policy implementation challenges. This point will be evident from the discussions in this chapter as well as in chapters four and five of this thesis. Furthermore this research, through chapter four illustrates that language is not seen or used as a transformative tool in the legislation and policies governing the South African legal system. Kaschula (2016: 199) argues further that language is pivotal in the transformation process, where it enables the African voice to emerge. The use of African languages needs to inform the discussions on how to enhance access to justice in order to transform the legal system. Linguistic transformation can be achieved where language is used in an empowering way (Kaschula, 2016: 201). According to Ruíz's (1984) three orientations, language is seen as either a

problem, a right or a resource. As part of the transformation process of the legal system, language is already a right in the Constitution, however language needs to be seen as a resource rather than a problem. This has to be reflected in statutes and policies which seek to transform the legal system, such as the Legal Practice Act (2014), which is discussed in chapter five of this thesis.

Presently transformation in South Africa is associated with race and gender, to ensure that the gender and racial disparity in our society is bridged (Moerane, 2003: 711). The majority of articles concerning transformation of the South African legal system pertains to the judiciary. The focus is on the transformation of the judiciary as a constitutional imperative. Although no actual reference is made in the Constitution to the word transformation, the Constitution emits the theme of transformation throughout the provisions (Budlender, 2005: 716).

2.17 Transformation as a constitutional imperative

The aforementioned relates to the constitutional provisions of Section 174 of the Constitution, concerned with the appointment of judicial officers. For the purposes of the thesis at hand subsections (1) and (2) are of direct relevance and state the following:

- (1) Any appropriately qualified woman or man who is a fit and proper person may 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.

Cognisance must be taken of the fact that no specific directives are given as to what is meant by 'fit and proper'. This is discussed in forthcoming chapters concerning the relevant legislation which gives meaning to subsection (1) and whether language in the form of a potential judicial officer being linguistically competent in an African language, should be a criterion for being fit and proper. Further cognisance must be taken of the fact that subsection (2) makes specific reference to gender and race, with the exclusion of language. Yet again the paradox of whether or not it is implied by the provision to include language as part of racial demographics is engaged with in the forthcoming chapters. If so, would this mean that the drafters of the Constitution associated race with language and whether this implication does not undermine the actual purpose of the Constitution in moving away from racialised thinking where African languages are associated with black persons.

2.18 Transformation: The demographics and access to justice arguments

Almost all of the scholarly works concerning transformation, have included what in their opinions judicial transformation consists of. Budlender (2005: 716) provided three areas in which the judiciary must be transformed. This included but was not limited to demographic transformation, where there is greater representation in terms of the racial profile of South Africa; secondly attitudinal transformation, where the underlying attitudes of the judiciary is transformed to the effect that the values and principles of a new legal order are embraced; thirdly where the judiciary is responsive to the needs of broader society. The last point was expanded upon, whereby the transformation of the judiciary should as a primary objective ensure that the citizenry has confidence in a judicial system that is accessible to all persons (Budlender, 2005: 716). This can take place where both the people and the judiciary can identify with each other, illustrating the importance of a demographically representative judiciary (Budlender, 2005: 716). This according to Wesson and du Plessis (2008: 2) fosters an efficient judiciary, one which is responsive to the needs of society.

Similar to Budlender (2005), Ntlama (2014: 3) advanced points which would give effective meaning to the transformation of the judiciary in terms of Section 174 of the Constitution, these included and were not limited to the process of judicial appointments; the need to diversify the judiciary; the need to change its attitude; the need to foster greater social accountability; the need for an efficient judiciary, one that is responsive to the needs of ordinary South Africans; and the facilitation of greater access to justice.

The above points advanced by Ntlama (2014: 3), overlap with Budlender's (2005) viewpoints. However, Ntlama (2014), premises the majority of his discussions of transformation on the diversification of the judiciary racially and through gender equality. Ntlama (2014: 15) went further by quoting the current Chief Justice Mogoeng Mogoeng's points in unpacking how to achieve judicial transformation, these included:

Ensuring the demographic representation of the country without sacrificing the quality of justice that has to be delivered;

Taking into account awareness of the injustices that were often meted out by courts to black people during the Apartheid era;

The inaccessibility of the courts and real justice;

Our commitment to a nation to make a decisive break from the institutionalised evil of the past; and

To hold our new constitutional values and the related imperative to bring into being a justice system that South Africans can relate to and proudly call theirs.

Yet again as I stated with regards to the points encompassing transformation of the judiciary by Budlender (2005), the above points are extensive in their mission of what change the judiciary needs to undergo for it to be transformed. However the directives appear broad and given that they are broad the question remains and is grappled with below in this thesis as to whether language is part of the demographics argument and the need for an inclusive judiciary which is representative not only through race and gender but also through language. Furthermore, to question whether as part of ensuring greater access to justice and accessibility to the courts, language is included.

Ntlama (2014: 6) raised the point of transformation as a necessary measure of ensuring the attainment of an equal society where the legacy of the discriminatory past is reversed and a constitutional democratic dispensation permeates all sectors of society. However, is this possible, if African languages are not seen as part of the process? Language has to feature as a measure of transformation for the judiciary and the legal system, given that on this specific ground people were marginalised from accessing justice through the mediums of English and Afrikaans only. This lends itself to what type of transformation is being sought and is it transformation if language is not a part thereof? In chapter one of this thesis I quoted the sentiments of Garda (2014) who said we need “wholesale transformation...” this would in my opinion include African languages being recognised as part of the transformation of the judiciary and legal system more broadly. As de Vos (2010) said we need to go back and ask ourselves what is meant by the word transformation when we use it and what transformation the judiciary and the entire legal system is actually aspiring to, a question which in my opinion based on the authors’ works thus far appears to be racial and gender transformation, for greater demographical representivity of the judiciary.

2.19 Language as part of judicial transformation

The point concerning the accessibility of courts from the preceding section appears from the authors’ works above to refer to the geographical location of the courts in fostering access for all persons (Moerane, 2003: 715-716). As I have stated that language does not appear to form

part of creating further access to courts, thus highlighting the fact that African languages and languages more generally are not ordinarily seen as part of the transformation of the legal system. Moerane (2003: 716) acknowledged this fact and stated that it was an area of transformation that still needed to be considered when he wrote this particular article in 2003.

What in my opinion was significant in Moerane's (2003: 716) article was the fact that he viewed language as an accessibility measure of access to justice and the courts. A further positive to be extracted in supporting the current research I have undertaken and which is presented in this thesis is the fact that he does not curtail accessing the courts in a language understood through interpretation (Moerana, 2003: 716). Instead he stated that the language being used in court should be understood by the parties before court. Moerane (2003: 716) acknowledged the complexities of the language of record, but in the same breath states that this reaffirms the need for sound language policies to grapple with the language question facing the legal system and draft and successfully implement a language policy.

2.20 Conclusion

This chapter has advanced the theory relating to language planning and policy, legislation and transformation. These three aspects form the basis of the theoretical underpinning of this thesis. More importantly the chapter incorporates the differentiating and concurring arguments of the various scholars. Furthermore the chapter illustrates that language planning and policy developments are informed by the social and political contexts in which they are formulated. The theory presented in this chapter informs the discussions in chapters four and five of this thesis, where the data is discussed and presented. The following chapter provides a comparative analysis of the Canadian legal model.

CHAPTER THREE

CANADIAN COMPARATIVE ANALYSIS

3.1 Introduction

This chapter comprises of an international Canadian comparative jurisprudential analysis. The chapter briefly sets out a theoretical overview of what a comparative analysis comprises of and the importance thereof. The chapter commences with a historical overview of the use and development of languages in Canada. The historical overview is followed by the constitutional and legislative frameworks being advanced. I have focussed specifically on the province of New Brunswick in the legislative framework as it comprises language legislation for the legal system, illustrating the centrality thereof in relation to the research at hand. Jurisprudential developments are advanced with specific reference to relevant case law. The insertion of the case law is to extrapolate the methods of interpretation utilised by Canadian judicial officers, with particular reference to the interpretation of language rights and the sociolinguistic effects thereof.

3.2 Historical linguistic developments in Canada's jurisprudence

From the onset it must be noted that the linguistic make up of Canada, comprises of both French and English speakers. Williams (2012: 47) states that there is a considerable number of French speakers who are not fully bilingual. This is an important point in understanding the implications of the constitutional language developments and language legislation in accommodating monolingual French speakers.

Williams (2012: 47) explains that 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...". Within the practical realm of daily life, French was not used by the State in the late nineteenth century. French assumed a subordinate position to English in both Parliament and Government (Williams, 2012: 47).

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). Furthermore, it housed the objectives and principles upon which the Official Languages Act of 1968 was drafted and later enacted in 1969 (Williams, 2012: 47).

The 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).

3.3 Canadian Charter of Rights and Freedoms

From the discussions above it is apparent that although official status was conferred on both English and French, the practical reality was not representative of this, bringing into question whether or not the languages were equal in status. According to Williams (2012: 48) much needed clarification of language rights and the obligation of the state in ensuring the realisation of the language rights commenced with the proclamation of the Canadian Charter of Rights and Freedoms in 1982. Williams (2012: 48) explains further that the Charter of Rights and Freedoms (1982) reaffirmed the "... core principle of linguistic duality". The Charter of Rights and Freedoms (1982) comprises of sections primarily focussed on language and reads as follows:

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.

Docuet (2012: 162) states that the adoption of the Canadian Charter of Rights and Freedoms in 1982 heralded in a new era for the recognition of linguistic constitutional rights, as quoted in the experts above. It is clear from Section 16.(1) and (2) quoted above that emphasis is placed on the importance of linguistic equality between the official languages, namely English and French. This point needs to be highlighted for the general purposes of the thesis at hand. Simply put chapter four advances the South African constitutional language rights model, which is contrasted to the Canadian legal model in chapter five of this thesis. Against the Canadian model, the shortcomings of the South African model are highlighted. These shortcomings are addressed in chapter six, where conclusions and recommendations are formulated with reference to the Canadian legal model.

The scope of these language rights created in the Charter of Rights and Freedoms (1982) needs to be assessed in relation to the topic at hand. Simply put the interpretation of the rights by the courts in Canada, needs to be discussed in assessing whether they are in fact practical in nature or theoretical paper rights. This discussion is undertaken with reference to specific Canadian case law in the proceeding section of this chapter. It must however be noted that before the case law is engaged with the entire Canadian legal framework needs to be explicated in understanding the parameters of the language rights and the implementation strategies developed and enacted in legislation.

3.4 Official Languages Act of Canada

The Official Languages Act of Canada (1988) was enacted with the primary purpose of giving practical meaning to the theoretical language rights created in the Charter of Rights and Freedoms (1982). 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).

Evident from the analysis provided by Williams (2012) is the applicability of the Official Languages Act of Canada (1988) to the state and government in its entirety. Therefore, both English and French speakers are accommodated in accessing government services in either English or French as afforded by the Charter of Rights and Freedoms (1982). Williams (2012: 50) further encapsulates the objectives of the Official Languages Act of Canada (1988), which according to him comprise of three main objectives namely:

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.

From the three objectives identified by Williams (2012: 50), it is my opinion that the primary purpose of the Official Languages Act of Canada (1988) in giving meaning to the Charter of Rights and Freedoms (1982) is to ensure that both languages are treated equally in practical terms within the realm of daily life and interaction with government and all government institutions.

3.5 New Brunswick Official Languages Act

For coherency purposes, in accordance with the discussions presented thus far, this section of chapter three highlights the provisions of the New Brunswick Official Languages Act (2002), which are relevant to the Canadian legal system. It must however be noted that an in-depth presentation and analysis of the case law based on these provisions will be discussed at a later stage in this chapter.

The New Brunswick Official Languages Act (2002) applies to New Brunswick in its entirety. The Preamble of the New Brunswick Official Languages Act (2002) unequivocally states that the provisions thereof are enacted in accordance with the Canadian Charter of Rights and Freedoms (1982).

Sections 16 to 26 of the New Brunswick Official Languages Act (2002) comprises of provisions relevant to the administration of justice. The sections 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.

The provisions in the excerpts above give rise to a series of points of discussion relevant to the thesis at hand. Firstly, what in my opinion is important, is the nature of the New Brunswick Official Languages Act (2002). Simply put the provisions spanning from Section 16 to Section 26 are extensive in their mandate, in covering all linguistic aspects of the New Brunswick legal system. The legislative position in New Brunswick, is, according to Doucet

(2012: 159) 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.

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 the language of the majority as the official language and 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.

The territorial approach is grounded on the geographical positioning of the majority of speakers of a particular language. 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.

The personal approach relates to the use of an official minority language in a geographical area where a subsequent official language is the dominant language in that specific geographical region (Doucet, 2012: 160). The significance of this approach is that no person is excluded on grounds of language, neither are persons confined to conforming with the majority of speakers of another language at the expense of their own (Doucet, 2012: 160). Thus the personal approach in my opinion provides for greater linguistic inclusivity, whilst embracing linguistic diversity. It would be remiss of me however not to clarify my position at this stage. The personal approach may at this time of the thesis with specific reference to Canada, be ideal in the circumstances as there are only two official languages, unlike the linguistic position in South Africa of eleven official languages. Therefore, it is my opinion further that the type of approach will be dependent on the nature of the linguistic framework of each country. Doucet (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.

Section 17 above, confers an absolute right, one which is not subject to practicalities or is only implementable with the satisfaction of other criteria such as available resources. Section 17 furthermore entrenches a right of choice and not a right to a language, which the party before court understands. The difference highlighted herein between understand and choice will become clearer in chapters four and five of this thesis, where the South African constitutional language provisions and the case law discerning the difference is advanced.

The inclusivity of Section 17 is also evident in the extension of the right to all court proceedings, namely civil and criminal as well as in relation to the documents associated therewith, as referred to in the provision by reference to pleadings.

The absoluteness of the right enshrined in Section 17 is reaffirmed through the provisions of Section 20(1) of the New Brunswick Official Languages Act (2002). Section 20(1) in referring to a criminal offence, entrenches a language right of choice, one which is not subject to any practicalities prior to the enforcement of the right. Furthermore in ensuring that the accused is aware of the language choice, an obligation is placed on the presiding officer in this instance, thus in my opinion illustrating the importance of both the right and the role of language within the legal system and the centrality thereof in the administration of justice.

The centrality of language in the legal system and for the administration of justice, is evident in Section 21 of the New Brunswick Official Languages Act (2002) where the language right is extended to witnesses, to impart evidence in an official language of their choice. In conferring this right, it can be said that the drafters carefully considered the potential language impasse that this could create where a witness chooses an official language, which is not that of the parties before court. Thus, consecutive interpretation is guaranteed and does not limit the language right conferred upon witnesses nor does it limit or contravene the absoluteness of the language right in Section 17. This point finds resonance in Section 18 of the New Brunswick Official Languages Act (2002) stating that no person will be placed at a disadvantage as a result of their choice of language. Linguistic prejudice is guarded against in guaranteeing the use of a language of choice in the legal system.

A further point of significance in my opinion is the fact that government and the state more broadly are obliged to conduct themselves in the language of choice by the opposing party before court, as conferred in Section 22 of the New Brunswick Official Languages Act (2002). This holds the state to account, through practical illustration that language rights of choice are in fact practical in nature and not abstract theoretical rights. A further point worth noting is the state's obligation to ensure both official languages are treated equitably in practice, reinforcing the provisions of the Canadian Constitution, which explicitly states both official languages are equal in status.

The provisions which I emphasise are Sections 19(2) and 24 of the New Brunswick Official Languages Act (2002) as these provisions are at the heart of the thesis. These provisions relate to the linguistic competency of the legal system. It is not practical to state that official

languages are equal in status and should be treated as such within the legal system and confer upon person's extensive language of choice rights to be exercised within the legal system, if the court officials are not linguistically competent to hear such cases. What is significant of Canada and New Brunswick in particular is that all officials before court be linguistically equipped to hear the matter in the official language of choice of the parties before court, without the aid of relying on translation or interpretation services. This in my opinion is pivotal to ensuring a linguistically equipped legal system, where judicial officers are linguistically competent to hear cases in the official languages in giving purposive and direct meaning and realisation to the right to be heard in an official language of choice. It is my opinion further that this gives effective realisation of the Canadian Charter of Rights and Freedoms (1988), whereby it explicitly states that both English and French the official languages are equal in status.

The fact that judgments are published in both official languages in accordance with Section 24(1) of the New Brunswick Official Languages Act (2002) is illustrative of linguistic inclusivity in New Brunswick with the objective of practical interpretation of the equality of two official languages. What in my opinion was both interesting and innovative was the insertion of subsection (2) addressing 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. By doing so, the provisions of the Canadian Charter of Rights and Freedoms (1982) conferring equal status on both official languages is achieved practically and simultaneously, avoiding the incurrence of translation delays that could hinder the prospects of appeal and review proceedings, where time is of the essence. These points must be borne in mind in relation to the discussions in chapters four and five of the thesis, relating to the South African constitutional provisions as well as the relevant case law.

3.6 Language rights interpretation in Canadian courts

Evidenced in the preceding section of this chapter, the Canadian constitutional and legislative frameworks have been developed fully, to include recognition and protection of language

rights across disciplines. In doing so the New Brunswick Official Languages Act (2002) established an extensive language rights framework specific to the legal system. In my opinion, this is an extraordinary achievement on paper. I make mention of the fact that it is on paper, as the practical implementation thereof within real life instances needs to be assessed. The relevant case law must be advanced from a developmental point of view. The purpose of doing this is to illustrate the jurisprudential development in the courts' reasoning and interpretation of the language rights provisions, assessing whether or not both the constitutional and legislative frameworks are interpreted restrictively or purposively. Discussions pertaining to the selected cases below are in congruence with the doctrine of precedent elucidated fully in chapter four of this thesis.

In contextualising the approach, 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 (Foucher, 2012: 333). 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 jurisprudence concerning 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). The legal reasoning emanating from both cases is of relevance to the thesis at hand. It concerns the courts' interpretation of language rights. In both instances the courts found 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 context in which the right is being limited must be assessed fully prior to the court determining that the limitation is reasonable.

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) was looked at in anticipation of the interpretive approach to language rights the SCC would adopt. 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).

The legal reasoning emanating from the *Manitoba* (1985) judgment, set the tone for purposive interpretation of language rights. This position was unfortunately short lived in the cases of *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), known as the trilogy of cases (Doucet, 2012: 162).

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.

It is unashamedly clear from the SCC's reasoning in the *MacDonald* case (1986) that the restrictive interpretive approach limited the strides taken in the constitutional and legislative frameworks advanced above. The reasoning brought into question the role of the judiciary in safeguarding the constitutional and legislative ideals in the best interests of the citizens. I am of the opinion that the SCC in *MacDonald* (1986) through their narrow approach conferred greater power on the state and restricted the accused's access to justice, based on their narrow interpretation.

A slight consolation was the dissenting judgment of Wilson J in the *MacDonald* case (1986), 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 an exemplary example of purposive interpretation by a judicial officer in giving full effect to the constitutional and legislative provisions in practice, where the parameters of the right are 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 the South African case law presented in chapter four, and critically discussed in chapter five of this thesis, as it serves as a model

form for rights interpretation and the interpretation of discretionary words such as ‘may’ and ‘either’ in language rights provisions, where a discretionary element needs to be discerned carefully from obligatory language in the form of the word ‘must’. In both instances, judicial interpretation must adopt a balanced and fair approach, which gives true account to the intention of the right for the litigant concerned.

The majority reasoning in the *MacDonald* case (1986) was adopted in the case of *Bilodeau v Attorney General of Manitoba* (1986). The case was on appeal and concerned the conviction of an English accused for the contravention of a Highway Traffic Act. The summons was issued in French only. The Appellant based the appeal on the fact that the summons being published in French 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 this 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.

Further similarities between the *MacDonald* (1986) and *Bilodeau* (1986) cases were evident with the inclusion of a minority judgment by Wilson J in *Bilodeau* (1986). It must be noted that this was a minority and not a dissenting judgment, as was the case in *MacDonald* (1986), meaning that in *Bilodeau* (1986) Wilson J (1986: 458) concurred with the majority in dismissing the appeal. However, his reasons for the dismissal differed significantly. Wilson J (1986: 458) held that with regard to the question of Section 23 of the Manitoba Act (1870) being contravened the Appellant was successful as the provision 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 the appeal was dismissed by Wilson J was that if not, it would have opened the floodgates to litigation. Simply put the Rule of Law (ROL) was to be followed strictly as to avoid legal chaos in convictions being overturned on linguistic grounds.

This minority judgment by Wilson J in *Bilodeau* (1986) is an example of what I referred to above as the need for judicial officers to interpret constitutional and legislative language

provisions purposively, while concurrently ensuring that fairness and justice are achieved through a balancing act of skilful interpretation. What for me was gravely concerning in the judgment of the majority in *Bilodeau* (1986) was that the restrictive approach was adopted in limiting the Appellant's Section 23 language right, which in my opinion made no sense in justifying why the legislation in this instance was valid. The means do not always justify the end, as in this case it was certainly proven, where the language rights bore the brunt of poor legal reasoning.

Although the cases of *MacDonald* (1986) and *Bilodeau* (1986) dealt with language rights and the interpretation thereof by judicial officers, the extensive New Brunswick Official Languages Act (2002) did not feature. This is important as advanced previously for the research at hand as it will become more apparent in chapters four and five of this thesis that to date South Africa has no legislation wholly dedicated to language in the legal system. Thus the third case in the trilogy, namely *Societe des Acadiens du Nouveau v Association of Parents for Fairness in Education* (1986) is an important case to gauge a sense of how such legislation is implemented and interpreted by the courts.

The *Societe* case (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 court in the *Societe* case (1986) missed the opportunity to reverse the restrictive interpretation of the language rights it had adopted in the cases of *MacDonald* (1986) and *Bilodeau* (1986). Instead, the court reaffirmed its restrictive approach to language rights and in my opinion went a step further by undermining the language provisions of the constitutional and legislative frameworks, in a judgment which focussed on trying to substantiate an incorrect finding that language rights be interpreted differently to the other legal rights, as if language rights are not legal in nature.

The trilogy of cases provided a restrictive interpretation of the various language rights as evidenced above. Given the nature of these judgments and the courts' reasoning in all three instances, it was assumed that precedent was set for future interpretation of all language rights provisions. This fortunately was not the case and the restrictive interpretive approaches were disregarded by the SCC in later years.

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).

More specific to the thesis at hand with regard to the role of language in the legal system was when 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. This, the court said reaffirmed that the language right was undoubtedly a substantive right and not a procedural right (1999: 770). This was of prime importance, given that the trilogy of cases with the exception of the dissenting and minority judgments of Wilson J, were that there was no language right and merely formed part of the right to a fair trial, where the court was in a position to afford this. Furthermore, the importance of language rights being recognised as substantive rights meant that the right could not be limited through restrictive interpretation.

With regard to the language rights being part and parcel of the right to a fair trial the court dismissed this misinterpretation, holding that the right of the accused to be heard in a language of their choice was in place to ensure that the accused gains equal access to a public service, one which was linguistically competent to respond fully to the right (1999: 772).

The purposive approach adopted in *Beaulac* (1999) set a precedent for the interpretation of language rights, which was followed in the case on appeal of *R v Pooran* (2011). 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 cases of *Beaulac* (1999) and *Pooran* (2011) provide a reversal of the disturbing precedent set in the trilogy of cases discussed above. In both *Beaulac* (1999) and *Pooran* (2011) purposive interpretation of the language rights within the context of each case was applied. This discussion must be borne in mind in chapters four and five of this thesis where the Canadian case law position will be contrasted to the interpretation methods employed in South African courts with reference to language rights.

3.7 Conclusion

The chapter outlined the Canadian constitutional and legislative language developments, which have culminated in the entrenchment of language rights in recognising the official bilingualism of the country. Indeed, as is evident from the extensive drafting and enacting process, official bilingualism, was achieved after many years. 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 I stated in the discussions of this Canadian comparative study, it is liberating to have an extensive theoretical framework, but this is meaningless if the practical implementation thereof does not take place. 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. In my opinion the Canadian model presents as a model which can be emulated, the question now remains as to whether it should be emulated by South Africa and the legal system more specifically given the primary distinction between language equality of two official languages as opposed to South Africa's eleven official

languages. This question is grappled with in chapters four and five of the thesis, with regard to the demographics argument, and in chapter 6 where conclusions and recommendations are proposed.

CHAPTER FOUR

DATA PRESENTATION

4.1 Introduction

This chapter presents the data in the form of the constitutional language provisions; legislation; language policies; language statistics and case law. The chapter contains the data presentation. The purpose of the chapter is to establish a foundation upon which the remainder of the thesis is based.

4.2 South African constitutional language framework

The Constitution being the supreme law of the Republic of South Africa, obligates the fulfilment of rights and obligations created in the provisions of the Constitution. This authoritative law provides a linguistic framework, in Section 6 of the Founding Provisions. This linguistic blueprint lays the base upon which the discipline specific language rights are established. Essentially Section 6 provides the linguistic obligations conferred upon the state towards the citizenry. Lourens (2012: 269) explicates that Section 6 comprises of a social contract between the state and the speakers of the various languages. This social contract drafted at the onset of the democratic dispensation and negotiated by the various representatives, extends the obligation to the state in power at any time, where the obligations contained herein bind all organs of state at all levels (Lourens, 2012: 269-270).

Section 6(1) establishes eleven languages, these being declared the official languages of the Republic. In addition to English and Afrikaans, the official languages during Apartheid, nine African languages are included as official languages. In line with the inclusion of nine African languages, acknowledging the previous diminished use and status of African languages during Apartheid, subsection (2) confers a positive obligation providing that "... the state must take practical and positive measures to elevate the status and advance the use of these languages".

Section 6(3)(a) provides broad guidelines on the use of the official languages by National government and Provincial governments. A discretionary approach is conferred by the provision stating that governments "...may use any particular official languages..." This discretion must however be exercised in accordance with the prescribed criteria including "...

usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned...” The discretion is minimally qualified through the obligatory statement that “... national government and each provincial government must use at least two official languages ...” This provides a minimum requirement, while not limiting the number of official languages that can be used.

The minimum requirements prescribed in subsection (3)(a) are not reiterated in subsection (3)(b) regarding the language use in municipalities. Subsection (3)(b) only confers an obligation on the municipalities to take into account “... the language usage and preferences of their residents.”

Subsection (3)(a) is expanded upon further in subsection (4) providing that national government and provincial governments are obligated to “... regulate and monitor their use of official languages.” This is to be done through legislative measures as well as any other measures, thus affording government at national level and provincial levels a discretion as to the choice of monitoring and evaluative measures. In providing for monitoring and evaluation subsection (4) obligates that official languages must enjoy ‘parity of esteem’ and be ‘treated equitably.’

The monitoring and evaluative measures to be adopted through legislative means, in effect is propelled by the establishment of a Pan South African Language Board (PanSALB). PanSALB according to subsection (5) must be established by national legislation. Subsection (5) provides two specific purposes of PanSALB, namely 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.

Section 6 clearly provides a broad linguistic framework. The positive obligations and discretionary elements conferred through Section 6, requires further engagement, to the extent of assessing the implementation of Section 6. By doing so the challenges arising during implementation and the role and effect of the discretionary elements is central to assessing the degree of implementation and the shortfalls. Thus, the critique and engagement of Section 6 is advanced in chapter five of this thesis in relation to the data presented below in this thesis, in the form of case law. To this effect, the point of emphasis is that the Constitution is only a framework. Cameron (2013: 15) explained that the:

Constitution is not self executing. In itself, it has no agency. All the Constitution does is to create the practical structures that enable the rest of us, that is you and me together with the principled leadership, a committed government an active citizenry and vigorous civil-society institutions-to perfect our future.

Building on the sentiments of Cameron (2013: 15) in the quotation above, the linguistic framework established in Section 6 is to be implemented within the various disciplines, as such the specific language rights are advanced under the proceeding subheading.

4.3 South African language rights framework

Chapter 2 of the Constitution, contains the BOR which according to Section 7 of the Constitution is the “... cornerstone of democracy in South Africa.” The rights contained therein are conferred upon all persons in the Republic, in giving effect to the principles of dignity, equality and freedom.

In contextualising the importance of the rights in the BOR in light of the fact that the rights are the “cornerstone of democracy in South Africa”, Section 8(1) states that the BOR applies to all law, and in turn the legislature, executive, judiciary and all organs of state are bound by the BOR.

The language rights within the BOR consists of Sections 29(2) and 35(3)(k), whilst the collective language rights are housed in Sections 30 and 31. The right in Section 35(3)(k) exists within the legal system, specifically the criminal justice system and reads as follows:

- (3) Every accused person has a right to a fair trial which includes the right-

(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.

From the provisions of Section 35(3)(k) above, a right is conferred upon an accused person to be tried in a language he or she understands. In my opinion the provision contains an alternative right, where the provision states that if it is not practicable to conduct the trial in a language the accused understands proceedings must be interpreted in that language. Pivotal to assessing the implementation of the right and the hindrances surrounding implementation is to fully comprehend the definitional aspects of the right. As such Schwikkard (2013: 800) advances that the right is not for a language of choice, rather a language which the accused understands. Schwikkard (2013: 800) explains that the language must be fully and not partially understood by the accused. In determining when the alternative of interpreting be adopted, the guideline provided in the right is when 'not practicable'. With no definition provided as to what determines when it is or is not practicable, clarity is to be sought from the relevant case law. Therefore in examining the case law, both the determination of 'practicable' may be sought (Madonsela, 2014) as well as assessing the implementation of the right in terms of the challenges faced within the legal system.

In accordance with engaging in a discussion pertaining to the parameters of the language rights, the issue of the possibility of limiting the right arises. In light of the practicality of the rights and the parameters thereof, the scope of the Constitution in a practical situation needs to be addressed, and this is advanced in chapter five of this thesis. However, prior to engaging with the relevant case law, where the right in Section 35(3)(k) has either been successfully implemented or in instances where the right has been limited, a theoretical discussion to this effect must be advanced.

To this effect Section 8 of the Constitution, which was referred to briefly in the preceding paragraphs needs to be quoted in its entirety, with the aim of illustrating that the Constitution recognises the need to develop and implement the rights and fulfil the obligations. Thus Section 8 states:

(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 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).”

Section 8(3)(a) in advancing the need for the development of the rights, grounds the statements by Cameron (2013:15) above, emphasising that the Constitution is only a framework which requires development and implementation. Equally, in recognising the need for development, Section 8(3)(b) permits that such development may include a form of limitation to ensure that infringements may be guarded against where there are competing rights. This in fact finds resonance within the provisions of Section 7(3), which states that the “rights in the Bill of Rights are subject to the limitations contained or referred to in Section 36, or elsewhere in the Bill”. Section 8 is by no means contradictory as it clearly recognises the need to strike a balance where competing rights may be limited where necessary. The balance struck in Section 8 reaffirms the fact that the rights in the BOR are not absolute.

With Section 8 above referring to the limitations of rights, Section 36 is advanced below. The application of Section 36 will be discussed in chapter five, however the theory needs to be advanced and as such it states:

(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 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.

Comprehending when and how the rights can be limited, is pivotal to understanding the complexities surrounding implementation of the rights. Currie and de Waal (2013: 151) provide a definition of the term limitation, namely a synonym for an infringement, or what they deemed a justifiable infringement. It is not nonsensical for an infringement to be justifiable, given the need to balance the rights of individuals, hence the factors listed in Section 36(1)(a)-(e). This furthermore relates to establishing the parameters of the rights when two rights are conflicting. Currie and de Waal (2013: 151) explained that the reasons provided for the limitation must be 'exceptionally strong', where the limitation serves a purpose, which a large majority of the citizenry would regard as 'compellingly important'. Regardless of the importance of the limitation, a court must ensure that there is no less restrictive measure, which can be employed in achieving the desired purpose, without limiting the right (Currie and de Waal, 2013: 151-152).

With regard to the criteria in Section 36 and the reasoning of Currie and de Waal (2013: 153) a two stage approach is adopted in determining if a right was infringed and if so whether the infringement is justifiable. The first stage concerns the determination of whether a right in the BOR has been infringed either by a law or by the respondent. If answered affirmatively the second stage is of relevance enquiring whether the infringement is justifiable based on the criteria in Section 36 in addition to the reasons provided by the respondent. The applicant bears the onus of proving the first stage of the right being infringed. Based on the evidence led by the applicant in discharging the onus, the court determines whether the right was in fact infringed. The onus then shifts to the respondent to prove that the infringement is justifiable based on the criteria in Section 36 of the Constitution. Thus, the first stage is concerned with interpreting the right, and the second stage requires a deeper factual enquiry (Currie and de Waal, 2013: 154). The second stage requires the respondent to lead evidence in the form of sociological and or statistical data (Currie and de Waal, 2013: 154). Noting that the nature of the evidence is case dependent, where the type of right and nature of the infringement is central to the nature and extent of the evidence being led.

The discussions on the limitation of rights, namely the two stage approach, is illustrative of the fact that a balance needs to be struck in ensuring proportionality, underlined by the

fundamental principles of dignity, equality and freedom. A limitation may never abstractly be determined by a court, ensuring the limitation is in the best interests of the majority of persons.

Given the generality of Section 36 of the Constitution, the sliding scale formula was formulated in applying specifically to the limitation of language rights. The sliding scale formula provides checks and balances when a court is engaging in the limitations analysis. It provides meaning to the term 'practicable'. Therefore assisting in the determination of when in the circumstances it is practicable to limit the right. Similar to the criteria in Section 36(1)(a) - (e) the sliding scale formula provides language specific criteria, namely "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). Therefore the criteria decreases the opportunity of limiting the right, by heightening the importance of the right.

A constant thread from the discussions above, is the need to ensure linguistic equality amongst eleven official languages. In order to achieve equality and equitable use of all official languages, a balancing exercise is to be undertaken. This would involve assessing whether a right can be justifiably limited.

In enhancing the point of the need to engage in an equality based argument, van Wyk (1992: 29) argues that equality of languages has never garnered centre stage, and the concept has been negated to a "... statutory injunction, meticulously and successfully observed in a vast body of official documentation..." Given this historical perspective on equality between languages in relation to the constant theme of equality emerging from the provisions of Section 6 and the language rights, Section 9 of the Constitution is relevant, namely:

- (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 race, gender, sex pregnancy, marital status, ethnic or

social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, *language* and birth. (my emphasis).

(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.* (my emphasis).

The bold italicised words in the provisions above, illustrates the relevance to the research at hand. Docrat (2017: 10) advances that the prohibited grounds in Section 9(3) of the Constitution, which includes language, is indicative of the importance placed on language. In light of the importance bestowed on language, cognisance must however be taken of the fact that a person alleging discrimination on one of the grounds in Section 9(3) will not exclude the court engaging with Section 36 of the Constitution where the listed ground is also a right in the BOR (Ngcukaitobi, 2013: 218). The court's analysis in determining if the discrimination is fair, if an infringement is alleged based on one of the prohibited listed grounds in subsection (3) is examined in further detail with reference to specific cases concerning language in the discussions below as well as in chapter five.

4.4 Contextualising the legal legislative framework: A linguistic approach

The constitutional provisions advanced above make specific reference to the need for legislation to give effect thereto. Noting the statements by Cameron (2013) of the Constitution being a framework requiring the drafting of legislation to give practical meaning to this framework. It is in this light that the legislative framework is of relevance. More specifically related to the thesis at hand is to critically examine the legislative framework of the legal system to assess if it is reflective of the constitutional language rights and the linguistic obligations created by Section 6 of the Constitution. This concerns goals one and two of this thesis as outlined in chapter one. I must however reiterate that the discussion below is curtailed to the point of advancing the relevant statutes and not engaging with them, as I have undertaken this task in chapter five and to a certain extent in chapter six. Therefore the primary investigation at this stage is to determine whether the Apartheid legal legislative framework remains in place as suggested in chapter one of this thesis. This is discussed following the discussion of the primary language legislation.

4.5 The Use of Official Languages Act

With regard to the theoretical discussion in chapter two of this thesis, where I advanced the different types of legislation, the Languages Act (2012) is the primary legislation in South Africa. The Languages Act is as a result of an order emanating from the judgment in the case of *Lourens v President of South Africa and Another* (2013).

Briefly the facts of the *Lourens* case (2013) was that an application was brought by Lourens the Applicant against the President of the Republic cited as the first Respondent and the Minister of the Department of Arts and Culture cited as the second Respondent. The Applicant argued that government had failed in its constitutional mandate to give effect to Section 6(4) of the Constitution, requiring that government adopt legislative and other measures, to monitor the use and development of the official languages. Du Plessis J (2010) accepted the argument by the Applicant and found government indeed failed to comply with Section 6(4). In accordance with the decision, Du Plessis J (2010) ordered that the legislature draft and enact legislation to this effect within two years from the date of judgment, in giving meaning to Section 6(4).

The Languages Act (2012) was accordingly drafted and enacted. The objectives of the Languages Act (2012) housed in Section 2 thereof are:

- (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.

From the objectives of the Languages Act (2012) above, it appears as though there is mere compliance with the *Lourens* judgment (2013), in giving effect to Section 6(4) of the Constitution with no further objectives. Furthermore, mere compliance with the provisions of Section 6(2) of the Constitution is visible in Section 2(b) of the Languages Act (2012). Section 2(c) and (d) of the Languages Act (2012) appears to be vague and broad in mandate. In addition to the Languages Act being the primary language legislation of the Republic, it is of further relevance to the thesis at hand as a result of its application. Simply put Section 3(1)

outlines the application of the Languages Act (2012) to the following departments and entities:

- (a) national departments;
- (b) national public entities; and
- (c) national public enterprises.

Docrat *et al* (2017: 8) advanced that the application of the Languages Act (2012) is limited to government, as seen from the excerpt above and thus in accordance with the doctrine of separation of powers, does not apply to the judiciary. However, it remains relevant to the thesis, as it applies to national departments, two of which are the Department of Justice and Constitutional Development and the SAPS.

The Languages Act (2012) necessitates that each national department and entity draft a language policy to comply with the provisions therein. Section 4, more specifically provides directives for the drafting of the language policy, where specific constitutional compliance is to be met, whilst including practical measures in publicising the respective language policy for public purposes. Docrat *et al* (2017: 7) advance that the language policy directives, are progressive in extending beyond the ambit of the linguistic framework created in Section 6 of the Constitution, in acknowledging the importance of other languages besides the official languages. Section 4(2)(d)(i) of the Languages Act (2012) requires government to establish mechanisms and illustrate how these mechanisms will ensure the inclusion of persons using sign language as a mode of communication. Undoubtedly a progressive step towards inclusion, on the basis of language and disability.

4.6 The legislative language requirements for Attorneys

With the primary legislative position advanced in the foregoing section the focus shifts to the specific statutes governing the legal system. More specifically the legislation dealing with the attorneys and advocates professions. Subheading 1.2 of this research under chapter one provided the historical account of the role of language in the legal system. Thus, it can be deduced from this preceding discussion that language was legislated, in accordance with the English and Afrikaans language requirements (Bambust *et al*, 2012). The subsequent amendments to the Attorneys Admission Act resulted in the Attorneys Amendment Act 115 of 1993 (Attorneys Amendment Act).

The Attorneys Amendment Act (1993) relates to the laws of admission and practice of attorneys, notaries and conveyancers. Given the inclusion of language requirements during Apartheid, I was under the presumption that the multitude of amendments would result in the removal of the English and Afrikaans language requirements, and to be replaced with the 'democratic' linguistic requirements in giving effect to Section 6 of the Constitution, representative of the nine official African languages.

Chapter 1, Sections 2 to 24 of the Attorneys Amendment Act (1993) concerns the qualifications, admissions and removal from the roll. In perusing these provisions, no language requirements for admission to the roll are necessary as apparent from Sections 4 and 15. 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, is of relevance given the absent language requirements appearing from the requirements for inception into the articles programme. An issue arises at this point given that there is an expectation as expressed above that the Apartheid legislative language requirements would be removed or reflect more broadly the 'new' constitutionally recognised official languages.

A further issue or question which arose was whether this position adversely affected the broader citizenry when accessing the legal system, in terms of communicating with their legal practitioners? In turn, the question raises further points to whether in fact a client has the right to communicate with their legal practitioner in a language they fully understand. Specifically, whether Section 35(3)(k) of the Constitution extends to communication between clients and their legal representatives. Furthermore does the legal system in fact provide an interpretational right in practice and a language of choice right in theory? Simply put, should there be a differentiation between theory and practice? It is my opinion that these questions should not be limited to an accused person in the criminal justice system. A complainant is also required to engage with the prosecutor discharging the onus. For example how practical is it for a monolingual English speaking prosecutor in a province where the majority of persons speak an African language, to be expected to fully comprehend the complainant's factual explanations of the event(a) in question? The question then arises as to whether, the complainant is being linguistically prejudiced? This impacts in my opinion on what level of substantive justice the legal system is delivering.

4.7 The legislative language requirements for Advocates

The Admission of Advocates Amendment Act, 55 of 1994 (Advocates Amendment Act) is aimed at amending the Admission of Advocates Act, 74 of 1964. At the onset cognisance must be taken of the dates at which the legislation was enacted, namely 1964 and 1994. Both of these dates are of significance. The Advocates Act (1964) represents the Apartheid legislative position, reflecting the official languages at the time, namely English and Afrikaans. The question which arises is whether or not the Advocates Amendment Act (1994) revised the linguistic position, to reflect the provisions of Section 6 of the Constitution. Moreover whether the proposed amendments provided a more inclusive framework, in the wake of charting a new legal discourse grounded on the newly formed democracy as it was then.

In examining the Advocates Amendment Act (1994), I found the purpose thereof is 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.

The purpose of the Advocates Amendment Act (1994) removes the Latin language requirements for admission to the profession. Contradictory however is the maintenance of the English and or Afrikaans requirements. These requirements were only removed at a later date, however remained in place after the enactment of the Constitution. The question and argument needs to engage with the fact that the Apartheid official languages were maintained with no mention of the inclusion or even incremental inclusion of any of the nine African languages conferred with official status. More specifically, the aforementioned is to be discussed in assessing the impact thereof on advocates entering the profession. One needs to question specifically whether the amendments reflect the linguistic demographics of the Republic. The same questions raised with regard to the Attorneys Amendment Act (1993) are of relevance to the advocates' profession.

The questions raised regarding both the Attorneys Amendment Act (1993) and the Admission of Advocates Amendment Act (1994) relates to the discussion on transformation. Thus, goals

one, two and five as indicated in chapter one are linked. The issue regarding whether or not there is a distinction between theory and practice is explored further within the discussions on the relevant case law.

4.8 The language requirements for judicial officers

The appointment of judicial officers is governed by Section 174 of the Constitution. Subsections (1) and (2) are of relevance to the thesis at hand. These provisions state the following:

- (1) Any appropriately qualified woman or man who is a fit and proper person may 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.

Subsection (1) refers to an appropriately qualified woman or man; but does the provision take into account linguistically qualified persons, in order to give sufficient effect to the constitutional language provisions? In essence, it is a subjective provision, which requires further engagement. Subsection (2) interestingly makes specific mention of the need to represent the racial and gender demographics of the Republic when appointing judicial officers. It is interesting in the sense that the language demographics of persons are not included. The question arising is whether the constitutional drafters did not view language as an important characteristic of transformation as opposed to race and gender.

Section 174(1) and (2) by no means specifically excludes the inclusion of language in assessing whether or not judicial officers are appropriately qualified. In fact, Section 180 of the Constitution concerned with 'other matters concerning administration of justice' provides that:

National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including-

- (a) training programmes for judicial officers;

Section 180 of the Constitution is important for two reasons. Firstly, it substantiates the point that Section 174 of the Constitution can be extended to include language through legislative

means. Secondly, Section 180 is discussed in chapter five of this thesis as well as chapter six, which deals with possible legal reform measures and recommendations.

The current legislation regarding the appointment of judicial officers, namely the Judicial Service Commission Act 9 of 1994 (JSC Act) does not refer to any linguistic requirements for judicial officers.

4.9 The recognition and use of language in the Magistrates Courts

The focus of the discussion turns to the legislative provisions regulating the use of language in the various courts. As explained above there are lower courts and higher courts. This is reflected in the legislation. This is important given that the attorneys and advocates practice within these courts where language is central to communicating.

Section 6 of the Magistrates' Courts Act (1944) as per the amendments deals with the medium to be employed in proceedings, and reads accordingly:

(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 of the Magistrates' Courts Act (1944) presents several points of discussion. Subsection (1) by referring to 'either of the official languages' refers to English and Afrikaans (Lubbe, 2008: 379). This reflects the exclusionary approach of the legislation, which has not been amended in accordance with the constitutional provisions of elevating the status and use of African languages, while ensuring discriminatory redress. Subsection (1) raises a further issue in that it prescribes the language of record is curtailed to English and Afrikaans. The question then arises as to whether or not a case can be heard in an African language and whether in fact the record can be recorded in an African language. These questions are addressed in the case law discussion, in this chapter below as well as in chapter

five of this thesis, with specific reference to the case of *State v Damoyi* (2004). These questions subsequently raise the issue surrounding the costs in transcribing the record into English as opposed to the costs of conducting a trial in its entirety in an African language.

Subsection (2) only applies to criminal cases, as opposed to subsection (1) which broadly refers to proceedings, not limiting the scope to civil or criminal proceedings. Subsection (2) can be interpreted in the sense of foregrounding the right to a fair trial, where the onus is heightened to beyond a reasonable doubt. The discretion employed in the phrase "... in the opinion of the court..." of subsection (2) is questionable, as no specific directives are given and ultimately is subjective in nature. Subsection (2) raises the question if the court is in fact equipped to determine an accused's linguistic competency. Is the provision inferring that all Magistrates have the necessary linguistic knowledge and skills to determine 'linguistic competency'? Furthermore, are there levels of competency, which the court ascribes to in their determination? Simply put, is there a yardstick, which can be applied to all cases regardless of the differing facts of each case? These questions are important as the interpretation of this phrase, ultimately affects a person's language rights and in doing so, may provide either a purposive or restrictive interpretation thereof.

Subsection (2) gives rise to the issue regarding a theoretical right as opposed to a practical right, where it is questioned if the translation of evidence imparted in a 'non' official language is in fact an alternative right? This issue is explicated in chapter five with reference to case law. This discussion is enhanced further through analytical engagement by Yekiso J (Interview Appendix F, 2016).

Another issue which resurfaces from subsection (2) is the meaning of the word 'official'. As with Section 6 of the Constitution the word needs to be understood in greater depth as Lourens (2012) explained. It must be noted however that the use of the term does in fact convey an elevated meaning of priority. Thus, is the meaning conveyed in subsection (2) the same meaning conveyed through Section 6 of the Constitution? If so, there is a clear disjuncture between what languages are 'actually' conferred with official status.

4.10 The linguistic legislative framework of the Superior Courts

The statute governing proceedings in the High Courts is the Superior Courts Act, 10 of 2013. The Superior Courts Act (2013) makes no reference to the languages which can be used in proceedings. The Uniform Rules of Court (Uniform Rules) (2013) regulates the conduct of

the proceedings of the several provincial and local divisions of the High Courts of South Africa. Rules 59; 60 and 61 are the language rules for court. Rule 59 provides qualification directives for sworn translators and the role of such translators in the court system. The purpose of Rule 59 is for the translation of documents to take place according to Rule 60. Rule 60 (1) permits a document in any of the official languages or any other languages. What is significant about this Rule is the linguistic inclusivity displayed, where parties before court are no longer restricted to two official languages, namely English and Afrikaans, thus the inclusion of African languages. Furthermore, based on the contents of the Rule the translation costs are borne by the court.

Rule 60(1) comprises of the provisions relating to the interpretation of evidence and reads accordingly:

- (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.

As noted above the Uniform Rules of Court (2013) only apply to High Courts in South Africa, as such the Supreme Court of Appeal (SCA) has a separate set of rules, namely the rules regulating the conduct of the proceedings of the Supreme Court of Appeal of South Africa (2013). These Rules do not make reference to the regulation of the use of language in proceedings as with the Uniform Rules of Court (2013).

The Constitutional Court Rules (2003) includes Rule 25 on translations. This is the only Rule making reference to language and reads as follows:

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.

Firstly, from Rule 25 it can be seen that the translation is not limited to a document only, but includes the record or parts of the record as well. Secondly, the Rule only applies where such documentation or the record is in an official language, thus the eleven official languages listed in Section 6(1) of the Constitution, advanced above. This is an inclusive provision as

the nine official African languages are recognised. Thirdly, it must however be noted there is no indication as to what the word “understand” means. Simply put, there is no criteria established and cited in Rule 25, indicating whether a minimum threshold of linguistic competency satisfies the meaning of the word “understand”. Fourthly, the rule relies on the translation services of a High Court translator, creating a linkage between the Uniform Rules of Court (2013) and the Constitutional Court Rules (2003).

In line with this linkage Rule 29 of the Constitutional Court Rules (2003) is the application of certain rules of the Uniform Rules (2013). The rule states that the following Uniform Rules listed shall apply with modifications where necessary to the proceedings in the Constitutional Court. Included in this list is Uniform Rules 59 and 61, discussed above. This illustrates why Rule 25 of the Constitutional Court Rules (2003) makes reference to a High Court Translator.

4.11 Language Policies in the South African legal system: Post-Apartheid

In accordance with the discussions in chapter two on the role of language policies. In particular the importance of a policy in giving effect to legislation within practical situations and the various stages of language planning outlined by Cooper (1989) two language policies are of importance to the thesis at hand. The discussion pertaining to opportunity planning in chapter two of this thesis must be borne in mind in relation to the two policies below. The first is the Department of Justice and Constitutional Development’s draft language policy (2015). The Department of Justice’s language policy (2015) was drafted in compliance with the provisions of the Languages Act (2012) which, as stated above mandates all national departments to draft a language policy. The Department of Justice’s language policy (2015) provides for compliance with Section 6 of the Constitution. Section 9 of the Department of Justice’s language policy (2015), dealing with “language use in court proceedings (language of court record)”, is relevant to the thesis at hand and reads as follows:

9.1 The use of official languages in court proceedings including court interpretation services, court process, documents and recordings of court proceedings shall be regulated by rules of court or any other applicable legislation.

Based on the excerpt of Section 9 above, it is clear that the provision and in effect the Department of Justice’s language policy (2015) does not regulate the use of African languages within the legal system, as expected, given the mandate of the Languages Act

(2012). More specifically, it fails to clarify the linguistic position, which is legislated in the legal framework presented above. Section 9 in fact, delegates the use of official languages to the court rules and what is referred to as applicable legislation, in this instance the legislative framework. The legislative framework perpetuates the Apartheid linguistic legislative position.

The constitutionality of Section 9 of the Department of Justice's language policy (2015) is in question. Simply put, does not comply with the provisions of Section 6 of the Constitution, which calls for all eleven languages to enjoy parity of esteem and be treated equitably. The Department of Justice's language policy (2015) makes no further reference to the use of language within the court system. There are no linguistic requirements for legal practitioners nor is there an initiative created for the vocation specific language training of legal practitioners. This raises the question of what the actual purpose of the Department of Justice's language policy (2015) is. It appears as though the policy was drafted to comply with the Languages Act (2012) in so far as it mandates the drafting of language policies for each national department.

The Department of Justice's language policy (2015) applies to the legal system and not to the South African Police Service (SAPS). The reason why the SAPS is applicable, is that the criminal justice system begins with the SAPS (Docrat *et al*, 2017: 12). As with the Department of Justice's language policy (2015) the SAPS language policy (2015) complies with the mandate issued through the Languages Act (2012), obligating each national department to draft and adopt a language policy.

According to Section 2 of the SAPS language policy (2015) the purpose is to establish an "... acceptable and equitable operational language dispensation that is economically feasible for the service." The policy makes constant reference to 'functional multilingualism', defined in Section 4 as the use of two or more languages for 'specific' tasks. The SAPS language policy (2015) however reaffirms the dominance of English within the SAPS structure, citing the use of African languages, where practically and economically feasible to do so. The SAPS language policy (2015) qualifies the use of an African language, by stating that a 'Language Management Unit', which dispatches linguistically equipped persons to the various police stations when required will be established. It can be questioned, if this will not result in a time delay during the investigative stages, particularly at the onset when statements are being given by non mother tongue English speakers. Furthermore there is a time delay that is

created when relying on the service, bringing into question whether or not this is then practicable. Simply put, the accused and or complainant would be choosing between their right to have a case investigated, or enforce their language right. The issues are not limited to complainants or accused persons, where the police personnel in effect can be placed in an unfortunate position of recording the facts incorrectly, due to a language barrier. The effects thereof in terms of the SAPS's negligence and culpability is undoubtedly a resultant effect and is explored further in the discussion pertaining to the case law in this chapter as well as in chapter five, with reference to the case of *State v Sikhafungana* (2012).

Yet again there is a difference between the right in theory as opposed to the right in practice. The importance of language in the criminal justice and the legal system more broadly is highlighted above, and how at the onset language has the power to include or exclude persons. In attesting to this point, Ralarala (2012: 56) contextualised this important yet contentious issue in the SAPS by stating that:

the actual translation of a police-sworn statement as a reconstruction of the complainant's oral narrative has serious, far-reaching implications when such translation involves witnesses that come from different cultural and linguistic backgrounds, not only for the complainant and the perpetrator but also for law enforcement personnel or police officers who might find it difficult to gather evidence as a result of language barriers (Ralarala, 2012: 56).

4.12 Language policies for the SALS and GCB

Further to the legislation governing the professions, there are no language requirements in the form of language policies for both the South African Law Society (SALS) and the General Council of the Bar (GCB). It must be noted however, that in November 2016 a report was released pertaining to the review of the attorneys' profession. Summarily it highlights the state of the attorneys' profession in relation to briefing patterns, and demographics in terms of a more racial and gender diverse profession. There is reference to transformational issues, however this does not include language and is limited to race and gender (Thebe, 2016).

4.13 South Africa's language demographics: A statistical analysis

The legislation and policies above clearly focus on English within the legal system. The elevation of English through the adoption of legislation and policies needs to be assessed against the language demographics of the Republic. The language demographics are

presented in this chapter and discussed in chapter five of this thesis. As noted above, Section 6 of the Constitution advanced the need for discriminatory redress. Specifically linguistic redress, where African languages are elevated in status, to the point of achieving equitability and parity of esteem alongside English and Afrikaans. This point relates to the role of language planning set out in chapter two of this thesis, specifically the statement by Eastman (1992: 96), that language planning is aimed at solving language problems. Therefore the legislation and policy frameworks of the legal system needs to place African languages alongside English and Afrikaans, to reflect the South African language demographics.

The focus shifts to the national census and the role it plays in presenting the demographics of the Republic. A population census according to Statistics South Africa (2016) was defined by the United Nations 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.

A population census is conducted every ten years (Statistics South Africa, 2016). The census, comprises of data collected from all households in South Africa as well as from individuals (Statistics South Africa, 2016). All persons are requested to complete the relevant forms provided by census officials. The last census was conducted in 2011. 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)

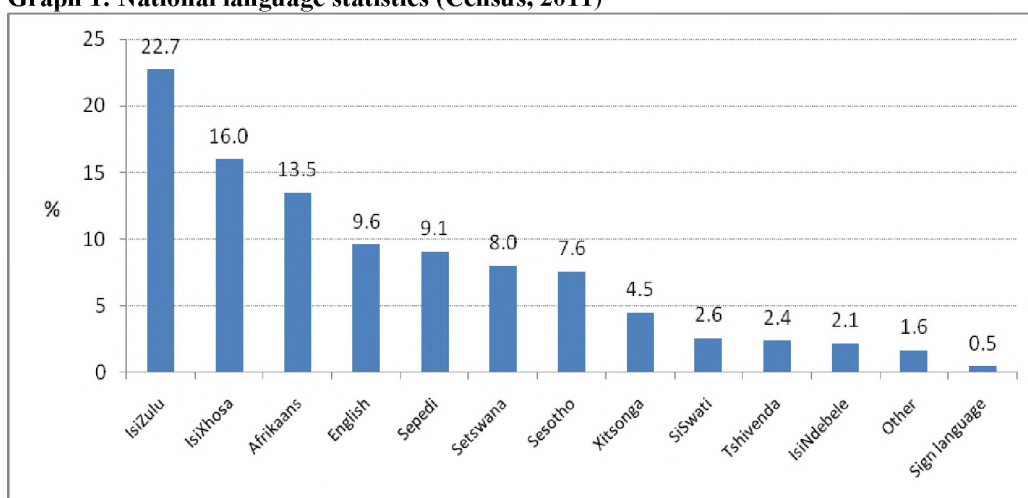


Table 1: National language demographics of South Africa (Census, 2011)

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, sign language and other languages. It is evident from these percentages that speakers of African official languages are the majority, whereas only 9.6 percent of the population speaks English as their mother tongue and 13.5 percent speak Afrikaans as their mother tongue.

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. It is however important to take cognisance of what the provincial language demographics are in determining whether or not there is one dominant African language in each province, and contrast this percentage against the number of English and Afrikaans speakers in the various provinces. 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. Thus, a minority of speakers in the aforementioned provinces speak English and Afrikaans 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. Simply put, the percentage of African language speakers outweighs the percentage of English and Afrikaans speakers, with a combined percentage of 10.3.

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. Cognisance must however be taken of the fact that a considerably large percentage of persons in these two provinces speak an African language, namely Setswana with 33.1 percent and isiXhosa with 24.7 percent. 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, which have a minority of English mother tongue speakers.

The purpose of the statistics represented in table 1, is to illustrate that the majority of persons in seven out of the nine provinces speak an African language as their mother tongue. The significance of this in relation to the research at hand is to substantiate a critique levelled at the English and Afrikaans status quo adopted in the legal system, where English and or Afrikaans remains the languages of record. Simply put, how can the language of record in all courts, be English and or Afrikaans only, when there is a smaller percentage of English and Afrikaans mother tongue speakers in each province? Yet again, it is based on what is seen as equitable and practicable in the circumstances. However the language demographics should not be overlooked.

Against the backdrop of the provincial language statistics, represented above, the geographical positioning of the courts in each province needs to be considered. Geographical positioning of the courts is part of what is referred to as jurisdiction (Pete *et al*, 2012: 35). In determining the jurisdiction of the court a number of factors are taken into account, namely the value of the claim, specifically for civil cases; the nature of the claim, this factor determines whether a specialised court is needed for instance the Equality Court or the Labour Court; and the area to which the claim is linked (Pete *et al*, 2012: 36).

For criminal cases, it is most probable that the Magistrates Courts will be the courts of first instance, or first appearance of the accused person. The hierarchy of courts is determined in Section 166 of the Constitution. Descending in the following order: the Constitutional Court (CC); the Supreme Court of Appeal (SCA); High Courts; Magistrates Courts; and any other court established by an Act of Parliament, which has similar status to a High Court or Magistrates Court (Theophilopoulos *et al*, 2012: 8). Comprehending the hierarchal structure of the courts, is important for the proceeding discussion on relevant case law, concerning language, as the doctrine of *stare decisis*, referred to as the doctrine of precedent, is of relevance. The doctrine of precedent relates to which court is bound by a previous decision (Theophilopoulos *et al*, 2012: 8). This has implications on the development and interpretation of the law, which will become more apparent in the following section of this chapter.

The CC has its seat in Johannesburg in Gauteng (Theophilopoulos *et al*, 2012: 10). It is the final court of appeal. It is concerned with cases of a constitutional nature. The procedure is clearly outlined in the Constitutional Court Rules, briefly referred to above. The CC hears appeals from the SCA and High Courts. The CC may be petitioned directly to hear a matter where it is in the interests of justice to do so (Theophilopoulos *et al*, 2012: 10).

The SCA is seated in Bloemfontein in the Free State province (Theophilopoulos *et al*, 2012: 10). It is a court of appeal and not a court of first instance. The SCA may hear appeals pertaining to both civil and criminal cases (Theophilopoulos *et al*, 2012: 10).

The commencement of the Superior Courts Act (2013), resulted in the renaming of the divisions of High Court. The seat of the Eastern Cape Division is in Grahamstown. The Eastern Cape also has three local divisions, situated in Bhisho, Mthatha and Port Elizabeth. The Free State Province has one division seated in Bloemfontein. Gauteng Province has a division in Pretoria and a local division in Johannesburg. KwaZulu-Natal has a division in Pietermaritzburg and a local division in Durban. Limpopo province has a division in Polokwane and a local division in Thohoyandou. Mpumalanga has only one division seated in Nelspruit. The Northern Cape Province has one division in Kimberley. The North West division is seated in Mahikeng. The Western Cape has a division in Cape Town.

The Magistrates Courts are in existence at two distinctive levels, namely district and regional level. According to Theophilopoulos *et al* (2012: 13) there are approximately five hundred district Magistrates Courts in South Africa. Each district court has jurisdiction over a

particular geographical area. The district courts may hear cases of both a civil and criminal nature.

Regional Magistrates Courts, prior to the enactment of the Regional Courts Amendment Act 31 of 2008 and the Magistrates Court Amendment Act 19 of 2010, only heard criminal cases (Theophilopoulos *et al*, 2012: 13). Since 2010 the regional courts now hear civil cases as well. The regional Magistrates courts exist in larger geographical areas.

Specialist courts are mentioned, however the Small Claims Courts, requires a brief discussion, as these courts are in a sense community based. The Small Claims Court allows persons to bring a claim against another person or a juristic entity but not the state, where such a claim does not exceed the monetary value of twelve thousand rand (Pete *et al*, 2012: 37). The court operates inquisitorially, without legal representation. The presiding officer is a legal practitioner who practices law within the geographical area in which the Small Claims Court operates.

The discussion pertaining to the geographical position of the various courts, is not only important in understanding the doctrine of precedent for further discussions below, but for the primary purpose of illustrating that in each province persons are able to access the various courts. A linkage can be created between the purpose of the statistics in graph 1 and table 1 above, specifically table 1 and the geographical positioning of the various courts. Simply put, it would be practical if a court geographically positioned in the Eastern Cape Province for example, is linguistically accessible to isiXhosa speakers, given that 78.8 percent of the province speaks isiXhosa as their mother tongue. This can be supported further where for example an accused is relying upon their right in Section 35(3)(k) of the Constitution. This is discussed with reference to specific case law, presented in this chapter and discussed in chapter five of thesis. There is a need to assess the language demographics of each district and metro of each municipality.

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	eThekweni 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	uMgungundlovu District Municipality	uMkhanyakude 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 a distinctive pattern in the language statistics, where in each district the African language, namely isiXhosa, is spoken by the majority of persons. Table 3 provides similar statistics to the Eastern Cape, where Sesotho, is spoken in every district of the province. More importantly, Sesotho is the primary African language, with the majority of persons speaking Sesotho as their mother tongue. 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. Table 5 presents statistics, where the percentage of Setswana mother tongue speakers outnumbers 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, do not present 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. This can be contrasted to the remaining three district municipalities, namely Namakwa, Pixley ka Seme and ZF Mgcawu, where Afrikaans is spoken by the majority of residents. Similarly, the districts and metropolitans in the Western Cape Province, appear from table 7 to have three dominant languages, namely Afrikaans, isiXhosa and English. These statistics support the fact that the language demographics comprising of two equally dominant languages, might have in this instance supported the legislative position of having English and or Afrikaans as the language of record, however the isiXhosa mother tongue speakers are excluded on this basis.

Table 6, pertaining to the Northern Cape, illustrates that in each district there is one dominant language except in the Frances Baard district, where both Afrikaans and Setswana are almost equally poised in terms of the percentage of speakers. Thus the court(s) in this district would need to be linguistically aligned with these demographics, where both Afrikaans and Setswana speakers, are treated in a linguistically fair manner, where English is not adopted as an alternative. The question thus arises, if it would not be practicable in the circumstances to have Cape Town Metropolitan adopting all three languages, given that the Western Cape High Court is seated in the Metropolitan. Thus the courts would be in a position to give effective meaning to an accused person's 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, is similar to the Western Cape and Northern Cape provinces, where there is no single language spoken by the majority of persons. For the Magistrates Courts, located in each district municipality, it would surely be practical in the circumstances for these courts to accommodate the language spoken by the majority in each district. 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.

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.

4.14 The demographics of the South African legal profession

The discussion above brings forth the data pertaining to the legal professionals, namely attorneys, advocates, magistrates and judges, as the courts cannot be in a position to give effect to the languages within the specific district where the professionals in the courts are monolingual or unable to speak the African language(s) of the province. It is must also be borne in mind that throughout this chapter reference has been made to the need for broad linguistic representation of the Republic and how this is seen as transformative. There is therefore a link between language and race within this transformational process, a point which is examined in chapter five of this thesis.

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

Tables 11 and 12 above encompasses racial statistics pertaining to practicing attorneys and advocates in South Africa. Table 11 groups together the attorneys per law society. As indicated above, each law society comprises of a number of provinces. It can be deduced from table 11 that 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.

Similarly table 12 above, encapsulating the racial demographics of practicing advocates at each bar, across the various provinces, illustrates an overwhelming majority of white advocates at each bar, with the exception of the Transkei and Bisho bars, in the Eastern Cape.

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 in comparison to the statistics pertaining to the practising attorneys and advocates. The statistics pertaining to the racial demographics of the Eastern Cape local divisions, seated in Port Elizabeth and Bisho respectively, remain a concern with a majority of white judges.

Table 14: Racial statistics of magistrates in South Africa at April 2015 (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. It must be noted that the statistics housed therein are not grouped according to the geographical areas of each province, given the number of Magistrates Courts in each district. The statistics above gives rise to the relationship between race and language within the transformation process. This point is discussed in chapter five of this thesis, with reference to the scholarly works advanced in chapter two, concerning transformation.

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. These recent statistics were compiled in a language survey by Legal Aid South Africa. 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 important to note from these statistics is the fact that English is not widely spoken in courts by litigants in both the civil and criminal systems. This point must be borne in mind in relation to a discussion pertaining to the language of record in South African High Courts, discussed in chapter five of this thesis. Moreover, that in both instances two African languages are the dominant languages alongside Afrikaans. The fact that Afrikaans is the second largest language spoken in courts is also discussed in chapter five with relation to the current position concerning the official languages of record.

The chapter has made reference to accused persons being conferred with an interpretational right as an alternative. Moreover, I have to a certain extent discussed the literature pertaining to how a court determines linguistic competency of a litigant and whether or not the court has the expertise to do so. This is discussed further in this chapter, with regard to the relevant case law. Simply put, there is a need to determine the English proficiency of litigants in criminal and civil cases. Tables 17 and 18 below encompass these statistics.

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 63.1 percent of litigants English proficiency was satisfactory, reflecting a positive outcome. Through further analysis from a provincial perspective, the majority of litigants in the Eastern Cape do not understand English, with the level of proficiency recorded at 56.4 percent. Exacerbating this is the fact that the overwhelming majority of litigants in the Eastern Cape cannot speak, read or write English, with the statistics recorded at 61.2 percent and 62.6 percent respectively. Similar to the Eastern Cape, litigants in KwaZulu-Natal have poor proficiency in English, recorded at 41 percent in understanding, 46.5 percent for speaking and 50 percent for reading and 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. This in my opinion however reaffirms the position that the majority of litigants in criminal and civil cases are not fully proficient in English.

The statistics presented in this section of the chapter, forms an important part of this thesis, in providing data that supports an argument for the elevation of African languages in the legal system. The statistics inform the discussions in chapter five as well as the conclusions and recommendations of this thesis in chapter six.

4.15 Case law

With the theoretical framework being advanced above, the practical implementation thereof is discussed below, specifically the relevant case law, similarly to the Canadian model discussed in chapter three. It must however be noted that the discussions below do not extend to the courts' reasoning and orders being critiqued. The discussions set out the legal issues relating to the language provisions of both the Constitution and legislative frameworks. In addition to the cases below concerning the practical implementation of Section 35(3)(k) of the Constitution, the discussions extend to the extraction of the legal principles pertaining to Section 6(2) of the Magistrates' Courts Act (1944). The primary purpose of this section is to establish the parameters of both the right enshrined in Section 35(3)(k) of the Constitution and Section 6(2) of the Magistrates' Courts Act (1944). What is important to note is that this section focuses on the development of the law, taking cognisance of the earlier explained doctrine of precedent.

In the case of *State v Lesaena* (1993) the facts were that the accused was convicted and sentenced in the court *a quo*, for contravening the Road Traffic Act 29 of 1989. During trial stage the accused was not legally represented, thus he represented himself. The accused appealed both conviction and sentence on the grounds that his right to a fair trial was infringed upon (1993: 264g). More specifically the grounds for the appeal related to the fact that, according to the accused he was not permitted by the Magistrate in the court *a quo* to conduct his defence in a language of his choice, namely Afrikaans. During trial proceedings in the court *a quo* the accused commenced presenting his case in Afrikaans, the language of his choice, in which he cross examined the witnesses. What is important to note is that during this stage, the Magistrate stopped the accused from presenting his evidence in Afrikaans and cross examining the witnesses in Afrikaans (1993: 264-265). It was in this light that the accused based his appeal on the fact that his right to a fair trial had been infringed upon.

On appeal, the court accordingly engaged with the record of the court *a quo* in which it was found that the accused had a reasonable linguistic Afrikaans competency, and thus it was the language of his choice in which to present his evidence. The court held that the centrality of the appeal hinged on the right to a fair trial. Furthermore, in relation to the facts of the case, the court held that in this instance 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.

In accordance with this excerpt from the judgment, the court 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. The parameter of the right to a fair trial is extended to include the right to interpretation, illustrating the centrality of language as part of the right to a fair trial, where the accused's language of choice is not an official language of court (1993: 265).

Consequently, on appeal the court held that with regard to the procedural irregularity, a 'fundamental injustice' had occurred. The appeal was thus successful and the court ordered

that both conviction and sentence be set aside (1993: 265). Van Dyk J concurred in the judgment and order by Mohamed J (1993).

The points of importance to note from the *Lesaena* (1993) judgment is that the right to have proceedings conducted in a language of choice is central to ensuring that the right to a fair trial is not infringed upon. Furthermore, that the language right includes the right to interpretation. The importance of language within a trial is explicitly highlighted where the court regards a transgression of the right as a severe infringement resulting in a procedural irregularity.

The points raised in the *Lesaena* (1993) case were subsequently in contention in the case of *State v Ndala* (1996). The case was a special review, heard in terms of Section 304(4) of the Criminal Procedure Act 51 of 1977 (CPA). The special review concerned Section 25(3)(i) of the Interim Constitution Act 200 of 1993, which currently is Section 35(3)(k) of the Constitution. Briefly, the facts emanating from the court *a quo*, were that the accused did not understand either of the official languages of court, namely English and Afrikaans. Thus, an interpreter was deployed, in terms of Section 25(3)(i) of the Interim Constitution, which is similar to Section 35(3)(k) of the Constitution, providing that an interpreter may be utilised in giving effective meaning to the right. The accused had testified in his defence, following which an adjournment occurred. During the adjournment the Magistrate was alerted to the fact that the interpreter, who was privy to the proceedings had not been sworn in as is required, hence the special review in terms of Section 304(4) of the CPA (1977).

The court held that the accused's right to a fair trial, which included the right to be tried in a language he or she understands, was extended to having the proceedings interpreted to him or her. The court drew a parallel between the right in Section 35(3)(k) and Section 6(2) of the Magistrates' Courts Act (1944). The court emphasised the point that Section 6(2) of the Magistrates' Courts Act (1944) conferred a duty on the 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). In light of this, the court held that where the Magistrate fails in their duty to ensure a competent interpreter is before court, a gross irregularity occurs. The Court held further that the Magistrate's attempted remedy for the irregularity of proceedings, in the form of interpreting after the evidence had been led, could not in any

instance remedy the proceedings. Therefore, the court ordered that the proceedings of the court *a quo* be set aside.

The *Ndala* case (1996) brings to the fore the relationship between the constitutional language provisions and the language provisions contained in the Magistrates' Courts Act (1944). In doing so the *Ndala* (1996) case further highlights the important duty conferred upon on the Magistrate to the case, where linguistic awareness is vitally important within the broader framework of a fair trial, and substantive justice.

The important role of the Magistrate and judicial officers more broadly as discussed above, came to the fore in the case of *State v Matomela* (1998). The court *a quo* heard the entire case in isiXhosa. On automatic review Tshabalala J (as he was then) enquired from the Magistrate who presided over trial the following:

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 to the query read 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 provided included the fact that Xhosa was one of the eleven official languages and the judgment thus complied 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).

From the excerpt above, it would appear that the sentiments expressed by Tshabalala J (1998) indicate that legislation be drafted where legal professionals and judicial officers be required to undergo vocation specific language training. This however is what Tshabalala J (1998: 342) had in mind as evidenced from the excerpt below:

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 equitably 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.

Tshabalala J's (1998) reasoning above, is confusing to me given that on the one hand he is stating that all official languages must be treated equitably. However one language, namely English, the language all the judges understand, to be the sole official language of record. This would entail litigants and witnesses relying on interpretation services, even if the judicial officer and court personnel speak their language. There is no definition of what his understanding is of the word 'practical'. This is certainly in my opinion, not practical for accused persons who would have to suffer trial delays nor is it fair for the complainant who is entitled to substantive justice. There seems to be an emphasis placed on what is best for legal professionals and court personnel rather than what is best for the accused upon whom the right in Section 35(3)(k) is conferred. These points are discussed further in chapters five and six of this thesis.

The case of *Mthethwa v De Bruyn No and Another* (1998) concerned an isiZulu speaking accused who had been charged with theft of a motor vehicle, in Vryheid (in KwaZulu-Natal).

The accused applied through his attorney for his trial to be conducted in isiZulu, his home language as well as one of the 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 accused argued further that an order be granted for him to be tried in a language of his choice, namely isiZulu. The Applicant apparently understood English, however he wanted to be tried in a language of his choice (Hlophe, 2000: 691).

The court on review heard 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 were able to speak isiZulu as their mother tongue and 35 were either English or Afrikaans speakers (Hlophe, 2000: 691).

Taking the aforementioned statistics into account 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 fact remains that there was and remains a need for a transformative legal system, not only racially, but linguistically. Howard JP's (1998: 338) reasoning above, illustrates that the JP was using English and Afrikaans as a yardstick and if an accused could not comprehend English then interpretation would be provided. Simply put I am of the opinion that Howard JP (1998) in establishing narrow parameters of the right in Section 35(3)(k) through restrictive interpretation acted contrary to the provisions of Section 6 of the Constitution. This is similar to the narrow interpretation adopted by the SCC in the Canadian trilogy of cases, discussed in chapter three of this thesis. Moreover, it is my opinion that the JP did not have the forensic linguistic expertise of determining the degree to which the appellant understood

English. These points are discussed further in chapters five and six. However from the Legal Aid 2016 language survey presented above, proficiency differs based on understanding, speaking, reading and writing.

Furthermore, it is evident from the *Mthethwa* (1998) case that in Howard JP's (1998) view an accused's language right is subject to the linguistic capabilities of the legal system. Furthermore, Howard JP (1998) failed to consider the language statistics in KwaZulu-Natal, comparing this instead to the statistics reflecting the language competency of legal professionals in KwaZulu-Natal. This points to restrictive interpretation with the aim of maintaining the status *quo* and avoiding the need to transform the legal system linguistically to reflect the language demographics of each province and the country as a whole.

In the case of *State v Pienaar* (2000) the accused was convicted of dealing in dagga and was sentenced to a fine of R3000.00 or a two year prison sentence. The accused was an Afrikaans mother tongue speaker who was assigned an English mother tongue legal representative. It is apparent from the facts of the case on review, that due to the language barriers, the accused represented himself. Importantly to note is that the accused informed the Magistrate of the language barrier. The trial proceeded in the court a *quo* without legal representation being assigned to the accused. The primary question on review was whether the accused had been prejudiced, by the absence of legal representation.

The court on review, commenced by examining the content of the right to a fair trial. In doing so the court found the right 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 advanced further that such communication in the accused's mother tongue should take place directly, 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).

With the content of the right advanced, the court proceeded to engage with how this right is implemented within a practical situation, namely a trial. The court explained that the success of the practical implementation of the right was an obligation conferred upon government through Section 35(3)(k) of the Constitution. More specifically according to the court 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 would be in accordance with Section 6 of the Constitution.

Given that there is an obligation on government to ensure the realisation of the right in Section 35(3)(k), the court raised the issue of whether or not the accused had this right when legal representation was provided for by the State? (2000: 145). In answering the question the court engaged with the language demographics pertaining to courts situated in the Northern Cape. The court accordingly found that Afrikaans was the most commonly used language. In addition, Afrikaans was used in 72 percent of cases, in comparison to 1.4 percent of cases in English (2000: 145). The court advanced further that the adopted English status *quo*, was in fact a policy directive of the Department of Justice (2000: 145). In line with this directive, the Department of Justice was appointing English speaking presiding officers and public defence attorneys (2000: 145).

The court explained that the Department of Justice's language of record would have 'phenomenal cost and quality implications' (2000: 145) where sole reliance would be placed on interpreters. The implications would exceed the financial burden due to interpretation, where the court advanced 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. In accordance with this stance, the court held that no interpretation of Section 35(3)(k) of the Constitution 'could restrict that right' (2000: 145). The court was of the view that this was by no means an impractical interpretation. In substantiating their interpretation of Section 35(3)(k), they turned to reaffirm the need for policy, where the obligation falls on government, in particular the Department of Justice to comply with Section 6 of the Constitution (2000: 145-146). This according to the court would entail the languages of the Northern Cape being promoted to enjoy equal status alongside English. The court held that:

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).

In line with reasoning above, the court held that with the accused having a right to a fair trial, it included a right to be tried in Afrikaans, further to being assigned a legal representative who could communicate directly in Afrikaans, or indirectly in exceptional circumstances (2000: 146). The fact that the Magistrate failed in their obligation to explain the aforementioned, resulted in a breach of the right to a fair trial, which in effect resulted in an irregularity in proceedings (2000: 146). Thus, the court ordered that both conviction and sentence be set aside (2000: 146).

The case of *State v Siyotula* (2002) was heard on special review. The precise facts of the case are not of direct relevance to the discussion at hand nor to the broader objectives of this thesis. Therefore, for current purposes, the accused was an isiXhosa mother tongue speaker. The accused's evidence was imparted in isiXhosa, following which eighteen witnesses gave their testimony. Following the evidence being led, the court *a quo* found that the interpreter was not sworn in as per the Magistrates' Courts Rules, namely Rules 68(3) and 68(5). Thus the primary question on review, was whether or not there was an irregularity in the proceedings.

For purposes of the thesis at hand, the legal reasoning and principles are important. Firstly, the court explained that where the trial is not conducted in a language that the accused fully understands or is not interpreted correctly in that language a 'proper' trial has not taken place (2002: 157). The court's point was substantiated by the case of *State v Mafu* (1978). The court in the *Siyotula* case (2002: 158) proceeded to emphasize the fact that 'understand' refers to full comprehension and not partial understanding as held in the case of *State v Ngubane* (1995).

The question thus before the court in every instance, should be whether or not the irregularity produced a 'miscarriage of justice'? (2002: 157). In addition to the facts of each case, the question is answered whereby the court is satisfied "... if the irregularity can be cured without prejudice to the parties" (2002: 158).

The case of *State v Damoyi* (2004) was heard by way of an automatic review in terms of Section 302(1)(a) of the CPA (1977). Briefly, the facts emanating from the court *a quo* were that an isiXhosa mother tongue accused, 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. It was stated that besides unduly delaying the accused right to a fair trial, and the fact that the prosecutor and magistrate spoke isiXhosa proficiently, IsiXhosa was also one of the eleven official languages as well 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).

Against these facts, Yekiso J (2004: 122) at the onset of his judgment, noted that the language issue which evades the courts, has not been resolved since the advent of democracy. Yekiso J (2004: 122) continued in this light by making the following observation in relation to the facts of the case at hand:

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.

With regard to the concept of administration of justice in the excerpt above, Yekiso J (2004: 123) was satisfied that based on the facts of the case before him that 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) subsequently queried with the DPP what the Department of Justice’s language policy is regarding the use of an official language other than English and or Afrikaans being used as a language of record. In response the DPP stated that no language policy existed and that the languages of record were English and Afrikaans. In addition the DPP 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) stated the aforementioned was contrary to the provisions of Section 6(2) and (4) read together with Section 35(3)(k) of the Constitution. Indeed in the case of *Pienaar*

(2000) the court was not in unfamiliar territory, as the Department of Justice's language policy in the Northern Cape provides for Afrikaans as language of record. In addition Section 6 of the Magistrates' Courts Act (1944) provides that a trial can be conducted in Afrikaans.

In conclusion 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. As with the case of *State v Matomela* (1998) the dominance of English remains, as the language of record, contrary to Section 6 of the Constitution advancing the elevation of African languages. Instead, a 'super official language' is created.

In the case of *State v Manzini* (2007) the accused was an isiZulu speaker, however based on the fact that the official language of the court was English the trial was conducted in English with the assistance of an interpreter (2007: 107), as provided for in Section 35(3)(k) of the Constitution. During sentencing the accused alleged that his evidence was not interpreted correctly. The Magistrate accordingly referred 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). After engaging with the observations in the report by the Chief interpreter, 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 Schwartzman 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). More specifically affecting the outcome of the case, per conviction. In light of this reasoning, the court held that the materiality of the interpretational defects adversely affected proceedings. The Magistrate failed to recognise the importance of language as part of the right to a fair trial. Thus the court held that the constitutional right in Section 35(3)(k) of the Constitution had been adversely affected, thereby ordering that the appeal succeed and conviction and sentence be set aside (2007: 110).

The legal principles extracted from the cases above, illustrates that in one instance there was a reference made to a previous decision namely in the *Damoyi* case (2004) where reference was made to the *Pienaar* (2000) and *Matomela* (1998) judgments. This is engaged with in

chapter five, where I have unpacked the development in the law and assess whether in fact there is a yardstick being applied by the courts in determining when the right in Section 35(3)(k) is implemented fully. In doing so, chapter five includes a discussion on the effects of the legal principles in establishing the parameters of the right and whether in fact the right has clearly defined parameters which can be applied.

4.16 Conclusion

The chapter in setting out the data, highlighted many issues and questions that are discussed below in the remainder of this thesis. The chapter importantly traced the development of the law relating to the status and use of language in the South African legal system. In doing so it highlights that, although politically there was a transition from the Apartheid regime to democracy, the legal frameworks to a large extent perpetuated the Apartheid era thinking. This points to the lack of linguistic transformation in the South African legal system. Specifically the status and the role of African languages, which from the data in this chapter appears not to have made significant gains in elevation of status and use. The case law, presented resembles the Canadian model in two ways. Firstly, where the courts acknowledged the importance of language, but adopted restrictive interpretation in most instances. Secondly, where similar to the Canadian model, there are cases, such as that of *Pienaar* (2000) where purposive interpretation is adopted. The chapter furthermore highlights that the South African language demographics are not represented in the legal system. Legal professionals are not linguistically competent as evidenced from the preliminary enquiries of the court in the cases of *Pienaar* (2000) and *Damoyi* (2004). This in turn has an effect on determining the language of record. The points discussed in this chapter provides an overview of the practical situation. This position is contrasted in chapter five, and cross-referenced to the theoretical position presented in chapter two of this thesis.

CHAPTER FIVE

DATA ANALYSIS

5.1 Introduction

The previous chapter provided an overview of the entire legal framework concerning language and more specifically the role of language in the legal system. What in my opinion is evident from the preceding chapter is that there is a disjuncture between the constitutional language framework and the legislative language framework of the South African legal system. This chapter provides a critique of the data in chapter four in relation to the theoretical backdrop of chapters one, two and three of this thesis.

5.2 The unclear constitutional language provisions

The provisions of Section 6 of the Constitution, quoted in full in chapter four, begins with subsection (1) conferring official status on all eleven languages, a significant change in favour of rectifying the past discrimination. Subsection (2) illustrates the importance of conferring official status on the nine African languages alongside English and Afrikaans, in that a positive obligation is placed on the state to take practical and positive measures to elevate the status and use of these languages. du Plessis and Pretorius (2000: 507) advanced that Section 6 comprises of three distinct parts. The first comprising Section 6(1) declares eleven languages official and alphabetises the listing thereof, not in terms of priority and status. The second part, Sections 6(2) and 6(4) sets out the normative guidelines for the drafting and enactment of language policies. The third part, Section 6(3), is obligatory in nature. To this effect national, provincial and municipal governments are instructed on how to select the appropriate official languages for the specific purposes (du Plessis and Pretorius, 2000: 507).

Perry (2004) unpacks Section 6, through a critical lens. It is argued that Section 6 is hierarchically structured where subsection (2) would override subsection (3) and so forth. It is my understanding then, that the analysis of Section 6 as with any other provision, legislation or policy is dependent on the method of interpretation employed. This point has been raised in the literature review in chapter two, advancing the different methods of interpretation. My understanding finds resonance in Perry's (2004) further analysis, that Section 6 be interpreted as providing a directive, which only amounts to symbolic gesturing. Alternatively where the unequal treatment of one language in favour of another would be interpreted as a breach of

the constitutional duties espoused in Section 6. I have inferred throughout this thesis that Section 6 is aspirational in nature, hence the subheading I have provided for this part of the discussion. Simply put, I would then be adopting the first method of interpretation, where Perry (2004: 132) refers to the provisions amounting to nothing but a symbolic gesture.

According to de Vos (Interview Appendix B, 2017) Section 6 is ambiguous, given that no definitions are provided for the terms ‘official’; ‘practicability’; and ‘positive measures’. This in turn weakens the enforceability of the provisions and results in discretionary implementation (de Vos, Interview Appendix B 2017). I probed de Vos (Interview Appendix B, 2017), on whether this was not in fact what Cameron (2013) had referred to as the Constitution being a theoretical framework that requires interpretation in practical situations. de Vos (Interview Appendix B, 2017) agreed, however he insisted that Section 6 prescribes minimal thresholds of compliance if any and that is problematic, where a state is not vested in developing the African languages in both status and use.

If one is to pay particular attention to subsection (3)(a) within the scope of the thesis at hand then it would follow that government departments should take into account the language demographics of the speakers in the given areas. The Department of Justice and Constitutional Development in terms of subsection (3)(a) should take into account that in all nine provinces of South Africa English is not the primary language spoken by the majority of the people in each province. The statistics in chapter four illustrate that an African language or Afrikaans is the primary language spoken by the majority of persons in each province and in South Africa more broadly.

Perry (2004) argues that a statistical argument, which I am proposing, would be countered with one based on budgetary constraints and this would be based on the discretionary element inserted in the subsection (3)(a), resulting in “... a more restrained fulfilment...” of the provision. One must be cautious not to accept this approach to interpretation of the provision as these ‘limiting’ terms are not legal norms and as such cannot supersede the spirit of Section 6 as a whole. Simply put, the exceptions or in this instance discretionary elements cannot supplant the obligatory functions of elevating the status and use of the African languages as stated in subsection (2).

It is my opinion that the Department of Justice and Constitutional Development are obligated to use an African language in accordance with Section 6(3)(a). In fact, the discretionary elements would support my argument if one is to take into account the statistics, representing

language demographics of each province. This would preclude the justification for English and Afrikaans as the two official languages adopted in the legal system.

Muller (Interview Appendix E, 2017) stated that the primary obligation for the development, use and promotion of the African languages rested on the Pan South African Language Board (PanSALB), created in terms of subsection (5). According to both Muller (Interview Appendix E, 2017) and Perry (2004) PanSALB is the body tasked with ensuring that Section 6 be implemented fully, emphasising this be done practicably.

5.3 Section 35(3)(k) language right or interpretational right?

As explicated thus far, the language rights are informed by Section 6 of the Constitution. The language right relevant the thesis at hand is Section 35(3)(k) as it concerns language in the legal system, more specifically the criminal justice system. As with Section 6 the provision is not explicit in establishing a language right. The primary question in my opinion which emanates from chapter four above, is whether Section 35(3)(k) confers a language right or an interpretational right on an accused person? It is my understanding that the first half of subsection (3)(k) means that an accused can be tried in his or her mother tongue. Moreover the second part of subsection (3)(k) is an alternative interpretational right. The distinguishing or determining factor is the phrase 'not practicable'. Once again we are faced with the dilemma of fathoming out what is meant by this phrase, as the Constitution, provides no definition or guidelines on determining when it is not practicable.

In order to answer the question the parameters of the right would need to be defined. This in my mind is three pronged. One, interpreting the right, and determining is there a yardstick in determining what understands means. Second, where does the right begin and end; how to limit the right justifiably in terms of Section 36 of the Constitution read together with Section 9 of the Constitution. Thirdly, determining the definition of the phrase 'where not practicable'.

In chapter four of this thesis, I advanced specific South African case law, where language and the provisions of Section 35(3)(k) were central to the cases. The *dicta* from these cases is of relevance in assessing whether the courts have established a yardstick determining what is meant by 'understand' and how this is measured. The cases of *Lesaena* (1993), *Damoyi* (2004) and *Manzini* (2007) all dealt with subsection (3)(k) as part of the right to a fair trial, however in all three instance the court did not determine what is meant by the term

‘understand’ and how to assess an accused’s linguistic competency. In the case of *Ndala* (1996) the court in this instance when explicating on the term ‘understand’ held that it was the responsibility of the court to “... ensure that the accused is sufficiently conversant with the language in which the evidence is being presented...” (1996: 219). Similarly in the case of *Siyotula* (2002), the court held that ‘understand’ means full comprehension and not partial understanding.

Based on the *dicta* and theoretical discussions by Schwikkard (2010) an accused person would have to fully comprehend the language and not partially understand it. The statistics, in particular Legal Aid South Africa’s Language Survey, presented in chapter four of this thesis, shows English proficiency in criminal trials is poor or satisfactory. This is indicative of the fact that in all nine provinces, litigants are not ‘good’ English speakers, readers or writers of the language. If one is to apply the statistics to the reasoning of the word ‘understand’ in the cases above and to Schwikkard’s (2010) reasoning, it would mean that in almost all instances litigants in criminal trials would require an interpreter as the languages of record are English and Afrikaans. Simply put the right in Section 35(3)(k) in my opinion is an interpretational right. The subsequent question arising is whether this is not contrary to the provisions and in particular the spirit of Section 6 of the Constitution? According to the court in *Pienaar* (2000) Section 35(3)(k) must be read together with Section 6 of the Constitution and by doing so, the court (2000: 145) found that the Department of Justice (as it was then) is obligated to develop and promote the languages of the province, spoken by the majority of the people.

Adopting the court’s reasoning in the *Pienaar* case (2000) in addition to the statistics relating to litigants proficiency in criminal trials, there is an argument to be made for the inclusion of an African language in each province, spoken by the majority of persons, to be a language of record. In my opinion this would give effect to Section 35(3)(k), where an accused person can be tried in a language he or she understands, without the aid of interpretation. In *Damoyi* (2004) the court held that although hearing the case in an African language and the language of the accused fulfilled the right to a fair trial, the court cautioned against the use of all eleven official languages, sighting among other reasons, budgetary constraints relating to the translation costs of the record for appeal purposes. Yekiso (Interview Appendix F, 2016) explained that although it was idealistic for cases to be heard in African languages, this was not practicable, given two reasons, the first as sighted in his judgment in *Damoyi* (2004) regarding the translation costs of the record and secondly the fact that the judiciary was not

linguistically diverse enough to hear the cases. Engaging further with Yekiso (Interview Appendix F, 2016), I asked whether this is a direct result of the lack of linguistic transformation taking place in the judiciary and the legal system more broadly. He agreed that language was part of the transformational debate, however he noted that it would be difficult for Judge Presidents to begin assigning cases according to linguistic competencies rather than based on their case loads and rotational basis as is the process currently. Mpati (retired Judge President of the SCA) (Interview Appendix D, 2017) shared similar sentiments to Yekiso (Interview Appendix F, 2016) although explicating further that by assigning judges to cases on a linguistic basis would be discriminating against judges on the basis of language. That according to Mpati (Interview Appendix D, 2017) would be reenacting an Apartheid mind thinking. Mpati (Interview Appendix D, 2017) stated that it would be ideal for accused persons to be tried in a language they fully understand, namely their mother tongue, but this right has to be balanced with the linguistic competencies of judicial officers and court personnel, and in his opinion, the best outcome would be for proceedings to be interpreted into the language the accused understands where that language is not English or Afrikaans.

By analysing the opinions of Mpati (Interview Appendix D, 2017) and Yekiso (Interview Appendix F, 2016), two points emerge. Firstly, limiting the right in Section 35(3)(k) on the basis of budgetary constraints. Secondly, limiting Section 35(3)(k) in terms of a competing right on judicial officers in Section 9 of the Constitution. Simply put, there are two competing rights, on the one hand the accused's Section 35(3)(k) and on the other a judicial officer's right not be discriminated against on grounds of language as espoused in Section 9(3) of the Constitution. When there are competing rights a limitations analysis is to be engaged with in terms of the limitations clause, Section 36 of the Constitution. This analysis is undertaken in the proceeding subsection of this chapter. What is important at this stage to note is this is what I referred to earlier as establishing the parameters of the rights.

The costs argument can be disposed off with ease. As advanced in preceding discussions of this thesis, there is a budgetary constraints argument levelled at conducting trials in African languages, where the record is to be translated into English, this argument was made glaring clear in the case of *Damoyi* (2004) and by Yekiso (Interview Appendix F, 2016) in a subsequent interview. The issue of budgetary constraints was also raised by Mpati (Interview Appendix D, 2017). Muller (Interview Appendix E, 2017) argues that the primary responsibility does not rest solely on the Department of Justice and Constitutional Development to raise the necessary funds for the use of African languages in the legal

system. PanSALB, according to Section 6(5)(a)(i) of the Constitution is obligated to "... promote, and create conditions for, the development and use of all official languages". PanSALB, is thus obligated to contribute financially in ensuring the use of African languages in the legal system alongside English and Afrikaans. There is no reason why monies cannot be levelled from PanSALB, the Departments of Arts and Culture and Justice and Constitutional Development collectively (Muller, Interview Appendix E, 2017). In 2003 National Treasury presented a costs analysis of implementing multilingualism nationally, at an Implementation Conference (Kaschula, 2004: 13). At that stage, Treasury came to the conclusion that it would cost two percent of each government department's budget. This would include a language unit for each department or province, infrastructure costs involved therein; salaries; training; implementation drives and translation services (Kaschula, 2004: 13). Although these figures date back fourteen years ago, the point is that it is possible, given that in this instance, I am proposing the implementation of African languages in one sector only, the legal system. Additionally the Department of Justice and Constitutional development would have the financial support of PanSALB and the Department of Arts and Culture. Moreover there is no logical reason that can be conjured in explaining why financially the costs employed in interpretation services cannot be used instead for translation of the records, where cases are heard in African languages.

For purposes of explaining the parameters of rights and how to determine what parameters are it is necessary to draw an analogy with the right to protest and how the courts explained the determination of parameters of rights. The parameters of rights are usually determined by way of a declaratory order. The declaratory order is explained in depth in chapter six of this thesis as it forms part of the conclusions and recommendations.

In the *Waterfront* case (2004), the facts briefly were that an interdict was brought against two homeless people who harassed tourists and other persons at the Waterfront in Cape Town. The application for an interdict included permanently restricting the two men from entering the Waterfront property; prohibiting them from harassing persons and behaving in a manner which was disrespectful to the security personnel and South African Police Service officers. Desai J (2004) explained that before restricting a person's freedom of movement the parameters of the right needed to be determined. In doing so, Desai J (2004) held that a balancing act was required in which the court was responsible for ensuring that all persons have a right to freedom of movement. The rights in the BOR are as a result of the past discrimination and marginalisation of people in South Africa. In reasoning as such he

cautioned against interdicting persons based on socio-economic circumstances, looks, origins, race and poverty.

The second example is the case of the protesters at the Cape Town International Airport. The facts briefly were that a group of protestors from Khayelitsha, informal settlement, known as the Ses'khona People's Rights Movement protested and threw human excrement on the floors of the Airport. Muller (2015) explained that in this instance there were two competing rights, one the right to protest as enshrined in Section 17 of the Constitution, while all other persons in the Airport had the right to dignity, enshrined in Section 10 of the Constitution as well as the right to access the airport freely. According to Muller (2015) in this instance the right to protest must be limited. With two competing rights and the obligation to uphold both rights equally, Muller (2015) explained that the right to protest could be limited by time, manner and place restrictions. This would involve the protesters protesting at a specific time, perhaps when the Airport is not extremely busy; protesting peacefully rather than throwing faeces on the floor and a particular place within the Airport rather than at an entrance point or international arrivals terminal. Simply put, by placing such restrictions on the right to protest, the effect would be limiting the right but simultaneously establishing the parameters of the right. The right to protest ends where the rights to movement, dignity and equality begin. Moreover the competing rights are both exercised, where the limitation is justifiable in an open and democratic South Africa, as prescribed in Section 36 of the Constitution.

Imparting the parameters of rights argument above to the competing rights of a judicial officer and an accused person, as raised by Mpati (Interview Appendix D, 2017), the parameters of each of these rights need to be clearly established and the first step in my opinion is to determine the parameters of Section 35(3)(k). This involves examining when the right can be limited so as not to interfere with a judicial officer's right.

5.4 Competing rights: The Equality Act

The competing rights of accused persons and judicial officers, are not one dimensional. Section 9 protects all persons and as such the accused also has the right not be discriminated against on grounds of language. The question thus, is whose right is more important, a judicial officer's or an accused's?

Subsection (3) to subsection (5) are relevant for the discussions at hand. Subsection (3) prohibits discrimination on the listed grounds; subsection (4) extends the prohibition to a

horizontal level, this is between private citizens and includes that legislation be drafted to prohibit discrimination; subsection (5) presumes that private and state discrimination on the listed grounds in subsection (3) is unfair. Section 9 of the Constitution is not an alternative or replacement of Section 36 of the Constitution (Ngcukaitobi, 2013: 217). The difference between the two sections, is that Section 36 is a law of general application and applies to all the rights in the BOR, while Section 9 applies to the listed grounds of discrimination in Section 9(3) of the Constitution (Ngcukaitobi, 2013: 217). The court can thus engage in the limitations analysis of Section 36 in addition to applying Section 9, if the listed ground upon which the discrimination is alleged is also a right in the BOR (Ngcukaitobi, 2013: 218).

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) was drafted and enacted in accordance with the mandate in Section 9(4) of the Constitution. Docrat (2017: 296) explains that the Equality Act (2000) is not a duplicate of Section 9 of the Constitution, rather it expands on the provisions thereof, by providing courts with guidelines in determining when the presumed unfair discrimination is fair. Thus an infringement must be alleged within the ambit of the Equality Act (2000) and not Section 9 of the Constitution. Ngcukaitobi (2013: 245) explained that direct reliance on Section 9 of the Constitution will only occur in exceptional circumstances, where the alleged discrimination is beyond the scope of the Equality Act (2000), other legislation or a direct ground listed in Section 9 has been infringed.

In imparting Mpati's (Interview Appendix D, 2017) argument that judicial officers would be discriminated against on grounds of language, to the theoretical discussion on the Equality Act (2000), the alleged discrimination must be assessed in terms of the Equality Act (2000). The crux of the argument is whether or not hearing cases directly in any of the nine official languages, these being African languages, would result in unfair discrimination against the judicial officers? In order to engage with this question, an analogy is to be drawn with the case of *Lourens v Speaker of the National Assembly and Others* (2015).

The facts briefly were that the Applicant, Lourens brought an application in the Equality Court against the Speaker of the National Assembly and Others. The application concerned Lourens alleging that the non publication of legislation in all official languages, resulted in unfair discrimination on grounds of language. Based on these facts, it is evident that the case is of relevance to the thesis at hand and specifically the discussion in this section of the

chapter, as the case unpacks the court's analysis and interpretation of both Section 9 of the Constitution and the Equality Act (2000) in relation to African languages.

The Applicant argued that by not publishing all legislation in all eleven official languages, the official languages other than English were being undermined. This according to the Applicant resulted in the elevation of English to 'super official status'. This is one of the points I am conveying in this thesis, in accordance with sub bullet three of the fourth objective of the thesis, in chapter one. The precise situation in my opinion is in existence in the legal system, where the African languages are marginalised at the expense of English. No pre-eminence is accorded to any of the official languages in Section 6 of the Constitution. This may be true on paper but certainly not in reality and within the legal system.

The Equality Act (2000) defines discrimination as:

Any act or omission including a policy, law, rule and practice, condition or situation which directly or indirectly-

- (a) Imposes a burden, obligation or disadvantage on; or
- (b) Withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds;

If we apply the statement by Mpati (Interview Appendix D, 2017) of linguistic discrimination levelled at judicial officers, if a policy or statute is enacted that permits cases to be heard directly in the official African languages, to the definition at hand, then the definition for discrimination would be satisfied, as it may be argued perhaps, that it imposes a disadvantage on monolingual English speaking judicial officers.

The first step in the enquiry would thus be satisfied, as discrimination would be present, and for discussion purposes, I am opting to state that discrimination would be present, following that Griesel J (2015) in the *Lourens* (2015) judgment found that the Applicant was being discriminated against on grounds of language, through the non-publication of legislation in all official languages.

The onus of proof shifts to the Respondent to prove that the discrimination is fair. Section 13 of the Equality Act (2000) outlines whether the discrimination is unfair or fair and states the following:

- (1) If the complainant makes out a *prima facie* case of discrimination-
 - (a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or
 - (b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.
- (2) If the discrimination did take place-
 - (a) on a ground in paragraph (a) of the definition of 'prohibited grounds', then it is unfair, unless the respondent proves that the discrimination is fair;
 - (b) on a ground in paragraph (b) of the definition of 'prohibited grounds', then it is unfair-
 - (i) if one or more of the conditions set out in paragraph (b) of the definition of 'prohibited grounds' is established; and
 - (ii) unless the respondent proves that the discrimination is fair.

Given that I am exploiting the situation for discussion purposes, and assume that the judge would find that discrimination is present, then in proving that the discrimination is fair in accordance with Section 13 of the Equality Act (2000) above, the criteria, determining fairness or unfairness is of relevance and Section 14 of the Equality Act (2000) reads as follows:

- (1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.
- (2) In determining whether the respondent has proved that 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 or belongs to a group that suffers from such 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 circumstances to-
 - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
 - (ii) accommodate diversity.

Griesel J (2015) did not engage with the criteria in Section 14 of the Equality Act (2000) in determining whether or not the discrimination was unfair. Instead the learned judge, opted to accept the arguments by the Respondents that the discrimination was fair. Griesel J (2015) agreed with the Respondents that firstly there is no mention in Section 6 of the Constitution of equal treatment of all eleven official languages. It is my opinion that a misinterpretation of the provisions of Section 6 took place by Griesel J (2015), in that Section 6(2) specifically states that positive and practical measures must be taken in elevating the status and use of

African languages (Docrat, 2017: 298). Simply put Griesel J (2015) was accepting the respondent's arguments, without reading Section 6 in its entirety. This point of critique, relates to the statements by Cameron (2013) which I have reiterated throughout this thesis, that the Constitution is a framework which requires interpretation to ensure the full realisation through practical measures. Moreover what would have been the point of conferring official status on the nine African languages alongside English and Afrikaans, if the default position of English is accepted as fair discrimination? How is this situation different from what happened during Apartheid? Is this a political decision, as indicated by Stewart Smith (1993: 252), whom I quoted in the literature review in chapter two of this thesis, explaining that the selection of a language or languages which do not include any African languages, would result in a discriminatory policy position, one as decisive as the Apartheid language planning model.

As Docrat (2017) stated, Griesel J's (2015) reasoning raises a plethora of questions, three of which I have raised above. These questions in my opinion should not even be arising, if in my opinion the learned judge, had engaged with criteria in Section 14 of the Equality Act (2000) in determining fair or unfair discrimination. There is no possible explanation why the learned judge failed to engage with the criteria, and find that the discrimination was in fact unfair.

The reasoning that Griesel J (2015) provided was that Section 6(3) and (4) of the Constitution allows for the discrimination against the nine official languages other than English and Afrikaans. This statement was made in relation to the following phrasing presented in chapter four above:

(3)(a) ... the national government and each provincial government ***must use at least two official languages***. (my emphasis)

(4) ... all official languages must enjoy parity of esteem and must be treated equitably.

Subsection (3)(a) above is discretionary. The discretion is conveyed through the words 'at least', thus two languages is a minimum not a maximum, as indicated by Griesel J (2015). Furthermore, there is no reference to these two languages being English and Afrikaans only. Moreover subsection (4) needs to be interpreted properly as de Vos (Interview Appendix B, 2017) explained, as in instances such as the *Lourens* case, Griesel J (2015) was clearly of the opinion that he was a forensic linguist and could interpret the provision restrictively stating

that it does not say equally. Without detracting from the critique at hand, Griesel J's (2015) reasoning supports the primary argument I am advancing in this thesis, for linguistic transformation of the legal system, where judicial officers are linguistically equipped with interpreting provisions and where unable to do so, call on forensic linguists to do so. There is no reason why the learned judge did not call a forensic linguist to provide expert evidence and assist with the interpretation of the language provisions. A judge would not venture to act as a ballistics or blood spatter expert. The importance of language was undermined, and more importantly the importance of elevating the status of African languages and thus reversing the marginalisation of African languages under Apartheid.

In applying Section 14 of the Equality Act's criteria to the statement by Mpati (Interview Appendix D, 2017), in my opinion the discrimination would be fair in the circumstances. My conclusion is based on satisfying the criteria in Section 14, as follows:

14(1) African language speakers have been discriminated against on linguistic grounds during Apartheid, thus it is not unfair discrimination to take measures, in this instance to allocate judicial officers to trials based on their linguistic competencies.

Section 14(3)(a) listed above, provides the criteria for subsection (3)(a); it would not impair the human dignity of judicial officers, as they are not being disadvantaged in the sense of not being permitted to hear any cases.

The impact or likely impact referred to in subsection (3)(b) would not be significant, in fact in my opinion it would only mean that the Judge Presidents and Chief Magistrates of each division, would have to rotate judicial officers and assign them according to linguistic competency. Thus the criteria for assigning judges will only need to be specified.

For subsection (3)(c) it is fair to say that English and Afrikaans language speakers were not disadvantaged and do not suffer from patterns of disadvantage, given that the language of record has been English and Afrikaans.

The nature of the discrimination would be linguistic discrimination only and would thus be in limited instances. Similar to subsection (3)(d), the discrimination would be limited. There are no other patterns or policies in place which discriminate against judicial officers on grounds of language. On the reverse, it is creating a more accessible legal system rather than one which unfairly discriminates against African language speakers, thus in response to subsection (3)(e) the discrimination is not systemic in nature.

I have unequivocally stated that by hearing cases in the nine official African languages, the legal system becomes more accessible, for accused persons. In light of the importance bestowed on the right to fair trial more broadly, while simultaneously realising the provisions of Section 6(2) of the Constitution, by elevating the status and use of African languages in the legal system, it can then be said as per subsection (3)(f) that the discrimination is for a legitimate purpose. This reasoning furthermore explains as is required from subsection (3)(g) the extent to which the purpose will be achieved, whereby African language speakers will be able to exercise their Section 35(3)(k) right in accordance with Section 6 of the Constitution and be tried in an African language, a language they comprehend fully.

In my opinion there is not a less disadvantageous or less restrictive manner in which to achieve the purpose as posed by subsection (3)(h). In my opinion the only option is the current one, where cases are not heard directly in African languages and where an accused is an African language speaker interpretation is utilised, and in my view this is not an alternative.

The criteria in subsection (3)(i) correlates with one of the recommendations in chapter six of this thesis, thus it would be impetuous of me to advance a recommendation in a chapter concerning the analysis of data. Suffice to say the disadvantage can be combated, where judicial officers begin to see the importance of learning an African language spoken by the majority of the people in the province in which the court has jurisdiction. The recommendations below in chapter six, address how the linguistic competency of monolingual judicial officers can be altered and how this will accommodate diversity.

5.5 Limitations analysis: Section 36 of the Constitution

The discussion on the Equality Act (2000) and Section 9 of the Constitution, above is indicative of the stringent criteria in determining when discrimination is fair or unfair. Moreover the limitation or infringement of Section 35(3)(k) is still subject to the limitations analysis of Section 36 of the Constitution.

Section 36, advanced above in chapter four of this thesis, comprises of a two stage enquiry. Similar to the enquiry in the Equality Act (2000) Section 36 requires a certain amount of balancing. Balancing becomes relevant where there are competing rights. According to Woolman (1998-2003: 12-53-54) balancing can take place in two ways. Firstly one right may simply outweigh the other competing right. A clear example was in the case of *S v*

Makwanyane (1995) where on one hand the accused had a right to life and on the other the state's interest was the death penalty. There was no possible justification for a decision that would enable a balance of some sought to be struck nor for the death penalty to outweigh the right to life (Woolman, 1998-2003: 12-55). Secondly balancing means 'striking a balance' between the competing rights or interests equally.

It is however a difficult task and in some instances may be impossible to strike a balance. To this effect 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. This supports my reasoning above, that it is a subjective interpretation of the law. Woolman (1998-2003) explicates 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.

Woolman's (1998-2003) commentary rings true, in that the sliding scale formula advanced in chapter four of this thesis should be applied to all language rights when limiting the rights. As Woolman (1998-2003) predicts this does not take place as seen from the cases dealing with the interpretation of Section 35(3)(k). The only instance within which this application did take place was in the case of *Pienaar* (2000) and to a marginal extent in the case of *Damoyi* (2004).

There is a clear disjuncture between theory and application, and it is alarming that in the cases advanced in chapter four of this thesis that the judicial officers, failed to engage with the sliding scale formula. Currie and de Waal (2013: 154) emphasis that the reasonability and justifiability of a limitation cannot be decided abstractly. This determination requires evidence in the form of sociological or statistical data, on the impact that the restriction will have on society. It is clear from the judgments other than in the cases of *Pienaar* (2000) and *Damoyi* (2004) that in not one instance was there statistical data, in the form of the statistics I have presented above in chapter four, relating to the use of language in the legal system and more specifically in the criminal justice system. Furthermore evidence could have been sought from forensic linguistic experts on both the legal and linguistic implications of limiting the Section 35(3)(k) right. Evidence of this sort can be in the form of both factual and or policies, this can be extended to include academic research on the impact this has on the right to a fair trial, the right to equality on linguistic grounds and ensuring that the provisions of Section 6(2) of the Constitution are complied with.

The difficulty in applying Section 36 according to Woolman (1998-2003) lies in determining the reasonability of the limitation. Simply put in applying the sliding scale formula to determine whether it is ‘reasonably practicable’ to limit the right, the court must take cognisance of the fact that language is not an isolated characteristic, where there was a connection between racial and linguistic marginalisation during Apartheid. de Vos (Interview Appendix B, 2017) acknowledges that this is correct, but cautions against racialising languages, as the Apartheid regime did. The question in my mind, is the current language of record position not perpetuating Apartheid’s racial discrimination and in this instance linguistic marginalisation? This point was reaffirmed by Moseneke DCJ (2010) as he was then, explaining that a language policy cannot perpetuate racial discrimination of any sorts. The reasonability standard therefore imposes what Moseneke DCJ (2010) referred to as a ‘context-sensitive understanding’ dependent on the facts of each case.

What is required of courts in limiting the right in Section 35(3)(k) is that such limitation be undertaken in terms of Section 36 of the Constitution. In addition thereto, courts are required to apply the sliding scale formula developed by Currie and de Waal (2005) to determine the reasonability and justifiability of the limitation. This however, does not occur in most instances as evidenced by the case law in chapter four. As a result the sociological and in the case of language the sociolinguistic and legal effects of limiting the language right are not considered.

5.6 A critique of the Use of Official Languages Act

The foregoing section of this thesis, illustrated that legislation is required to give effect to the constitutional language provisions as mandated by Section 6(4) of the Constitution. As explained in chapter four, there was no language legislation in South Africa, until the judgment in the case of *Lourens* (2013). What follows below is a critique of the Languages Act (2012) against the theoretical backdrop of language legislation in chapter two and the relevant provisions of the Languages Act (2012) in chapter four.

Lourens (2012) advanced during the drafting stages of the Languages Act (2012) that the Languages Act (2012) should contain enforcement mechanisms and incorporate practical guidelines on the application of these mechanisms. Seeing that the Languages Act (2012) would apply to all government departments and national entities, each of these functionaries should be accorded specific obligations on how to implement multilingualism in their respective departments (Lourens, 2012: 284). Lourens (2012: 284) acknowledges the

‘complication’ in Section 6(3)(a) of the Constitution, that a minimum of two official languages need to be used, to this effect, Lourens (2012: 284) adopts the same argument I am proposing that the language demographics be used in determining which official languages be used in each province. The point is that a static one size fits all policy cannot be adopted by each department that will apply to all nine provinces.

What Lourens (2012) suggested while the Languages Act (2012) was in draft form did not occur. Subsequently the Languages Act (2012) has garnered harsh criticism from the FW de Klerk Foundation (2011), who stated that the Languages Act (2012) merely scrapes the surface in addressing the important role of how the implementation of African languages will take place in each department. Moreover the FW de Klerk Foundation (2011) criticised the fact that implementation of the Languages Act (2012) favours a top down implementation process. An important criticism levelled at the Languages Act (2012) was that there is no scope or provision in the Languages Act (2012) upon which persons are able to enforce their language rights (Docrat and Kaschula, 2015: 3). As I advanced earlier, the Equality Act (2000) provides a framework upon which language infringements can be challenged before court. This is the purpose of legislation to flesh out the constitutional provisions and in doing so, set out clearly when and how limitations of these rights can be assessed by courts of law. The Languages Act (2012) fails to do so.

Pretorius (2013) provides a critique of the Languages Act (2012) from a constitutional and administrative law view. From the onset of the critique, he holds that the Languages Act (2012) is devoid of any and all inclusivity. If one were to omit the obligatory principles, the Languages Act (2012) would be nothing more than a statute housing unguided powers to limit rather than promote the use of all official languages (Pretorius, 2013). The Languages Act (2012) needed to overhaul the exclusionary language framework, however it has done very little to incorporate binding normative standards for official languages use in legislation (Pretorius, 2013: 307). By binding normative standards, this would mean including provisions on how multilingualism will be implemented and if not what the consequences thereof would be.

Essentially the Languages Act (2012) needed to house two primary objectives, one a statement of binding authority of the important role of all official languages. Secondly how this would be implemented. As seen from the quoted provisions of the Languages Act (2012) in chapter four of this thesis, there is a delegation of discretionary powers on government

departments and functionaries on the use of official languages in each department and the implementation thereof. These delegated discretionary powers are afforded by stating that each government department and functionary must draft and adopt a language policy. This according to Pretorius (2013: 308) fails to demonstrate the legislature's commitment to the values underlying Section 6 of the Constitution. Pretorius (2013: 308) succinctly summarises this point:

Surrendering to administrative bodies the competence to make decisions which reflect relatively unfettered basic constitutional value judgments sidesteps the democratic guarantees of the legislative process in terms of compulsory publicity, broad public involvement and minority party participation.

The quotation, illustrates the important functionary power of the legislature in safeguarding the democratic principles as well as ensuring the realisation of the constitutional principles, values, ideals and in this instance language rights. The delegation of such powers to functionaries and government departments undermines the authority of the electorate, by abdicating legislative responsibility in what appears to be in favour of the executive and administrative branches. This point of critique can be substantiated further, through Section 195 of the Constitution. The Constitution through Section 195 dealing with the basic values and principles governing public administration, specifically states that:

- (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
 - (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
 - (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

This did not happen in the case of the Languages Act (2012) as the statute merely delegated discretionary powers to create policy, where the public's needs might not be responded to as there is no mechanism inserted in the Languages Act (2012) that obligates government departments to engage with the public through public participation. Thus the constitutional provisions of Section 195 above are not complied with. Additionally this compromises both the SOP and the principle of legal certainty as fundamental tenets of the ROL (Pretorius, 2013: 309).

Legislative control is pivotal in maintaining stability and predictability, in circumventing arbitrary policy decisions being formulated concerning the use of official languages in government departments and all public functionaries. Does the Languages Act (2012) meet the standards of primary legislation as explicated by du Plessis (2012) in chapter two of this thesis? According to Pretorius (2013: 309) this question is answered by two further questions. One, does the principle of inclusivity shine through the Languages Act (2012) as it does through Section 6 of the Constitution? Two, does the Languages Act (2012) represent clear progress in the quest for equity, clarity and predictability in official language use? Both of these questions are answered in the negative, as the Languages Act (2012) shifts the responsibility of ensuring linguistic inclusivity as mandated by Section 6 of the Constitution, to partial government departments and functionaries, who are in a position to adopt the default position of maintaining English and Afrikaans as the official languages. This satisfies the minimum requirements in Section 6(3)(a) of the Constitution where a minimum of two official languages must be adopted for governmental usage. The Languages Act (2012) is no more than an Act by government for government.

5.7 The absence of language requirements for legal professionals

With the primary legislation paying lip service to the English default position, the focus shifts to secondary legislation. In this instance the secondary legislation comprises two parts. The first comprises the legislation regulating the language requirements of legal practitioners and judicial officers and the second the legislation regulating the use of language in South African courts.

There is a further divide between the private and public sectors, consisting of private attorneys and state employees, in the prosecutorial sense. This distinction will become clearer in the proceeding paragraphs of this thesis, dealing with the Department of Justice and Constitutional Development's Draft Language Policy (2015).

Without further regression, given that the Attorneys Amendment Act (1993) excludes any language requirements, this brings into question whether the right in Section 35(3)(f) and (g) of the Constitution is subject and in effect limited by linguistic competency, where the accused has the right:

- (f) to choose, and be represented by, a legal practitioner, and be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at the state expense, if substantive injustice would otherwise result, and to be informed of this right promptly;

Subsections (f) and (g) are to be read together with Section (35)(3)(k). In doing so the accused has a right to a fair trial which includes the right to assistance of a legal representative with whom the accused could communicate in his or her own language (*S v Pienaar*, 2000: 145). A further important point emanating from the *Pienaar* case (2000: 144-145) is where 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 this may only occur indirectly through interpretation in exceptional cases.

In this instance the court in *Pienaar* (2000) clarified that the right in Section 35(3)(k) did not confer a default interpretational right but rather a language right where the accused be tried directly in his or her own language. Furthermore, the court explained that Section 35(3)(k) obligated government and in particular the Department of Justice (as it was then) to ensure in terms of Section 6 of the Constitution that the languages used overwhelmingly in the Northern Cape (the province in which the *Pienaar* (2000) case was heard) are promoted in a manner in which they would eventually achieve equality of status alongside English and be treated equitably (*S v Pienaar*, 2000: 145).

It is then clear that what would be required is linguistically competent legal practitioners who are competent in one or more of the languages of the province in which they practice. Meaning then that such language requirements should have been legislated in the Attorneys Amendment Act (1993). Mpati (Interview Appendix D, 2017) argued that the removal of the Apartheid language requirements levels the playing field and reverses the discrimination of the past. Mpati (Interview Appendix D, 2017) substantiates that by inserting 'new' African language requirements into the Attorneys Amendment Act (1993) Apartheid era thinking would be emulated, where the legislature would be forcing lawyers to learn an African language. This according to Mpati (Interview Appendix D, 2017) is contrary to the ideals and purpose of the Constitution and does not foster transformation. Mpati (Interview Appendix D, 2017) agreed however that African languages are important and that practical ways need to be developed to ensure the use of African languages in the legal system, but maintained that the approach I am proposing of legislating language requirements is not one of the approaches, rather creating awareness of the importance of the status and use of African

languages. This would encourage current and future legal practitioners to voluntarily acquire an African language. It is my opinion that this is not a practical approach as required in Section 6 of the Constitution. Neither does it seek to address the language impasse of language rights or interpretational rights. It is not about dictating, but rather putting the interests of the majority first. If after twenty one years since the enactment of the Constitution, legal practitioners have not realised the importance of African languages and the use thereof in the legal system, how is it possible to believe that this will happen in the future. It is my opinion further that these utopian ideals which Mpati (Interview Appendix D, 2017) aspires to requires practical and positive actions. It is about challenging a status quo that excludes the majority of the people from accessing justice directly through their mother tongues.

Mpati (Interview Appendix D, 2017) asked which African languages legal practitioners would have to learn given that there are nine? This question can be disposed of by referring to the language statistics in chapter four above. The statistics emanating from the 2011 national Census, illustrates that in each province three primary languages are spoken by the majority. Additionally the statistics from Legal Aid South Africa's language survey (2016), also presented in chapter four above, compounds the argument that the majority of persons across the civil and criminal divide, do not speak English as their mother tongue and are reliant on interpretational services. I emphasis at this stage that I am by no means saying that English should be done away with as a language of record. The argument is not about English, it is about elevating the status of the African languages, to assume their rightful place alongside English and Afrikaans in the legal system.

The statistical based argument was adopted by the court as well in the *Pienaar* case (2000: 145) where the court went a step further than engaging with the general statistics and looked specifically at the language demographics in the courts in the Northern Cape. The court in *Pienaar* (2000) found that English was used by all parties in only 1.4 percent of cases. The court (*S v Pienaar*, 2000: 145) held that the majority of legal representatives and presiding officers were monolingual English speakers in this province and as a result, this meant a 'phenomenal' increase in interpretation costs as well as quality implications.

The court in *Pienaar* (2000) went a step further, in stating that one of the primary reasons why judicial officers were monolingual English speakers was a result of them being white. The court appeared to link language and race. Noting the date at which the judgment was

delivered, the bench has become more racially representative as seen in table 13 in chapter four of this thesis comprising the racial demographics of the Northern Cape in 2015. The court in *Pienaar* (2000) associated race with language. Although it is true that by appointing black judicial officers, they would be able to communicate effectively in the respective African language(s). However, the official languages and in particular the African languages are all our languages, not the languages of black South African's only. Once a collective voice emerges, then it will become the responsibility of all South Africans to learn an African language of their respective province.

The Admission of Advocates Amendment Act (1994), as evidenced by the discussion in chapter four of this thesis, has no African language requirements. The same position I have reflected above with regards to attorneys needs to apply to advocates. There is no reason why in my view as part of the year long pupillage programme, that these prospective advocates not be required to write an examination following a vocation specific language course.

de Vos (Interview Appendix B, 2017) explained that it would be ideal if all future lawyers and advocates would be linguistically competent in the African language of the province. He is of the view that this is practicable and achievable. de Vos (Interview Appendix B, 2017) says intentions require actions, and where the status quo suits those in power and legal practitioners who benefit from the system, resistance from inner circles will be present. Moreover de Vos (Interview Appendix B, 2017) explained that there needs to be a collective effort and it needs to begin simultaneously with universities, making it compulsory for all Bachelor of Laws (LLB) graduates to be linguistically competent before being conferred with their degrees.

In March 2017, the parliamentary justice and corrections oversight committee chairman Mathole Motshekga (Ndenze, 2017: 4) proposed that all LLB students first pass one or other of the indigenous languages before being awarded a law degree. He succinctly said:

law is not just mastery of rules, it has to do with people. If you don't understand society and how it functions, then how do we extend rights to people?

What this illustrates is that there are proposals on the use of African languages in South African courts. Whether or not these will be implemented are unknown at this stage and would require buy in from both the legal system, universities and the legislature. Language legislation and policies at all levels will have to be drafted and enacted to ensure co-operation

and importantly implementation strategies and penalties for implementation failures would need to be put in place. As de Vos (Interview Appendix B, 2017) stated, all stakeholders need to be on the same page with realising the importance of African languages. The second step would be drafting language policies through curriculum transformation at Universities, which would relate directly to the language policies and requirements in legislation such as the Attorneys Amendment Act (1993) as well as the Admission of Advocates Amendment Act (1994) as well as the Judicial Service Commission Act (1994), which is discussed in the proceeding section of this chapter.

It is telling that following the proposal by Motshekga and robust engagement on the proposal, no tangible results in the form of universities revising their curriculum to include African language requirements as part of the LLB degree has taken place. Nor has there been any legislative drafting to this effect.

5.8 Language competency of judicial officers

The same discussion relating to attorneys and advocates applies to judicial officers. Courts require judicial officers who would also be competent in the languages of the province in which the court is positioned. Chapter four above illustrates that both the constitutional and legislative frameworks regulating the appointment of judicial officers in the form of Section 174 of the Constitution and the Judicial Service Commission Act (1994), makes no reference to language requirements. It is my opinion that this does not exclude the JSC from excluding linguistic competency as part of the interview process, assessing the qualifications of the candidate for judicial appointment. This line of reasoning can be supported by Section 180(a) of the Constitution read together with Section 174 of the Constitution. This enables the legislature to ‘fill the gaps’ that presently exist. The point made by Cameron (2013) that the Constitution is merely a framework requiring interpretation and application, is applicable in this instance. It is the legislature’s responsibility to provide meaning to the provisions of Sections 174 and 180 of the Constitution through legislation to enable the Department of Justice and Constitutional Development to draft language policies in compliance with legislative directives. I return to this discussion in further detail with reference to the Legal Practice Act (2014) and Department of Justice’s Draft Language Policy (2015) below.

It is my understanding that Section 174 of the Constitution in sticking with the primary principle of equality in the Constitution and reversing the past injustices, placed emphasis on race and gender. It is however my opinion that the constitutional drafters, created a sort of

hierarchy where race and gender were prioritised. Simply put, language was not placed alongside race and gender, although inherent during Apartheid. It is my opinion further that this is a glaring omission which continues the cycle of linguistic exclusion. Not only is the link between race and language overlooked, but also the role language plays in enabling access to justice. Judicial officers are not appointed to courts where all litigants are English mother tongue speakers or have high levels of English competencies. It is the complete opposite, as evidenced by the language demographics, presented in chapter four of this thesis.

In accordance with the provisions of Section 174 of the Constitution, suitably qualified would entail having the requisite legal qualifications, expertise and experience. The legislation, specifically the Judicial Service Commission Act (1994), creates confusion by not providing further expansion on the requirement of ‘appropriately qualified’. de Vos (Interview Appendix B, 2017) explained that this resembled the provisions of Section 6 of the Constitution and the Languages Act (2012), where ambiguous discretionary words are inserted and no definitions and expansions are found in primary legislation, resulting in the provisions being subject to subjective interpretation.

Section 174 of the Constitution obligates the JSC to take into account race and gender recommending judicial appointments to the bench. The question arising then is whether or not language is part of transformation and more specifically seen as a tool to transform the legal system. In light of the discussions in chapter two of this thesis pertaining to transformation of the judiciary, the authors cited therein all acknowledged that language is part of transforming the legal system and by doing so will foster access to justice for litigants who are primarily African language speakers.

Mpati (Interview Appendix D, 2017) maintained that in his opinion, transformation of the judiciary was ensuring equal representation. Such representation included race and gender only. This appears to be contradictory, given that Mpati (Interview Appendix D, 2017) stated that legislating language requirements would imitate Apartheid era thinking and result in unfair discrimination on grounds of language. However, taking into account race and gender is seen as justifiable. This reaffirms the point put forward in preceding paragraphs, of how language and the role of language in the legal system is viewed.

A further point raised by Mpati (Interview Appendix D, 2017) is the issue of appeal. If a case is heard for instance in isiXhosa in one of the High Courts of the Eastern Cape and is taken on appeal to the Supreme Court of Appeal sitting in Bloemfontein in the Free State Province,

with seven judges, the language issue complicates the situation. I am not suggesting that English be done away with. The judgments can be translated into English where the judges on appeal are not conversant in the language in which the trial was conducted. Opportunity planning, discussed in chapter two of this thesis would be of relevance in this regard, as it would create employment opportunities for translators. Furthermore the translation of the record, is possible as evidenced in the Canadian model, presented in chapter three of this thesis.

It appears from Mpati's (Interview Appendix D, 2017) reasoning that it would be difficult if not impossible to legislate language requirements for judicial officers. The Canadian jurisprudential model presented in chapter three of this thesis proves otherwise. The constitutional and legislative frameworks are authoritative with reference to a bilingual legal system. The New Brunswick Official Languages Act (2002), goes a step further by expanding on how to practically implement bilingualism in the legal system. The provisions relevant at this stage of the discussions are Sections 19(1), 24(1) and 24(2). Section 19(1) by stating that a trial must be heard in one or both of the official languages, without any aid of interpretation, requires judicial officers who are competent in both official languages. The issue of appeal Mpati (Interview Appendix D, 2017) raised can also be countered if the Canadian model is followed. Section 24(1) of the New Brunswick Official Languages Act (2002) holds that where a judgment concerns a legal principle, is in the interests of the public or sets precedent, it must be published in both official languages. Section 24(2) takes into account potential time delays by the publication of the judgment in both official languages.

In applying the Canadian model above it is possible to have cases heard in African languages, where judicial officers are linguistically competent in the languages of the province, in which the court is seated. Therefore if the case is precedent setting or in the public's interest or is needed for an appeal or review proceedings it can be translated into English where necessary.

As seen in chapter four of this thesis, Rule 25 of the Constitutional Court Rules (2003) permits the lodging of a document in any of the official languages. If the document appears in a language not understood by the judges the Constitutional Court bears the costs of such translation. This rule in effect acknowledges that documents can be lodged in any of the official languages. This supports the translation of judgments in the Canadian model and counters the argument by Mpati (Interview Appendix D, 2017) that it is impractical for trials to be heard in African languages.

The Canadian model, is one which can be emulated by South Africa. Although the South African constitutional and legislative frameworks are ambiguous and do not explicitly recognise the importance of language requirements for judicial officers in determining whether or not they are ‘appropriately qualified’, policies can be enacted to this effect and judicial programmes can include vocation specific language courses for current and future judicial officers. In the interim, through Section 180(a) of the Constitution, a judicial language programme can be established.

5.9 Language usage in courts: The exclusion of African languages

The legislative frameworks in this chapter thus far, have proved to be deficient when concerning language in the legal system with specific reference to language requirements for legal professionals. This trend continues in the legislative framework governing the use of language in courts. As stated in chapter four above, Section 6 of the Magistrates’ Courts Act (1944) only recognises two official language. This correlates with the legislation concerning the admission of attorneys and advocates, during the Apartheid era. Regardless thereof, however, as seen in the case law, cases have been heard directly in African languages without the assistance of interpretation services being employed. Section 6(2) of the Magistrates’ Courts Act (1944) reaffirms the interpretational right in Section 35(3)(k). Section 6(2) of the Magistrates’ Courts Act (1944) further refers to permitting interpretation where after the court has determined the linguistic competency of the person imparting evidence. I have discussed linguistic competency in relation to Section 35(3)(k) of the Constitution above, drawing on case law. As I noted there is no yardstick in existence and the authoritative academic text which the courts have adopted to define linguistic competency is Schwikkard’s (2010) on criminal procedure, where both Schwikkard (2010) and the courts have said that this is where the accused or person imparting evidence fully comprehends the language. Simply put, Section 6 of the Magistrates’ Courts Act (1944) does not comply with the provisions of Section 6 of the Constitution and at present is linguistically exclusionary, with regards to African languages.

The Superior Courts Act (2013) makes no reference to language and as explained in chapter four the focus therefore shifts to the Uniform Rules of Court (2013). Similarly to the Magistrates’ Courts Act (1944) Rule 60(1) of the Uniform Rules of Court (2013) entrenches an interpretational right. What is important is that the Uniform Rules of Court (2013) permits the lodgement of documents in any official language as with the Constitutional Court Rules

(2003). The fact however remains that the legislative framework for both lower and higher courts does not extend to cases being heard in African languages, thus mirroring the absence of African language requirements for legal professional and judicial officers.

Although the Languages Act (2012) merely scratches the surface, the point is that it creates a framework in which the concept of multilingualism and specifically all the official languages need to be looked at within each government department. It is my understanding that the Languages Act (2012) compels the adoption of a language policy in each government department to ensure the practical use of the official languages. The language policies for the department of Justice and Constitutional Development and the South African Police Services (SAPS) has the important role of moving away from the exclusionary linguistic position in the legal legislative framework presented in chapter four and critically discussed above, to a linguistic inclusionary approach, one which complies with the principles in Section 6 of the Constitution.

5.10 Department of Justice and Constitutional Development's Language Policy

As seen in chapter four from the Section 9.1 excerpt, the use of language in courts reaffirms the position in the rules of court and all other applicable legislation, such as the Magistrates' Courts Act (1944). It is my opinion that the Department of Justice's language policy (2015) is not in compliance with the Languages Act (2012) nor with Section 6 of the Constitution. The Department of Justice's language policy (2015) does not take into consideration the language demographics of South Africans nor is there any indication that language surveys were undertaken as with Legal Aid South Africa's Language Survey (2016), to consider the language statistics of all courts per province. Furthermore, there is a failure to develop the law and fill in the legislative and policy gaps which were pointed out by Yekiso J (2004) in the case of *Damoyi* (2004). In his judgment Yekiso J (2004: 123) explained that he wrote to the Director of Public Prosecutions in the Western Cape to enquire whether or not there was a language policy in existence for the Department of Justice and what it says concerning the use of any one of the official languages in criminal proceedings in both the High Court and lower courts. In addition it is evident in the judgment that Yekiso J (2004: 123) specifically asked to be advised on what the capacity of the office of the Director of Public Prosecutions was on the use of any official language other than English and Afrikaans in both High and lower courts in criminal proceedings.

In response thereto the Director of Public Prosecutions indicated that there was no language policy in place for the Department of Justice and that upon preliminary enquiries of 262 prosecutors in lower courts in the Western Cape, 62 were black and proficient in an African language; of 36 state advocates in the High Court only 3 were proficient in an African language, as advanced in chapter four of this thesis (*S v Damoyi*, 2004: 123).

The Directorate, has appeared to link race and language. Although racial transformation is pivotal in redressing the past, linguistic transformation is not wholly dependent thereon. This aside, the statistics by Legal Aid South Africa (2016) is evidence that isiXhosa is the second largest language used in the courts of the Western Cape. When juxtaposing the statistics provided by the Directorate there is a glaring disparity. Simply put, this substantiates the point I am conveying of the importance to draft a language policy which addresses these issues in practical situations. The Department of Justice's language policy (2015) has unfortunately failed to do so.

The Department of Justice's language policy (2015) promotes what Heugh (2002: 451) quoted in chapter two of this thesis, refers to as linguisticism, where high status is placed on English and a low status on the other languages. By not addressing the practical role and use of African languages in the policy (2015) the status quo is maintained and a low status is continuously placed on African languages, given the exclusion thereof.

In chapter two, I set out the four tests developed by Kerr (1976) which assess the suitability of the policy once it has been drafted. In applying the four tests to the Department of Justice's language policy (2015); the desirability test is uncertain, given the provisions of the policy, it appears to me that it is not desirable for African language litigants. Against this light there is no possible manner in which the Department of Justice's language policy (2015) can be just and fair. The justness test relates to persons being treated in an equitable manner and by failing to elevate the status of the African languages within the justice system, the Department of Justice's language policy (2015) treats African language speakers differently to English and Afrikaans speakers. The effectiveness test is not satisfied in this regard as the objectives of the policy (2015) is to comply with the mandate in the Languages Act (2012) where the use of the official languages needs to be clearly stated. These objectives are absent and what is present is a perpetuation of an exclusionary framework. The final test, namely tolerability, is satisfied as no resources are to be restructured in accommodating the African languages, so essentially the exclusionary position satisfies this test.

Following the application of the tests, I stated in chapter two that the purpose of a language policy can achieve one of three objectives, maintaining a social order, reforming a social order or transforming a social order. It is my opinion based on the critique advanced thus far is that the Department of Justice's language policy (2015) maintains an exclusionary social order. The Department of Justice's language policy (2015) in its present form is in conflict with the primary purpose of what a language policy and planning process should emulate. According to Alexander (2014: 4) a language policy should primarily be concerned with reforming / transforming society.

5.11 South African Police Service's Language Policy

The SAPS language policy (2015) is relevant to this research, as stated in chapter four above as the criminal justice system commences with the SAPS, where a charge/complaint is laid. It is also the first port of call for arrested, accused and detained persons as espoused in Section 35(3)(k) of the Constitution. It is this investigation that results in a decision to either prosecute or not. Furthermore the statements captured during the investigative stages informs the *viva voce* evidence in court. The use of language can either hinder access to the justice system or enable it.

Section 7(1)(a) of the SAPS language policy (2015) provides that English is the main working language of the SAPS, and that English is to be used for all official documentation. The SAPS language policy (2015) does however contain a table of the provincial languages that may be used for communicative purposes. These languages include the official African languages. Although African languages are recognised as languages of communication in the respective provinces, English maintains its status quo as the official language of the SAPS. This in turn means that even though a complainant, accused or arrested person provide their statement in an African language to a police official who is linguistically competent in the respective African language, such communication will be recorded in English in the written statement. In effect a police official is in this instance acting as a translator as well, where their English proficiency may be satisfactory or poor and may result in factual inaccuracies being recorded. This has the potential of jeopardising a complainant's chances of a prosecution or securing a conviction. Alternatively it could jeopardise the accused's right to a fair trial.

In addition what the SAPS language policy (2015) fails to include are language requirements for police officials. Members of the public should not be expected to convey their statements

in English, this undermines the principles of Section 6 of the Constitution, and brings into question whether this is constitutionally sound in light of Section 9(3) of the Constitution. Docrat *et al* (2017) stated that the SAPS language policy (2015) should have addressed the issue of accessing police services in an official language of the province. Furthermore, that police officers undergo vocation specific language training courses in order to communicate with members of the public more efficiently in line with the constitutional language requirements (Docrat *et al*, 2017: 301). A policy which is able to articulate these practical guidelines would foster transformation.

Docrat *et al* (2017) critiqued the case of *State v Sikhafungana* (2012) against the backdrop of the SAPS language policy (2015). The facts briefly were that the deaf complainant was sexually assaulted by the accused. The assault was witnessed by two neighbours who intervened and apprehended the accused (Docrat *et al*, 2017: 289). The accused was subsequently charged with housebreaking and sexual assault, and was found not guilty on both charges (Docrat *et al*, 2017: 290). He was also charged in the alternative on a lesser charge of trespassing on which he was convicted and sentenced to three months imprisonment or a fine of three thousand rand (Docrat *et al*, 2017: 290). The *dictum* which is of relevance to the thesis at hand is the linguistic incompetency from the entire criminal justice system. This commenced with police officers being unable to communicate with the complainant and they had to communicate via with the complainant's sister who acted as an interpreter and relayed the events to the police who subsequently translated the oral statement into English for record purposes. Although the complainant communicating via her sister stated that there were two witnesses, this was not recorded in the statement by police officials and as such the pivotal evidence was not captured and the witnesses were not called before court.

The linguistic insensitivity coupled in my opinion with incompetence was compounded by the fact that the prosecutor failed to address the factual and evidentiary inaccuracies arising from the investigation. At the centre of the trial was the language and disability barrier, which the magistrate failed to take note of. Section 170 A (1) and (2) of the CPA, allows for evidence to be imparted through intermediaries. In this instance a sign language interpreter would have been of no use, given that the complainant could not communicate in any form of sign language. Morgan (2001: 26) however noted that Section 170 of the CPA (1977) permits the use of a relay interpreter (a person not officially recognised as an interpreter), in this

instance the complainant's sister. This would have afforded the complainant her right to impart *viva voce* evidence.

What is of importance for the thesis at hand is that language has the power to deny person's access to justice. In this instance the important role of language was undermined and the police officials, at the first port of call were simply not linguistically trained or competent to deal effectively with the situation. Furthermore the *Sikhafungana* (2012) case is illustrative of the practical language issues which the SAPS language policy (2015) should have addressed adequately.

5.12 A new transformative legal agenda: The exclusion of African languages

What is evident from the previous section of this thesis, is that the 'new' language policies affecting the legal system, remain defective, in that it perpetuates the Apartheid status quo by not elevating the status of African languages to an equal status alongside English and Afrikaans where appropriate. Doing so would entail transforming the legal system. This correlates with Wesson and du Plessis's (2008: 2) definition of transformation advanced in chapter two of this thesis; a change in the state of affairs that existed previously.

Moerane (2003: 716) explained that reasons such as costs in translation of the record for appeal are not reasons for the absence of language policies that encourage the promotion and creation of conditions for the development and use of African languages in the legal system. Cowling (2007: 94) explained that the courts function in terms of national legislation and as such their rules and procedures must be provided for by national legislation. This is evident from the legal legislative framework presented in chapter four of this thesis. This might be stating the obvious, but it is important, as the legislature has the constitutional mandate of transforming the legal system linguistically by drafting legislation that alters the current framework perpetuating Apartheid era thinking (Cowling, 2007: 94).

The legislature in heeding the call for the transformation of the legal system in its entirety, drafted and enacted the Legal Practice Act (2014), which I have referred to briefly in chapter one of this thesis. 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 so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic;

From the excerpt above, it was my understanding that the constitutional imperatives, would include the elevation of African languages as required by Section 6 of the Constitution, as well as treating African languages and the speakers thereof equitably. In doing so this would facilitate a legal profession that broadly reflects the linguistic diversity and language demographics of South Africa.

Moreover the purpose of the Legal Practice Act (2014) is to:

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;

In determining the extent to which the above applies to and includes language, the focus shifted to chapter three of the Legal Practice Act (2014) regulating legal practitioners and candidates. This would entail the application of chapter three to the Admission of Advocates Amendment Act (1994) as well as the Attorneys Amendment Act (1993). 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, advocates, candidates 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. It is my understanding that community service, involving the small claims court or *pro bono* public interest law, would involve communicating in some if not most instances with African language speakers. Therefore, it would make common sense to include language requirements or language training programmes. This is my understanding of transformation of the legal system, breaking down language barriers for every citizen regardless of their language to have access to the legal system and in the achievement of substantive justice. This cannot be limited to race and gender, which the Legal Practice Act (2014) focuses on to the exclusion of language.

Given the supposedly transformative statute, such as the Legal Practice Act (2014), and the fact that it excludes language, I made a concerted effort to contact the relevant persons who

were responsible for informing the drafting of the Legal Practice Act (2014) in the legal profession, to enquire at first hand the reasons for the exclusion. Unfortunately all emails and enquiries were either not responded to. Where I did receive a response I was either redirected to another individual or when the questions were sent, no response thereto was received. This issue is discussed in chapter one of this thesis, concerning the research methodology and the difficulties encountered in conducting the research.

Mpati (Interview Appendix D, 2017) and de Vos (Interview Appendix B, 2017), regarding the Legal Practice Act (2014), were of the view that the exclusion of language would have been defended by the drafters thereof on the basis that their understanding of transformation of the legal system was confined to race and gender. de Vos (Interview Appendix B, 2017) went further and explained that legislation and the process and understanding of transformation that informs the legislative drafting is in most instances to a large extent subjective. Where people are not of the view that language has the power to hinder or enable access to justice this does not arise as a salient feature of the statute.

The sentiments expressed by de Vos (Interview Appendix B, 2017) reinforced those I made reference to in chapter two of this thesis that there is no specific definition of transformation and that it is context dependent. By being context dependent, the people in the discipline determine what transformation is and how it should occur. It is my opinion at this stage of the research that the Legal Practice Act (2014) fails to engage with the concept of transformation and that the 'real' issues such as how to include African languages in the legal system is not addressed. The present status quo supports the position occupied by the legal professionals who had a hand in drafting this statute. de Vos (2010) succinctly conveys this point in the following quotation:

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.

5.13 Untransformative language of record decision

With the new transformative model above being seen as linguistically untransformative, one would imagine that the situation could not worsen. This is not the case as was evidenced on 16 April 2017. It was reported that the languages of record, English and Afrikaans, had been changed to English only with immediate effect (Docrat *et al*, 2017: 1). The decision was reported to have been taken by the Heads of Court, comprising of all Judge Presidents of all High Courts under the leadership of the Chief Justice of the Constitutional Court.

The primary question arising is whether the Chief Justice has the constitutional or legislative power to take this alleged (it has not been published in the *Government Gazette*) decision and change the language of record to English only? In answering the question the Superior Courts Act (2013) needs to be engaged with, specifically subsections 8(3), (4), (5) and (6) which state the following:

(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 subsection (2) and (3), the Judge President of a Division is also responsible for the co-ordination of the judicial functions of all Magistrates' Courts failing 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 sittings 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.

These provisions above do not refer to the authority to change the language of record in South African High Courts to English only, whether or not the Chief Justice enjoyed the support of all Heads of High Courts. Docrat *et al* (2017: 1) argued that the removal of Afrikaans and the move away from a de facto bilingual language of record to a monolingual position weakens the argument for a linguistically inclusive legal system. According to Docrat *et al* (2017) it is questionable how the alleged decision can be justified in relation to the provisions of Section 35(3)(k) read together with Section 6 of the Constitution. This would result in an interpretational right being conferred on all accused persons other than those who are English mother tongue litigants.

It is argued that the alleged decision results in unfair discrimination on grounds of language, in terms of Section 9 of the Constitution as well as the Equality Act (2000). In substantiating their reasoning they rely on the statistics in Legal Aid South Africa's 2016 Language Survey (2016), as I have done in this chapter of this thesis. It is evident from the statistics presented in chapter four, that litigants in both criminal and civil cases, more especially criminal cases, have a poor level of English proficiency (Docrat *et al*, 2017: 1).

It can however be argued that the removal of Afrikaans is the removal of an Apartheid language. However, according to Docrat *et al* (2017: 1) they caution against adopting an unthinking reaction to Afrikaans. If this is the reason why Afrikaans has allegedly been removed as a language of record, it is questioned how English can be retained given that it is a colonial language (Docrat, 2017: 1). Following the open communication by Docrat *et al* (2017) a subsequent press release emerged from the office of the Chief Justice. In the press release the Chief Justice, reaffirmed the judiciary's decision to remove Afrikaans as a language of record (Chabalala, 2017). It was stated that this decision was made as it practicable, given that all the judges understand English.

The removal of Afrikaans in my opinion cannot be justified in relation to the statistical data presented in chapter four of this thesis, where Afrikaans was one of three languages alongside isiXhosa and isiZulu spoken by the majority of persons. It would furthermore not support my argument for a language policy for each province to be applied in the legal system, where in the Northern Cape and Free State provinces Afrikaans is one of the languages spoken by the majority. As I have stated above there is a need to balance the rights in the Constitution in accordance with the sliding scale formula (Currie and de Waal, 2005). By applying the sliding scale formula, the limitation would have to be justified through the use of statistical data, which in this instance does not support having English as the sole language of record.

At this point, it remains unclear as to whether or not the decision was taken given that it has not been published in the *Government Gazette*. However, it raises the point yet again of what de Vos (2010) referred to in the previous section of this chapter i.e. that the use of the word transformation in the legal system is thrown around and defined differently to suit a particular agenda. In this instance, it is my opinion that the alleged decision is unconstitutional and untransformative, and questions the intentions of the judiciary in transforming the legal system and to whose benefit. It is my opinion that it is to the benefit of legal professionals and judicial officers who have, and continue to benefit from this linguistic exclusionary position, at the expense of broader South Africa and in particular litigants accessing the legal system.

5.14 Conclusion

This chapter has engaged with the constitutional, legislative and policy frameworks, regulating the use of language in the legal system. The frameworks have been critically discussed against the backdrop of theory presented in the literature review of chapter two as well as the interviews I have conducted, the transcriptions of which appear as appendices B, C, D, E and F, at the end of this thesis. What is evident is that the frameworks do not correlate with what the theory envisions and as such raises a plethora of issues affecting the practicality and implementation thereof. This chapter has furthermore resulted in a holistic discussion in which all the previous chapters are drawn upon in formulating and solidifying the argument that those legal frameworks, past and present are defective and that linguistic transformation is possible and is required. The chapter furthermore exposes the linguistic exclusion in statutes such as the Legal Practice (2014) premised on the misleading fact that this statute is aimed at transforming the entire legal system. Many of the arguments emanating lean towards the fact that it may be impractical to have a linguistically transformed legal system. However, this is countered by the comparative Canadian jurisprudential model, proving that a linguistically inclusive legal system is possible and is needed as evidenced through the language demographics. The chapter concludes with a discussion around the exclusionary position being cemented to a certain extent with the alleged adoption of English as the sole official language of record in South African High Courts. The implications thereof are discussed in chapter six below. This chapter also provides the basis upon which the conclusions and recommendations advanced in chapter six have been formulated.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

This chapter provides an overview of the thesis in relation to the goals, explicated in chapter one. This chapter furthermore provides six recommendations, with reference to the discussions in the previous five chapters and an overall conclusion.

6.2 Overview

The research commenced with the objectives of investigating the legislative and policy developments in the legal system concerning the recognition and use of language therein. By doing so the thesis explored the history of languages and more specifically the role of African languages in the legal system pre and post Apartheid. The research provided an overview of the constitutional framework, which was critically analysed. Against this constitutional framework, the relevant legislation and policies were advanced and critiqued.

The research transitioned from a theoretical backdrop to a comparative Canadian jurisprudential case study. The purpose of this was to illustrate that a legal system can give effective meaning to language rights through purposive interpretation, despite previous restrictive interpretation. Furthermore, that it is possible to have a legal system in which all legal professionals and judicial officers are linguistically competent in the official languages of the province, as illustrated through the New Brunswick example.

In light of the Canadian comparative analysis, the data pertaining to the South African legal system was presented, where case law illustrated that although cases have been heard in African languages on appeal or review, judges cautioned against this approach. This in effect illustrated the restrictive interpretation employed by judges.

Chapter five in effect culminated in a discussion comprising of a critique of the data in relation to the theoretical framework presented from chapters two onwards. Chapter five furthermore provided that the new purportedly transformative legislative framework, is in fact linguistically exclusionary, where the status and use of African languages in the South

African legal system is not included. This position is weakened further by the alleged adoption of English as the sole official language of record.

6.3 Recommendations

The discussion below comprises of the proposing of six recommendations. Each of the recommendations are interlinked to a certain extent and this will become apparent with the progression of the discussions.

6.3.1 Declaratory order

As with the discussions in the preceding chapters of this thesis, the Constitution is the starting point, being the supreme law, providing the framework upon which legislation and policies are drafted and enacted to give effect to the provisions. As seen from the discussions above the constitutional language provisions are contentious, given the ambiguity created through the inclusion of discretionary phrases. Perry (2004: 131) encapsulating the sentiments of Sachs states further that the provisions of Section 6 are "... messy, inelegant and contradictory." Stating further that the provisions of Section 6 amounts to nothing more than symbolic gesturing. These views were supported, given the interpretation of the constitutional language provisions in the South Africa case law. Besides the case of *Pienaar* (2000) the South African case law in chapter four, has not advanced a clear position on the constitutional language provisions. This point is discussed further concerning interpretation with regard to the second recommendation in this chapter.

Based on the above, the first recommendation is to obtain a declaratory order. A declaratory order comprises of the court establishing the parameters of rights and provisions as explicated in chapters four and five, with reference to the *Waterfront* (2004) case and the Khayelitsha example. Any person who has the capacity to litigate can bring the declaratory order. 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. For purposes of the thesis at hand existing rights and obligations in Sections 6 and 35(3)(k) would be the basis for which the declaratory order would be sought. The declaratory order is not enforceable. If a party applying for a declaratory order wants to enforce the courts findings, this must be coupled

with an application for another order such as an interdict, as seen in the *Waterfront* (2004) case. For purposes of the thesis at hand, the declaratory order would describe with precision what breach or infringement of a right is and through inference what the parameters of the right is.

The applicability of a declaratory order as a recommendation has not only been motivated for through the discussions in this thesis, but was recommended by Muller (Interview Appendix E, 2017) whom I asked if it would be applicable in the circumstances. 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 entail the courts in future language rights cases, having the parameters established, enforce the rights and obligations without discretionary interpretation which as evidenced from the South African case law, has been interpreted restrictively by judicial officers, rendering Section 35(3)(k) an interpretational right, where the accused is an African language speaker.

The Canadian model supports the recommendation of a declaratory order being sought, in order for the parameters of rights to be clearly established (Foucher, 2012). The declaratory order would allow for clarification that resembles the clarity of the Canadian Charter of Rights and Freedoms (1982) which is authoritative, unambiguous and precise. It would also provide clarity on whether the official languages are equal in status and the language rights and obligations are equal for all official language speakers, as with the Canadian Charter of Rights and Freedoms (1982).

6.3.2 Purposive interpretation

One of the reasons for recommending a declaratory order is to preclude judicial officers from adopting restrictive interpretations of the constitutional language provisions, given its ambiguity that enables such interpretation. The South Africa case law, with the exclusion of *Pienaar* (2000) is illustrative of the restrictive interpretation, where in my opinion judges do not think it is their responsibility to interpret the provisions purposively. The latest case of *Lourens* (2015) saw Griesel J adopting the view that it is not his responsibility to interpret the provision in Section 6. This was similar to the interpretation adopted in the Canadian 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." The restrictive methods of interpretation

adopted is contrary to Cameron's (2013) statement that the Constitution is merely a theoretical framework that requires practical interpretation. 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.

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, but 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. Thus, as seen in chapter four through the case law, where on grounds of language, appeals and reviews were upheld, based on the fact that it resulted in a procedural irregularity. In addition to the *Lourens* (2015) case where Griesel J interpreted the language provisions restrictively instead of purposively (Lourens Interview Appendix C, 2017). Purposive interpretation is therefore recommended for future interpretation of language rights and legislative provisions regulating the use of language in the legal system.

6.3.3 Legal reform

The historical perspective advanced in chapter one saw the enactment of many statutes for the legal system. These include the Apartheid languages, which attorneys and advocates were required to learn at university level in order to satisfy the requirements for admission to the Side Bar and Bar respectively. The statutes were amended following the new constitutional order where the language requirements were removed. However these were not replaced with African language requirements. In effect, the entire legal framework continues to perpetuate an exclusionary position concerning the status and use of African languages as seen with the

relevant legislation. Moreover the new transformative framework in the form of the Legal Practice Act (2014) and language policies of the Department of Justice (2015) and the SAPS (2015), either excludes African languages or promotes English.

What is needed is legal reform and by legal reform, I mean reforming through amendments of the legislative and policy frameworks, to reflect the African languages in the legal system. This has not been done to date. I am of the opinion that the removal of the Apartheid language requirements for attorneys and advocates, did not result in creating equality between English and Afrikaans and the African languages, as the African languages still do not feature in the legal system. This in my opinion as I have advanced above results in unfair discrimination on grounds of language.

There is a Law Reform Commission in South Africa, which is responsible for amending legislation, which was drafted during Apartheid to reflect the constitutional provisions. I recommend that the legal legislative framework that was inherited from the Apartheid regime be reformed in line with the findings of this thesis. More specifically, I have provided a model, namely the Canadian model which can be emulated by the Law Reform Commission. The New Brunswick Official Languages Act (2002) provides that it is practicable for cases to be heard in all official languages of the litigant's choice, without the aid of interpretation.

6.3.4 Meaningful Engagement

Following on from the recommendation for legal reform, the question remains as to whether the legislature at national level is able to amend legislation (which has not been done to date), without adopting a top down approach. This point was discussed in chapter two of this thesis with reference to Alexander's (1992) bottom up approach.

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). It 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).

I recommend that meaningful engagement occur, with regards to the review of the current legislative and policy frameworks. The applicability of meaningful engagement in relation to language legislation is encapsulated in the reasoning below by Docrat and Kaschula (2015: 4) who stated that:

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.

The critique I have advanced pertaining to the legislative and policy frameworks is extensive, however justified in my opinion, where I have laid bare the shortcomings resulting in an exclusionary legal system, which does not effectively foster access to justice, but instead discriminates unfairly against persons on grounds of language. In doing so I have presented a model, based on the Canadian system that must be emulated in line with these recommendations.

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 policies 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.

6.3.5 Transforming South Africa's legal system

As I have continuously reiterated in this thesis, transformation, as well as the extent and type thereof is dependent on a number of factors, such as what we understand transformation to be and what we want to transform and for whose interests, as encapsulated by de Vos (2010) in chapter five of this thesis. It is my recommendation that transformation of the entire legal system take place, where the transformational imperatives in Section 174 of the Constitution are extended to include language training programmes. This is made possible through Section 180 of the Constitution. Moreover Chief Justice Mogoeng Mogoeng's transformational imperatives outlined by Ntlama (2014) in chapter two of this thesis, needs to be extended to include language as a tool to enhance access to justice.

What is required is linguistic transformation, where African language and languages more broadly are included as requirements for legal practitioners and judicial officers. This would give effect to the constitutional language provisions being interpreted purposively. The right in Section 35(3)(k) affords litigants the right to be tried in their mother tongue, where their mother tongue is an official language spoken by the majority of the people in the specific province in which the court is seated.

There has to be one transformational agenda in order for the legal system to be linguistically inclusive. In order to achieve this, the needs of African language speakers needs to be prioritised above any other agenda that perpetuates linguistic discrimination for the benefit of a few in the legal system. This point was aptly stated by de Vos (2010) in the following quotation:

Real and deep transformation is the enemy of the elite - black and white - because if deep transformation is actually implemented, it will transform the very system that we all benefit so handsomely from, that allows us to drive to work in million rand cars without having to step out into the streets where people are dying from hunger and disease. Why support deep transformation if one is benefitting from the system?

6.3.6 Drafting of new policies

In light of the fact that the new legislative framework does not give effective meaning to the provision of Section 6 of the Constitution, I recommend that each province's legislature draft language policies that will affect the governance of the courts in that specific province. This recommendation must be implemented through the process of meaningful engagement, following the declaratory order and the Law Reform Commission's amendments of the relevant legislation to enable the drafting of the recommended policies. These policies should be drafted in consultation with forensic linguists, academics, legal practitioners, judicial officers and most importantly the broader populace.

The language policies should be formulated by taking into account the language statistics of each province (Lourens, Interview Appendix C, 2017). The main purpose would be to elevate African languages as provided for by Section 6 of the Constitution. I am by no means stating that English should be done away with, given the need for a translated record for appeal and review processes, as with the Canadian model. Each province would adopt a language policy, which gives effect to the language demographics alongside English. Stewart-Smith (1993)

spoke to this point in relation to language flexibility, where African languages would be introduced alongside English.

Simultaneously what will be required is for universities to ensure that linguistically competent students graduate with LLB degrees as recommended by the parliamentary portfolio committee on Justice and Correctional Services. Simply put, as explained by de Vos (Interview Appendix B, 2017), policy initiatives and implementation thereof will have to commence simultaneously, where collaboration will be key to successful implementation. This of course will have to be undertaken incrementally in relation to the available finances.

6.3.7 Conclusion

This thesis has identified the gaps in the constitutional, legislative and policy frameworks, which are impeding the implementation of multilingualism in the South African legal system. The thesis has taken stock of the developments of African languages in the legal system, illustrating that the system has not transformed from a language point of view. In addition to the exclusionary legal frameworks, what has emerged from this thesis, is that there is a silent voice of legal professionals and broader society. Kaschula (2016: 201) with reference to higher education institutions, explains that the silent voice of students and lecturers has in effect resulted in the embracement of the hegemony of English regardless of the intellectual costs to themselves. The same applies to attorneys, advocates, magistrates and judges who remain silent and blissfully accept that African languages can only be languages of interpretation and not languages of record in the South African legal system. This silent voice is in effect promoting the elevation of English to a super official language at the cost of elevating the status and use of African languages. In effect this silent voice comprises of African language legal practitioners who support the powerful position occupied by English in the legal system, on the justification that it is the most practicable solution to the language problem. For the monolingual few, the idea of multilingualism is intimidating and threatens their powerful position in the legal system, where dominance has been entrenched at the expense of the broader majority.

Language is not a problem, however it is seen as such to ensure that the system that everyone benefits from, as indicated by de Vos (2010) does not change, regardless of the effects thereof for African language speakers trying to access justice. They see language and in particular multilingualism as a problem rather than a resource and therefore something that must be avoided (Ruíz 1984). Language planners therefore need to engage with Ruíz's (1984)

three orientations to language planning, namely language as a problem, language as a right and language as a resource. Orientation refers to “a complex of dispositions toward language and its role, and toward languages and their role in society” (Ruíz 1984:16). As explained in chapter two of this thesis, this will assist in transforming the legal system linguistically.

By viewing language as a resource rather than a problem, it will create opportunities for forensic linguists to inform the language planning and policy processes, in order for the frameworks to be legally and linguistically sound, given the interdisciplinary nature of the recommendations I have advanced. Opportunity planning will also be of relevance in creating employment opportunities for translators in the legal system as explicated in chapter two of this thesis. The legislature in consultation with relevant stakeholders has to confront these challenges highlighted and implement the necessary recommendations, in responding to the language demographics of litigants in the legal system, where language is seen as a resource. This is in the interests of a more effective judicial system.

I have undertaken this research as both an LLB and African languages graduate to ensure that the legal system I intend entering is a linguistically inclusive one, that enables access to justice, regardless of whether a litigant is an English, Afrikaans or African language speaker. To enable such linguistic inclusivity all persons regardless of race, need to value the status and use of the African languages, where legal practitioners are linguistically competent in the languages of the province in which they practice. This research, in Lourens’s (Interview Appendix C, 2017) opinion is the first step towards highlighting the importance of the relationship between law and language in the broader transformational agenda of the legal system. To this effect, I have attempted to give meaning to the departing sentiments of Alexander (2013) who stated that:

My sincere wish is that readers will consider these thoughts, take a step back and try to get a perspective on what has actually been happening since 1990, when the new South Africa began. Even more optimistically, I hope that such a rethink will inspire the reader to want to find a point of engagement.

What is needed now is for a broader engagement process, in accordance with the findings and recommendations of this research. To this effect, “we cannot sjambok the people to paradise” (Alexander, 1997: 90), but we can no longer be the silent voice that benefits from a linguistically exclusionary legal system, and this research marks the emergence of a

transformed vocal voice, where the legal system is one for all official language speakers rather than an English elite.

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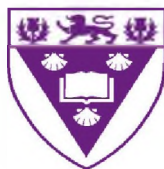
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APPENDIX A



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NRF SARChI Chair: Intellectualisation of African Languages, Multilingualism and Education

7 March 2016

To whom it may concern,

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 MA Degree in African Language Studies under my tutelage and supervision.

Ms Docrat is presently embarking on research pertaining to the role of African Languages in transforming the South African legal system.

In order to pursue and conduct this research she requests to engage with you for your expert opinion on Language and the Law. This would be of great benefit to Ms Docrat's research, given also has an LLB degree as well as an Honours degree in African Language Studies.

I do hope that you will be able to find the time to answer a few questions that Ms Docrat needs assistance with. Thank you in advance and with kind regards.

Sincerely

A handwritten signature in black ink, appearing to read 'R.H. Kaschula'.

Professor Russell H Kaschula

SARChI Chair: Intellectualisation of African Languages, Multilingualism and Education

APPENDIX B

Interview

Name of interviewee: Professor Pierre de Vos

Occupation: Constitutional law expert

Date: 25 April 2017

Time: 11h00

Duration: 41 minutes

Place: Faculty of Law, University of Cape Town (UCT)

Recording: Digitally recorded and transcribed

Questions:

- 1. 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. In accordance with this understanding and the clarity of the need to elevate the status of the African languages through practical and positive measures, advanced in ss (2), would this not extend to the legal system, particularly the Department of Justice and Constitutional Development?**

Section 6 is a bit of a mess in my opinion. They tried to signal that there should be some respect for multilingualism and at the same time tried to make the obligation imposed by the Section minimal. Languages must be treated equitably and not equally; they must have parity of esteem, whatever that may mean. It is qualified by reasonably practicable and costs and so forth. So it is not clear what the obligation is. I am not sure how it will pan out if you take it to court. Not because there is no argument and a good argument to be made for the obligation on the state to promote multilingualism or the department of justice or anyone else. The reason why I am not sure whenever you interpret and apply the constitution it happens within a political context. In our context there is very little support for multilingualism. There is a strong for support that every language is equal but English is more equal. Having said that one can construct a very strong legal argument on the obligation of the Department of Justice to do something. Where it does nothing the argument will be a breach and what the court will do then, I am not so sure about.

1.1 If so, would the Department of Justice and Constitutional Development's Draft Language Policy (2015) specifically Section 9.1 thereof which states the following:

The use of official languages in court proceedings including court interpretation services, court process, documents and recordings of court proceedings shall be regulated by rules of court or any other applicable legislation;

not be contrary to the provisions of Section 6 of the Constitution?

There is another problem here. The politics of it is being bedevilled by Afrikaans. Because, of our history and how Afrikaans is associated with the Apartheid regime and 1976 and all of that, Afrikaans people have the power in promoting multilingualism and that bedevils the entire thing. That is why now we have an English only policy. We have to get beyond that. The people who challenge this from an Afrikaans perspective have money and influence. I think if you are going to challenge this you will have to get people who speak some of the other nine official indigenous languages and not the people who are upset that Afrikaans has been diminished. This must be done within the context of decolonisation. Let's face it English is the language of the coloniser.

Follow up question: I take your point Prof de Vos, regarding Afrikaans. It was not the language that oppressed the people rather the people who used the language to oppress the people. The same thing is happening with English, where African language speakers are adopting an English only approach. Would you agree with this?

It is completely incoherent I think to say that Afrikaans is bad but English is fine. It is a conceptually and politically incoherent position. English is also the language of the oppressor and an imposition. Obviously if you believe in the language of the day and decolonisation you have to believe in multilingualism and there are tools in Section 6 that you could use to do that. I just think that most of these provisions that are vague and dependent on what is practicable and what are the costs involved, you have a much better chance of winning in court where you have won in the court of public opinion. The phrases are very vague- what is practicable? The proponents of English are going to say that you need one language that most people can understand and you can record in as it is the system of precedent and people don't understand all the languages. It is a huge thing to deal with it. How do you deal with it?

People have to learn more languages. We need to teach people more multilingual skills and those people who are already multilingual need to be rewarded.

1.2 Would the fact that the languages of record being English and Afrikaans not be contrary to the provisions of Section 6(4) of the Constitution, which states that “... all official languages must enjoy parity of esteem and be treated equitably” ? Or are the provisions of subsection (4) subject to budgetary constraints? (My reference to budgetary constraints is based on the cases of *S v Damoyi* [2004 (1) SACR 121 (C)] and *S v Matomela* [1998 (3) SA BCLR (Ck)] where the issue of translation costs were raised, where the cases were heard in an African language).

See answers under questions 1 and 1.1 above.

2. Both Sections 6 and 35(3)(k) of the Constitution includes the terms practicable and reasonably practicable. I have noted the discussions by Perry (2004) and Curie and de Waal (2005 & 2013) on the sliding scale formula relevant to language rights, when assessing when the rights may be justifiably limited in light of the limitations clause in Section 36 of the Constitution.

See answers under questions 1 and 1.1 above and 2.2 below.

2.1 Moseneke DCJ (as he was then) in the case of *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2010 (2) SA 415 (CC)] held that ‘reasonably practicable’ will be determined with reference to the specific context of the case which includes taking cognisance of racial discrimination. I understand that although the case dealt with language, the context was an educational one, however in your opinion should/ must the court in instances concerning language, in determining when it is ‘reasonably practicable’ consider the racial discrimination?

See answer under question 2.2 below.

2.2 Furthermore in the *Ermelo* judgment [2010 (2) SA 415 (CC)] Moseneke DCJ held that where the language(s) are official the state bears the duty not to take away or diminish the right without appropriate justification. Would it mean that given that the languages of record currently being English and or

Afrikaans and having official status, would justify the exclusion of an African language(s) per province as a language(s) of record?

This is an interesting argument that raises a rather technical legal argument. There is a strange thing that raises the way in which the constitution deals with language. I am not sure the section is as strong as we think. The section is not placed in the Bill of Rights. It is not actually the enforceable right in the Bill of Rights. Section 29(2) is an enforceable right in the Bill of Rights. We do not know how enforceable Section 6 is and whether the same Bill of Rights argument can be translated to a non Bill of Rights obligation. That is the technical aspect. I have always wondered why it was not included in the Bill of Rights. It is as if they did not want it to be included as the rights. This is what we ideally want to do, but with the rights it reads this is what must be done. It is possible to make an argument, I am not sure how the court will decide this, but is not absolute to make a direct comparison.

3. With reference to the article on your blog, entitled *All Languages Equal but English and Afrikaans more Equal?* (2008) you raise the point of the importance of the language demographics being representative in the courts.

3.1 In your opinion would there need to be a language policy drafted per province to accommodate the language demographics of each province?

See answers under follow up questions following question 6.6.

3.2 Would you agree that this would require attorneys, advocates and judicial officers who are linguistically competent speakers of the languages of the province?

See answer under question 5.1 below.

3.3 The Apartheid official languages were legislated in the Attorneys Act 53 of 1979 and the Admission of Advocates Act 74 of 1964; in your opinion should the amended legislative works not have included the African languages?

See second follow up answer under question 6.1.1 below.

3.4 More specifically is the current legislative framework not perpetuating the Apartheid legislative languages by maintaining the English and Afrikaans status quo in courts, specifically with regard to the language of record?

See follow up answers under question 6.6 below.

3.5 In your opinion is the current legislative position not contradictory to the Constitutional provisions, with regard to language?

See follow up answers under question 6.1.1 below.

3.6 In your opinion is the legal system afraid that by elevating the status of African languages in the various statutes that this will be seen as politicising language, with the intention of entrenching this onto legal professionals?

See follow up answers under question 6.1.1 below.

3.7 After perusing the Judicial Service Commission Act 9 of 1994, I found no reference to language, or language requirements for judges.

3.7.1 In your opinion should these individuals not be linguistically competent as well?

See follow up questions under question 6.1.1 below.

3.8 Should the bench not be reflective of the official languages in South Africa in the province they are appointed in?

See follow up questions under section 6.1.1 below.

4. Based on the above questions, in your opinion is the right in Section 35(3)(k) of the Constitution an interpretational right only with regard to speakers of African languages?

See answer under question 2.2

4.1 If so, would this not be contrary to the provisions of Section 6 of the Constitution specifically subsections (2) and (4)?

See answers under questions 1 and 2.2.

5. In your article entitled *All Languages Equal but English and Afrikaans more Equal?* (2008) you raise the point of entrenching language requirements on legal professionals.

5.1 Should the African languages of the province not be taught as part of the LLB programme where vocation specific courses are compulsory to ensure linguistically competent students are graduated?

Language is politicised. These are political choices being made. These are the choices of the elites. English for some bizarre reason is seen as the language of the elite. It is an aspirational language and the language of success. It is part of the colonial legacy. What is needed is a complete radical change in the attitude of people, the judges, lawyers, the people who teach at universities and how we see languages. You have to change. That is why there is this incoherence. People want to put the band aid on saying you have to speak an indigenous language if you graduate with an LLB. The argument there is I suppose that you can speak to the clients, but keep English as the language of record.

5.2 Furthermore in your opinion should African language requirements not be legislated for attorneys and advocates prior to admission to the Side Bar and Bar? Would this in your opinion be adopting the Apartheid legislative approach of entrenching language requirements or would it be justifiable on the basis of giving meaning to Section 6 of the Constitution?

See follow up answers under question 6.1.1 below.

6. **“To provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic” (Legal Practice Act, 2014).**

6.1 I have read your article on your Blog, entitled “What do we talk about when we talk about transformation (2010).

6.1.1 What is your understanding of transforming the South African legal system?

Respect for difference and diversity. Destabilising the set, sometimes invisible norms that we use to regulate and measure success and privilege. Respect for difference in language, sexuality, gender and so forth. The system being set up in such a way that it doesn't automatically and invisibly privilege people because of their language or sexuality. People just shout out transformation but actually they just want to do it on top and don't want to do it in the structures. That is why I am worried that the multilingualism will be difficult to promote, because people don't see how it has to do with transformation. For most people it becomes invisible.

Follow up question: Prof de Vos, I wanted to ask you a question about UCT if you do not mind? With the LLB, do the students learn an African language? isiXhosa perhaps?

No. There is an option which nobody takes. There was no appetite for a compulsory course. People must be do a language, but they must choose it can be Mandarin it can be French or any other language. Up until now, people have resisted the imposition of isiXhosa or another indigenous South African language. Unlike the medical school where you have to take the conversant course in isiXhosa.

Follow up question: Does this not shift the ball back to Universities to transform and decolonise?

There is a tendency for institutions to do what is easiest for them. The path of least resistance. It is more difficult to actually fundamentally change how we see language, so it is easier to have a final year elective course to say we are doing something but we are actually doing nothing. At my University, UCT, I have found them as a general rule not to be receptive to any promotion of multilingualism. When I was on the senate research and learning committee, I proposed that when were redoing the admissions policy, and people said we mustn't only use race, I said okay if you don't want to really use race why not use language and we give some extra points to people who can speak an indigenous South African language, automatically if they apply. If they have done this course in matric we give them two extra points, then you do not mention race, and people, looked at me at as though I was crazy. That was just a small carrot and people were not interested. This was the position four years ago.

Follow up question: It reverts to the mindset of people and how they view language?

Yes. Especially at an English liberal institution, there is a deficit attitude. We have a problem, people cannot speak English and we have to teach them how to speak. So, instead of saying we have people with different languages, we have this fantastic resource we should do things differently, we have this deficit that if you cannot speak English you are not good enough. That is deeply ingrained, even though people might not say the words, because it is politically incorrect to say, that is what people think. There are class issues and what we see as aspirational.

6.2 More specifically in your opinion and with regard to the Legal Practice Act, is the process of transformation limited to race and gender?

That is the big problem with the whole discourse of transformation in my opinion. It focuses on one or two identities, race and gender and maybe disability, but we pretend that it does not really matter. Instead of thinking about real transformation, is actually about the structures that perpetuate advantage and disadvantage and language plays a fundamental role in structuring that advantage and disadvantage. If you are not a first language English speaker you are already disadvantaged in many ways in our system. It is inherent in the system, because you are presumed to have a certain competence which makes people assume you are intelligent, successful and so forth. If you are a second, third or fourth language speaker you might have exceptional proficiency in your home language, but this has no value in our system. We often see transformation in people- putting a different person there, how is that system structured how is the legal system structured, these rules, who does it benefit and who does it disadvantage and obviously language is one of the things that is fundamental. It is not the only thing, there are class issues.

6.3 It is my understanding further, that the Legal Practice Act is aimed at fostering a more accessible legal system.

6.3.1 In terms of the accessibility of the public, how will this be achieved if the majority of persons in South Africa are African language speakers and only 9.6% of the population speaks English?

See answer under second follow up question following question 6.6 below.

6.4 How does the Legal Practice Act, envisage broader representation of the legal profession, where the primary focus is on race only and language does not feature?

See answer under question 6.2 above.

6.5 Am I correct in my understanding that the Legal Practice Act aims to encourage students to study law at the former Historically Black Universities (HBU's)? If so are we to presume that all law graduates need to first master the English Language to enter the profession?

You would be disadvantaged. There will be a difference between how you are being taught and the language in which you are being taught. To change you need everything to change. If you change one thing you create a new problem. If you have courses taught bilingually, in the absence of the system changing, what happens? It is almost an all or nothing situation. This is one of the challenges. People who are opposed to multilingualism in the legal system are going to say it is not possible to do everything at the same time, so it is better to do nothing. In a way they have a point, if we start with something we create a new problem. We have to think of a way of doing everything incrementally, but doing a little bit of everything incrementally. This is what we must counter from people who say it is not possible. You must say we can do a little of everything incrementally and make it better.

Follow up question: Does it revert to the costs issue for both Universities and the legal system? Why not plough the money used for interpretation services which are not always accurate into translation of the record where necessary?

I think there might be a problem, maybe I am wrong. There is definitely a costs issue. Then you could let some courts run in isiXhosa and isiZulu and so on. I think there is a problem with this. The politically dominant language is English. I fear that this will create two systems, one in English and another in isiXhosa or another language. You have to find a mechanism to deal with this.

Follow up question: If you look at the statistics released by Legal Aid South Africa, a minority of people speak English as their mother tongue. In addition, the statistics illustrate that proficiency in English is poor in most instances. How is it fair to have English then as the sole official language record?

The problem is once again, maybe I am overstating this matter, the vast majority of what happens in the legal system is irrelevant not for the people involved but for the legal system. All that counts is what happens in High Courts, the SCA and Constitutional Court, they set the precedent. Most of the people go to the Magistrates' Courts and do not count in the sense of precedent, they are seen as inferior, we do not know what happens there and their cases are not reported. All the cases that will be run in vernacular languages will be in the Magistrates' Courts, it will not be recorded. What we need for multilingualism to flourish is for the law to be written in the vernacular languages. During the Apartheid years, Afrikaans was taken up by the Universities and the law was written in Afrikaans and judgments were reported in Afrikaans.

7. I have read your article entitled *Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court 2000 (63) THRHR.*

7.1 Do you agree with Griesel J in the case of *Lourens v Speaker of the National Assembly and Others* [2015 (1) SA 618 (EqC)] that as a result of Section 6 of the Constitution not explicitly stating that the official languages should all be used simultaneously, justifies the non-publication of legislation in the African Languages?

See answer under question 7.2 below.

7.2 Do you think that Griesel J's interpretation of the constitutional language provisions was restrictive, and did indeed elevate English to a 'super official' language?

The problem is that it is larger than the text in the Constitution. It sounds like a deficit model where everyone must speak English and we can add something on the side.

7.3 In your opinion do you agree with the analysis and application of Section 13(2)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, by Griesel J who found that discrimination was fair?

See answer under question 7.2 above.

APPENDIX C

Interview

Name of interviewee: Mr Cerneels J.A. Lourens

Occupation: Lawyer and language rights activist

Date: 28 April 2017

Time: N/A

Length: N/A

Place: Brits, North West Province

Recording: Questions were answered via e-mail

Questions:

- 1. Section 6(2): 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.**

- 1.1 Based on section 6(2) of the Constitution above, it is my understanding that the term ‘state’ includes the Department of Justice and Constitutional Development. Is this understanding correct?**

The State is not defined in the constitution. The Department of Justice and Constitutional Development is part and parcel of the National Government being the executive branch.

- 1.2 If so, in your opinion would the Department of Justice and Constitutional Development be complying, given that the language of record in the courts remains English/ Afrikaans?**

It is very interesting. In my opinion language is a substratum through which the rights protected in the Constitution should be actualised. The magistrates must comply in regard to the usage of languages in the Courts in terms of Section 6 of the Magistrates’ Courts Act. In regard to the High Courts, the 17th amendment of the Constitution and then in terms of Section 8 of the Superior Courts Act the Chief Justice has the authority to rule and administrate the High Court. In practice, the use of Afrikaans has been phased out in many instances. This was caused by the failure / absence of a proper language policy

which would be geographically based. Language demography dictates that it is reasonable, proportional and practical to render judicial services in Afrikaans and in other official languages other than in English, in those areas. With regard to African languages, I am thus of the same opinion. The Chief Justice will create a situation where he will have to recuse himself if the decision only to use English is taken on review. It may create an interesting constitutional crisis. I am of the opinion that the constitutional change to make the Chief Justice in charge of the High Court's administration, in the light of the separation of powers, is an error in law. The determination of language of record is an executive function. All 11 official languages should be languages of record. The duplication of time in the court by the interpreting of everything in order to record it in English or in Afrikaans (the latter can now be ignored) is contra the Constitution. If the magistrate, accused and complainant are for instance isiXhosa speaking, the trial should proceed in isiXhosa and the court rolls will be much shorter. The solution is in the management of the courts. Where the presiding officer is not proficient in a language, the development of a rotational court system where the magistrates or judges can be sent to a specific court who can then adjudicate the case in the language required. A language manager will thus allocate those cases.

2. Would you agree that English/ Afrikaans both enjoy enhanced status as official languages in comparison to the nine official African languages in the South African legal system?

With regard to English, yes but with regard to Afrikaans, no. Since 1994 the use of Afrikaans as a language of record was intentionally diluted. The core problem is that black lawyers are trained in English. The legal text books and legislation as source documents, are not available in the African languages: consequently if they do not demand the use of the African languages, it will become a final default position in favour of English.

2.1 My question above is informed by the provisions of section 6(1) of the Magistrates Courts Act, besides the fact that English and Afrikaans are also the languages of record.

According to the text of Section 6(1) of the Magistrate's Court Act, as amended, English and Afrikaans are no longer the only languages of record.

2.2 Is this not contrary to the provisions of section 6(4) of the Constitution as well, which states that in accordance with subsection (2) all eleven official languages must enjoy parity of esteem and be treated equitably?

A very important issue is raised in this question. The interpretation of this second sentence of Section 6(4) has not as yet been authoritatively determined by the courts. The first words, "without detracting from s 6(2)," is very important. What does it mean when you read the rest of this sub clause without this condition? The word "parity" or the phrase "parity of esteem" and "equitable treatment" do not mean equality, if one reads it with the first words of the second sentence of Section 6.4. I am of the opinion that the intention was that the constitutional writers understood that total equality is not practical, also in the light of the fact that the 9 African languages have not been developed to be able to act as "official" languages as yet. In the light of the criteria of parity of esteem and equitable treatment, limited by the introducing words which obliges the state to develop the previously marginalized African languages, the Government can say that it is not practical. I am of the opinion that it cannot say that parity of esteem and equitable treatment are granted towards the African languages if they do not use them as languages of record. The constitutional court's decisions should only be published in English. This cancels a lot of what has been argued that the authorities will not be usable in the lower courts. The essential cases should be translated in my view in all official languages if real contents will be given to the official languages.

2.3 Section 9.1 of the Department of Justice and Constitutional Development's Draft language Policy (2015) states that interpretation, court process, documents and proceedings will be regulated by the rules of court or applicable legislation.

Please note that the department gave a presentation before PanSALB at the end of February 2017.

2.3.1 Based on the above, would you agree that the Department of Justice and Constitutional Development's Draft language Policy (2015) reaffirms the English/ Afrikaans language of record and elevation of superiority over the nine official African languages, and is thus contrary to Section 6(2) and (4) of the Constitution?

No. It refers that the rules will have to dictate what languages will be used in court and there is no rule in either the High Court or in the Magistrates' Court's rules, but only in that of the Constitutional Court. A proper language management programme must be developed by the department in conjunction with the Chief Justice's office and the Magistrates' Court's Commission.

3. The following questions relate to your chapter: "Language Rights in the Constitution: the unborn language legislation of subsection 6(4) and the consequences of the delayed birth" In *Law, Language and the Multilingual State*.

3.1 Based on the discussion pertaining to what is meant by 'official' given the absence of a definition in the Constitution; you stated that official means the language(s) selected by the state for official purposes.

See answer under question 3.5 below.

3.2 Furthermore you stated that once the official languages were elected the executive can neither directly nor indirectly forbid or neglect the use thereof, as this would undermine the ROL.

See answer under question 3.5 below.

3.3 If so, then in your opinion would the exclusion of the African languages as languages of record, not be undermining the ROL? Or in your opinion is

this justified based on the fact that an accused person can impart evidence in a language they understand, including the African languages, through interpretation, in accordance with section 35(3)(k)?

See answer under question 3.5 below.

3.4 In your opinion then, do African language speakers only have interpretational rights? Is this fair and equitable? Is this not contrary to the provisions of section 6(2) of the Constitution.

See answer under question 3.5 below.

3.5 Would you agree with me that the nine official African languages are only official on paper and not in practice, specifically in the legal system?

I will answer all the sub questions of question 3 simultaneously. The granting of official language status to the African languages is currently interpreted and applied by the National Government as what the old people said about children: “children should be seen, but not be heard”. Take the national Legislator where they can use their own languages in debates, but when they received the legislation, it is only made available in English. I think the whole problem is caused by politician’s ignorance about the language law and the failure to plan. Furthermore, the myth that the development and use of the African languages will create or vitalise tribalism and ethnic tensions which will undermine the national unity, is one of the core problems. The current policy indeed boils down to only interpreting rights. Nobody is entitled to his own language as is clear from Section 35(3)(k). This is a very relative right. It has its own limitation in it as well as the limitation found in Section 36. We must remember that this is why your thesis is so important, that we may now be sowing the good seeds. It is a long and steep hill; if we can reach the top, where all the official languages are treated relatively equal, I think that is what is meant by “parity of esteem” and then Section 6(2) will no longer be necessary. Section 6(3)(a) is also in my mind formulated not to be a minimum requirement clause but the intention is to maximise the languages with a minimum limitation. Thus, read together with section 6(2), it is meant to be a progressive use clause of the official languages. Raising up, instead of levering down to only English, should be the point of departure.

- 4. What is your view on the drafting of a language policy for the justice system, where the primary African language or Afrikaans, depending on the demographics of the region is placed alongside English as the record? My argument is based on language demographics of the country and the geographical positioning of the various courts in each area.**

The practical and realistic interpretation of the language clause of 11 official languages is that it should be used on a geographical basis according to the language demography. The internationally accepted principals of practicality and proportionality must be adhered to. I am in agreement with you that the geographical approach is the correct approach.

- 5. You raised the point in your chapter referred to above, that the demographics argument could be used to ensure linguistic diversity.**

5.1 What is your understanding of transformation of the South African legal system?

The transformation of the South African legal system is in my view needed but the principle of Ubuntu, as contextualised in a geographical area should be complied with. The exclusionary penalising approach against Afrikaans speaking lawyers is wrong, but the core of the policy to transform the bench in accordance with the racial demography cannot be criticised. This should however, be limited to include the language offer in the courts, thus notwithstanding race, the judge in the Western Cape must be able to speak English, Afrikaans and isiXhosa. In Mthatha English and isiXhosa, and so forth. The absence at the judicial service commission and magistrates' commission to take language proficiency into account when appointing judges and magistrates in specific courts, is a breach of a basic human linguistic right. (The matter is naturally a developing concept).

5.2 Do you think that language forms part of transforming the legal system, or is it limited to race and gender only?

See answer under question 5.1 above.

5.3 Do you think that the absence of language requirements in the JSE Act for the appointment to the judiciary ignores the importance of language in the legal system?

Yes I agree.

5.4 Do you think that by legislating African language requirements for attorneys and advocates prior to admission to the Side Bar and bar, it would be entrenching language on them as the Apartheid system did?

To answer you indirectly; in the light of the absence of a language requirement, the default position, in the light of the non-availability of the legislation and study material in African languages English is made the only official language in Courts. The Courts cannot work without the necessary legal tools, that is the legislation should be available in the African Languages as a prerequisite, in order to achieve this purpose. I am personally of the view that a lawyer should have English, Afrikaans and the regional language. Naturally what the University offers, would limit the aforesaid choice.

5.5 In your opinion should the focus not be on the types of LLB students our universities are graduating? Simply put should we ensure that our LLB graduates are linguistically competent (in terms of the African language in their province or the language spoken by the majority in the province)?

I think I have answered it above. This will enhance the need for the teaching and development of the African languages and I am 500% sure of this.

6. *Lourens v Speaker of the National Assembly and Others* 2015 (1) SA 618 (EqC)

6.1 In your opinion based on the judgment, would the provisions of Section 6(2) and (4) of the Constitution not outweigh the arguments by the Respondents regarding simultaneous and equal use of the languages not stated in the Constitution?

I have never understood Judge Griessel's interpretation of my argument where he stated in the judgment that the 11 official languages should be treated equally at all times, as he understood my case which was wrong as I have never argued that. My point is that "officiality" means that the legislation, through which the people are governed, should be available in all official languages within a reasonable

time. Sections 6(3)(a) and 6(4), which deals with the “use” are thus relevant in the administration. Thus, in Mthatha English and isiXhosa versions of the national legislation will be used and in the north of Limpopo, Tshivenda and English will be used.

6.2 Should the judge not have interpreted the constitutional provisions purposively?

Indeed. In this regard, with regard also to the previous question.

6.3 In your opinion is the fact that legislation not being published in the eleven official languages not excluding persons from broader society on the grounds of language?

See answer under question 6 above.

APPENDIX D

Interview

Name of interviewee: Justice Lex Mpati

Occupation: Retired Judge President of the SCA, Bloemfontein.

Date: 1 February 2017

Time: 11h00

Length: 34 minutes

Place: Grahamstown High Court, High Street

Recording: Digitally recorded and transcribed

Questions:

- 1. 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. In accordance with this understanding and the clarity of the need to elevate the status of the African languages through practical and positive measures, advanced in ss(2), would this not extend to the legal system, particularly the department of Justice and Constitutional Development?**

Provision is made in the court system. Any and every witness in the courts is entitled to use a language in which he or she is comfortable with or in which they are able to express themselves in. It is for the state to get an interpreter so the litigant can put his or her case across to the presiding officer.

Follow up question: Are you saying that the right is given meaning through interpretation and that this satisfies a practical measure?

It will be chaos in South Africa, if each and every African languages or all languages should be languages of record, I think it is sufficient for there to be one or two official languages of record for the presiding officer. There must be properly trained interpreters who will not be making mistakes. Then for the litigants to comfortable in the language they understand and for the interpreter to interpret from this language into the language of record.

Follow up question: Could we not use the demographics argument, specifically the regional languages, for example in the Eastern Cape we have three provincial

languages. Would that not be introducing isiXhosa to a certain extent? Could we not do this in each province where there are majority spoken languages?

The Eastern and Western Cape provinces would be much easier, as there are three dominant languages. However in other provinces there are four or five dominant languages used. I think we need uniformity in the country. As far as the Constitution is concerned each province is required to use two official languages. In the Eastern Cape it would probably be English and isiXhosa, I do not think Afrikaans. In KwaZulu-Natal it would be English and isiZulu. For the provinces that is fine but for the courts it is a practical issue. The trial does not only end in the court of first instance. For example in the Constitutional Court there are Sotho, isiXhosa and isiZulu speaking judges, who however may not be comfortable in the other languages. This is why I am talking about having one official language of record, it is to facilitate the higher courts.

Follow up question: For example in the case of *State v Damoyi* the trial was conducted in isiXhosa. On appeal however the language of record was not in English and this was obviously an issue. In instances such as these could the record not be translated into English?

It would be practical if we had the resources, it would be okay.

1.1. More specifically should the legal system not adopt 'practical measures' to ensure the equal use of the African languages given the provisions of Section 6 of the Constitution?

See answer to follow up question under question 1 above.

1.2. Would the adoption or creation of these practical measures not assist in ensuring that the right conferred in Section 35 (3) (k) of the Constitution be implemented, to the extent of having trials conducted in an African language?

See answer under question 1 above.

1.3. In your opinion is the 'parity of esteem' and 'equitability' which is advanced in Section 6 of the Constitution evident in the courts?

See answer under question 1 above.

2. The Apartheid official languages were legislated in the Attorneys Act 53 of 1979 and the Admission of Advocates Act 74 of 1964; in your opinion should the amended legislative works not have included the African languages?

See answer to follow up question under question 2.3 below.

2.1 In your opinion is the current legislative position not contradictory to the Constitutional provisions, with regard to language?

See answer to follow up question under question 2.3 below.

2.2 In your opinion is the legal system afraid that by elevating the status of African languages in the various statutes that this will be seen as politicising language, with the intention of entrenching this onto legal professionals?

See answer to follow up question below.

Follow up question: Could we not legislative that before you graduate with your LLB or as part of the admission requirements you be linguistically competent? Or would you think this is politicising language?

I would not like to say it would be politicising it, but doing away with those requirements of English and Afrikaans in the first place was along political grounds. Why these two languages. These were requirements. The same argument would apply why would you need to pass a language in order to be admitted into the profession.

3. After perusing the Judicial Service Commission Act 9 of 1994, I found no reference to language, or language requirements for judges. Furthermore I read an interview which took place in 2011 as part of the Constitutional oral history project. Therein you spoke about the importance of transformation of the bench in South Africa, specifically mentioning the importance of ensuring that competent judicial officers are appointed.

3.1 In your opinion should these individuals not be linguistically competent as well?

See answer under question 3.4 below.

3.2 Should the bench not be reflective of the official languages in South Africa in the province they are appointed in?

See answer to follow up question under question 3.4 below.

3.3 In your opinion is transformation understood to be limited to gender and race only?

See answers under question 3.4 and follow up question below.

3.4 If so how does such transformation foster equal access to the legal system, where language can be an exclusionary measure?

You would not want to exclude a candidate who meets the criteria, because he or she cannot speak a language. You would be placing suitable candidates at a disadvantage on grounds of language. I think the aim is that the judiciary should not be lily white or black only but reflect the demographics of all races. When you look at the composition of the judiciary that it is representative of all the races and both genders.

Follow up question: Do you think language forms part of the transformational process?

Again it is desirable that people are able to communicate in languages other than in English and Afrikaans, but to me that is not what transformation is. My view is that in addition to race and gender and skill, you need someone to have an open mind where whether white or black receives equal treatment. That in addition to the demographics is what I understand transformation to be.

4. Being a mother tongue isiXhosa speaker and an isiXhosa graduate, has it benefited you in practice and while you have been a judge?

Absolutely. It has definitely benefitted me. That is why I said it is desirable for a judge to be able to communicate directly with the litigant. You are able to communicate with your client much better without a middle person. This is more important in the criminal system, where there are nuances that has not been

translated correctly. It assists as a presiding officer is able to understand where there are discrepancies. When I was an attorney I had a client who was isiXhosa speaking and charged with arson. A question from the prosecutor was that you ought to have known that you would start a fire. The interpreter translated ought to as must have. In law there is a major difference. Knowing that this was incorrect I intervened and alerted the Magistrate who could not speak isiXhosa of the interpretational error. The Magistrate after deliberating with others returned to court and said he accepts the interpreter's version as correct and my client was found guilty. It is advantageous for a presiding officer to understand even if there is an interpreter present.

4.1 Do you think that the process of transformation needs to begin at universities where the LLB programme is redesigned in light of the transformational space we currently find ourselves in?

See answer to follow up question under question 4.2 below.

4.2 Should the African languages of the province not be taught as part of the LLB programme where vocation specific courses are compulsory to ensure linguistically competent students are graduated?

See answer to follow up question below.

Follow up question: Would it not be practical for students to learn the African language for example in the Eastern Cape, isiXhosa as a vocation specific language that could be utilised while working at the legal aid clinic? Or would this be forcing the students to learn a language?

It is the same argument. It is desirable to be able to communicate with the client in language which the client is comfortable in. Again what about students from other provinces, you would be forcing it on them. It is desirable, but we cannot force it on people.

Follow up question: Scholarly articles have made reference to enhancing access to justice and bringing the courts closer to the people. Is this in terms of geographical location or is this based on accessing justice in a language understand. Is this too utopian?

This is again desirable. To my mind access to justice and accessible in the sense of feeling comfortable and walk out of court and say I received justice. You need facilities in the court where people are linguistically competent to communicate with persons, this in my opinion is what is meant by access to courts.

5. In your opinion, given the purpose the Legal Practice Act (to transform the legal system) should the role of African languages not have featured in this supposedly transformative statute?

See answer under question 6 below.

6. Does the fact that language, not forming a significant part of the Legal Practice Act, in your opinion suggest that the legal system specifically legal practitioners and judges do not prioritise language and do not view it as a transformative mechanism to ensure greater access to the courts and justice?

It is desirable to converse and put your case across in a language you are most comfortable in and for the presiding officer to ensure there is an interpreter present. That is transformation not forcing people to learn a language. It is the responsibility of the speakers of the African languages to learn their own languages and to preserve their languages. This would lend itself to the development of the African languages as the Afrikaans speakers did. This would elevate the use and status of the African languages.

APPENDIX E

Interview

Name of interviewee: Dr Gustav Muller

Occupation: Constitutional Law expert at the University of Pretoria

Date: 28 July 2017

Time: 08h15

Length: 37 minutes

Place: Interview conducted telephonically

Recording: Digitally recorded and transcribed

Questions:

- 1. Section 6(2): 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.**

- 1.1 Based on section 6(2) of the Constitution above, it is my understanding that the term 'state' includes the judiciary. Is this understanding correct?**

Question was not asked in the interview, as it was answered in a previous interview. See Appendix C, Lourens Interview.

Follow up question: In terms of Section 6(2) of the Constitution, when referring to the elevation of the African languages, where practicable, is this discretionary given that there are no guidelines?

Yes, that is correct.

Follow up question: If they are discretionary then how do we as citizens know what they are?

That is where you need the executive through a minister or the presidency to set a policy agenda. On the legislative side to allow for parliament or provincial parliaments to draft legislation with specific guidelines. Parliament has a dual role, where in addition to the legislating, as part of their constitutional awareness campaign, language can be promoted. PanSALB as a creature of statute would bear the primary responsibility of promoting, advocating and enhancing the use of all languages, as this is their primary mandate.

Follow up question: Although PanSALB has a yearly campaign, this in my opinion is not enough. How do we hold parliament and PanSALB accountable? Can we use a declaratory order in establishing what their responsibilities are and what are the parameters of Section 6 of the Constitution?

It is important to hold all three branches to account, this would include the executive. It does not necessarily have to go to the courts. Questions can be posed in parliamentary committees. It can be an advocacy process as well. With regards to the specific question of bringing a declaratory order- most definitely. Section 38 of the Constitution enables this should the matter be taken to court, where the court is entitled to grant a declaratory order. The declaratory order is an optional remedy. The financial resources needs to be determined.

Follow up question: In applying the point of budgetary constraints to the right in Section 35(3)(k), then would this not be limiting the right based on budgetary constraints?

The first thing would be to ensure there is enough funding made available and projects are prioritised.

Follow up question: So should it be a joint initiative where the onus does not rest solely on the Department of Justice and Constitutional Development?

The principles of cooperative governance in Chapter 3 of the Constitution cannot be forgotten. Although one department might have the primary obligation, it takes a team effort to fulfil the obligation.

2. It is my understanding further that Section 6 of the Constitution creates obligations and as such these obligations need to be enforced.

See answer to follow up question under question 2 above.

2.1 With regards to Section 6(2) above, could a declaration of rights order be utilised in ensuring the state complies with these obligations?

See answer to follow up question under question 2 above.

3. Could a declaratory order assist in providing further interpretation on what the state's obligations are?

See answer to follow up question under question 2 above.

3.1 Given that Section 6 establishes obligations and not rights, would PanSALB be responsible for approaching a court in respect of a declaratory order?

See answer to follow up question under question 2 above.

3.2 Could the declaratory order be accompanied by an enforcement order in the form of direct damages or costs orders? The question emanates from a the Constitutional Litigation lecture last year, where you explained that in the cases of *Mcunu* and *Pheku*, the officials were held responsible in their personal capacity. Could this approach be applied when attempting to ensure section 6 is implemented or could this only be done with a specific language right, for example section 35(3)(k)?

See answer under question 4.3 below.

3.3 More specifically could the enforcement order be made against the CEO of PanSALB in his personal capacity?

No. This can only happen once the person is in breach of a court order. The declaratory order would need to be coupled with a mandatory or a prohibitory order. Upon failing to comply with the enforcement order the CEO could then be held responsible in his personal capacity.

4. Is the state not constitutionally bound by Section 6, where section 1(d) of the Constitution states that there must be accountability?

See answer under question 6.2 below.

5. In the case of *Lourens v Speaker of the National Assembly and Others* 2015 (1) SA 618 (EqC), the judge held that although discrimination was present in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, such discrimination was fair.

5.1 Would the above order not be contrary to the provisions of section 6 of the Constitution given that legislation affects all South Africans and the languages in which it is published either excludes or includes persons from participating in broader society?

We could do it on a rotational basis with all official languages.

5.2 If so, would the judgment not be contrary to section 195 of the Constitution, specifically ss (1)(a), (e), (f), (i) and ss (3)?

No. I think that by relying on Section 195 would weaken the argument. Reliance on cooperative governance through Chapter 3 of the Constitution is the better option in supporting the argument.

5.3 What impact does this have on section 9(3) of the Constitution, given that language is a listed ground?

Section 9(3) can be limited. You would need to ensure that there are enough translators and this will revert back to the budgetary constraints which needs to be determined.

APPENDIX F

Interview

Name of interviewee: Judge James Yekiso

Occupation: Judge of the High Court (Western Cape Division)

Date: 9 August 2016

Time: 13h00

Length: 34 minutes

Place: Interview conducted telephonically

Recording: Digitally recorded and transcribed

Questions:

1. **“Section 35(3) Every accused person has the right to a fair trial, which includes the right – (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;”**

- 1.1 **Would you agree that Section 35(3)(k) confers a right on an accused person to be tried in a language the accused person understands?**

Yes, all the rights under Section 35 confer rights on accused, arrested and detained persons. There is a qualification on the right not a limitation but a qualification on the content of the right. Qualified in the sense that it is practicable.

- 1.2 **Would you agree further that the interpretation of proceedings is the alternative of the right?**

Interpretation would be needed where there are witnesses imparting evidence in various other languages other than the language of the accused or judicial officer.

- 1.3 **Based on section 35(3)(k) would you agree with Professor Schwikkard that the interpretation of ‘understand’ in the right, means where an accused fully understands and not where he/she partially understands?**

See answer under question 1.1 above.

2. **What is your definitional understanding of the word ‘practicable’?**

It is not a limitation. It is unlike the other rights in the Bill of Rights. For example the right to freedom of expression has a limitation placed on the content of the right.

3. What constitutes practicable? Does a Judge apply specific criteria in determining what is practicable in the circumstances; is it discretionary or do you engage in the limitation of rights in terms of the two stage approach under Section 36?

It is case based. It depends on the practicalities of the case. If all the parties are for example Tshivenda speaking then the accused would most definitely have the right to proceed in Tshivenda and not in English. If the accused then appeals then the record would need to be translated and there are costs involved in doing this. There are also time delays with the translation and this could affect the review proceedings.

4. Is it correct to assume that when interpreting rights in the Bill of Rights, judges are to provide positive purposive interpretations?

See answer under question 3 above.

5. A constant issue arising in both the *Damoyi* review judgment and the *Matomela* case is the issue of expenses in transcribing the record. Based on this it is my understanding that this is a reason provided for substantiating an argument against trials being conducted in languages other than English and or Afrikaans, is this correct?

There were numerous issues in the transcribing of the record into English. In fact in the *Matomela* case it took two years to transcribe the record. There are issues plaguing the interpretation services, where high levels of incompetency plagues the system. The requirement is that within six days of the case being heard in the lower court the record is needed for review by the High Court.

5.1 Does the cost of interpretation not outweigh the cost of transcribing?

See answer under question 5.3 below.

5.2 Are time constraints and expenses qualifiers of the right enshrined in Section 35(3)(k)?

The expenses would have the potential to compromise the full realisation of the right.

6. At paragraph 18 of your judgment in the *Damoyi* case you concurred with the suggestion by Tshabalala J (as he was then) that one language be the language of record, what are your reasons for this decision?

The judgment must be interpreted in light of the time at which I drafted it. I am not sure of the resources of the Department currently. When I made the suggestion that English be the sole official language of record for practical purposes. I relied on foreign jurisdiction (I had not set this reasoning out in my judgment). I looked at Kenya, Namibia and Uganda, where English is not the primary spoken language but was the language of record. I thought to myself that the if the other SADC countries are using English as their language of record why not do so in South Africa.

6.1 Is this not contrary to the provisions of Section 6(2) and (4) of the Constitution?

This must be explicated in the Use of Official Languages Act as the Constitution is silent on the application of Section 6 in practical situations. Policies need to be drafted to regulate the use of official languages in terms of achieving parity of esteem.

Follow up question: Do you think it would then be possible to draft a language policy for each province based on the language demographics?

Yes, the legislature in each province can do this alternatively the Parliament can delegate this function.

7. At paragraph 6 of your judgment in the *Damoyi* case it was ascertained that the Western Cape Department of Justice did not have a policy relating to the use of an official language other than English and Afrikaans.

See answer under question 6.1 above.

7.1 Furthermore do the statistics provided by the Director of Public Prosecutions, recorded at paragraph 6 of your judgment in the *Damoyi* case illustrate the need for transformation both linguistically and racially?

See answer under question 9 below.

7.2 Should the law reform commission and legislature, ensure that the Apartheid inherited legislation in the form of the Magistrates Court Act of 1944 (specifically section 6) be inclusive and reflect the Constitutional provisions?

All law is subject to the Constitution, so regardless of when the legislation was drafted it has to be consistent with the Constitution. You need to read in the legislation in accordance with the Constitution.

8. Are there any linguistic requirements in line with the Constitutional provisions of section 6 for legal practitioners and judicial officers at Provincial and or National level?

It would be desirable for all judicial officers and legal practitioners to have a working knowledge of the eleven official languages. This would depend on the social circumstances.

Follow up question: Would you agree that there is a responsibility on universities to provide vocation specific courses for law students?

I agree if we could do this with Latin why can we not expect current students to learn an African language. It points to the lack of commitment by Universities as well as the lack of curriculum transformation. Language would form part of transformation, not being limited to racial transformation.