

The Right to Language Use in South African Criminal Courts

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I hereby declare that I have read and understood the regulations governing the submission of *Master of Laws (LL.M.)* dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Introduction

For the average person, confrontation with the criminal justice system is a frightening experience. Most people enter a courtroom with little or no knowledge of their rights. Courtroom procedures are complicated and beyond most people's experience.

The situation is exacerbated when the court actors are speaking in a language that the accused does not understand or does not understand well. This is often the case for people who stand accused in a South African courtroom where the majority of accused do not speak the language of the court, but are rather speakers of the country's indigenous languages.

Just over 12 years ago, the languages of the court were officially Afrikaans and English. South Africa's transition to constitutional democracy, however, has changed the linguistic obligations on the government and its organs, including the judiciary.

After over 10 years of democratic rule and this change of the legal status of the country's indigenous African languages, has there been a change in the way language is used in South Africa's criminal courts? Has the constitutionally proscribed right of "parity of esteem" and equal treatment¹ been respected by a judiciary that is by and large composed of speakers of the two former sole official languages?² And finally, are the courts an appropriate place to promote languages rights or is language use in court a basic right to communication rather than cultural expression?

In order to fully understand the use of languages in criminal court, I will begin with a brief history of government's treatment of languages in the South African context. This will give a backdrop to understanding the challenges facing the government today. Next, I will summarize the obligations imposed by the Constitution as well as the various pieces of South African legislation dealing with language use in court. Using this analysis as a base, I will then take the reader through the case-law that has been developing around these obligations and the interpretation given to them by magistrates and judges in various parts of the country. As will be seen, there are regional differences to how languages are used in the reality of the country's courtrooms.

¹ Section 6(4) Constitution Act 108 of 1996.

² SAfm Radio Transcript, "Language of Justice" Interview with Judge President of the Cape High Court J.M. Hlophe. Broadcast date: 29 October 2003. Transcript accessed online: www.safm.co.za/transcripts/index.jsp?transcriptid=4054

Following this analysis, I will then examine language provisions under international law. These provisions are not necessarily binding on South Africa, but give an indication of how international organizations, which for obvious reasons work in a multi-lingual environment, have been interpreting cultural rights as opposed to communication rights. A similar analysis will then be made of foreign jurisdictions and their use of language rights in court. A look at Canadian case-law allows a comparison with the provisions in the South African Bill of Rights as the two legal regimes share many similarities, but not necessarily the same outcomes. A brief look at other jurisdictions, such as India, China and Malawi, dealing with the realities of a multi-lingual environment coupled with scarce resources may help South African officials in finding solutions to the problems in this country.

The next section will deal with the use of interpreters in the courtroom. This is an old tradition in South African courts, but one which has added complications to an already overhaught criminal justice system. These issues of practicality are further explored with the following section on the practicability and the Constitution. The language provisions in the Bill of Rights are often limited by practicability clauses imbedded in the section. I will examine the various components of practicability and the way they have been interpreted by courts around the country.

Lastly, I will look at one suggestion that has been proposed not only by courts, but government officials as well. This would be to make one language of record for all South African courts. I will look at the constitutionality of such as proposal and whether it is appropriate within the broader lines of reconciliation and the requirement to advance the use of indigenous languages as imposed by the Constitution. The final part will then finish with conclusions and recommendations for the use of languages in criminal court in both the short and long term.

The South African government had bestowed upon it a great challenge when generous language provisions were included in the country's Constitution. It remains to be seen, however, if it can meet the challenges that have been set out within the practical confines of its resources and its actors.

1. Brief History of the Development of Language in the Courtroom

In order to understand the debates about language in court, it is necessary to understand the context of language in law and the role it has played and continues to play in the shaping of the South African political and historical culture.

Before the arrival of European settlers, the indigenous African populations lived under complex, though unwritten, bodies of law.³ Peoples identified themselves through various traits, one of the most important being language. When the first settlers of the Dutch East India Company (V.O.C.) arrived at the Cape in 1652, they imported a written body of law as well as the Dutch language. Throughout the V.O.C. rule, Dutch and its local derivative, the fledgling Afrikaans, became the dominant language in the execution and administration of that law.⁴

The exclusive use of these languages was threatened by the British conquest of the Cape and its subsequent annexation in 1806. British administrators brought not only their law, but imposed their language on the administration of the colony, including the courts. This was to set the stage for the linguistic “*bellum juridicum*” that would dominate South African legal history until the early 1990’s.⁵

After the establishment of the independent states of the Orange Free State and the Transvaal in the 1850’s, the language of the Dutch settlers began to develop in earnest, leading even to the publication of texts in their *parlance* rather than the more formal Dutch language.⁶ The Anglo-Boer War brought an end to the independence of these states, but the people, who now referred to themselves as Afrikaners, retained a sense of nationalism that would lead them to take great measures to protect and develop their identity, especially with regards to their language. In the negotiations that led to the Union of South Africa Act of 1910, a joint submission was introduced and accepted by the British government making both English and Dutch official languages of the country.⁷ The subsequent Official Languages of the Union Act 8 of 1925 included

³ LOUBSER, Max, “Linguistic Factors into the Mix: The South African Experience of Language and the Law,” *Tulane Law Review*, December 2003, p. 111.

⁴ Op cit. fn 3, p. 112.

⁵ Op cit. fn 3., p. 115.

⁶ Op cit. fn 3, p. 140.

⁷ RENSBURG, MALHERBE, and LANDMAN (Friday Group), “Do We Really Mean Multilingualism?” Accessed through www.groep63.org.za/opstelle.htm; and

Afrikaans as part of the Dutch Language. The 1961 Republic of South Africa Constitution Act 32 of 1961 reversed the importance and made Dutch as part of the Afrikaans language while the 1983 Republic of South Africa Constitution Act 110 of 1983 made no mention of Dutch at all. The importance of the protection of the Afrikaans language is revealed by the special procedures set in place for repealing these language provisions.⁸

Throughout the twentieth century, considerable efforts on the part of the Afrikaans-speaking community fueled by an anti-imperialist sentiment led to a concerted development of the Afrikaans language. This was especially true in the area of law. Afrikaans language schools were established in Stellenbosch and Pretoria and by 1937, there was an Afrikaans language law journal being published.⁹ The election of the Nationalist Party in 1948 saw the increase in the use of Afrikaans in the public sector. As the state grew, so did the use and support of the language to the point where it had developed into a fully-fledged legal language.

Unfortunately, the African languages of South Africa did not receive the same attention. It was not until the 1993 “Interim Constitution” (Constitution of the Republic of South Africa Act 200 of 1993) that African indigenous languages were given any official recognition as languages of the state.¹⁰ The realities of a multilingual South Africa could not be ignored, even by former euro-centric colonial and post-colonial regimes. Statutes such as the Magistrates’ Courts Act of 1944 created obligations for courts to find appropriate interpretation for accused persons who appeared to not understand the language of the Court.¹¹ Rules of the High Court¹² as well as the Criminal Procedure Act 51 of 1977 both contain dispositions for the use and translation of testimony and documents in indigenous languages in courts. Normally, these provisions ensure that evidence and testimony is translated into what were the two official languages of the Republic, English and Afrikaans. But there was no interest in

Op cit. ftn 14, p. 548.

⁸ Op cit. ftn 3, p 114 and 123; and

Op cit. ftn 14, p. 548.

⁹ Op cit. ftn 3, p. 115.

¹⁰ Op cit. ftn 3, p. 144.

¹¹ CASSIM, Fawzia, “The Right to Address the Court in the Language of One’s Choice,” *Codillus XLIV No/Nr 2*, p. 25: Magistrates’ Courts Act 32 of 1944, s. 6(2) (as reported in article).

¹² Op cit. ftn 3, p. 146.

developing these languages for use in government until the 1950's. It was at this time that the government began to implement its "Homelands" scheme in which areas of the country would become "independent" and self-governing. It was expected that the indigenous languages of each tribal group would become the language of government for each homeland area.¹³

By the time the struggle against apartheid has reached the point of negotiations in the early 1990's, language had played an extremely important part in the development of the liberation movement's struggle towards democracy. One of the pinnacle moments of the struggle was the Soweto uprisings which put the situation in South Africa in the eye of the international community and saw a violent turn in the various movements. One of the main catalysts for this uprising was the decision by the government to impose schooling in Afrikaans on Black students.¹⁴ This negative view of Afrikaans has led to its diminished use by government and the public sector.¹⁵

The constitutional negotiations and the subsequent draft Constitutions that were created were governed by a set of Constitutional Principles which were to be respected before the Constitutional Court would accept a final draft. Principle XI sought the protection and promotion of language and culture.¹⁶ This principle influenced the provisions of the Constitution today, both those provisions within as well as those outside the gambit of the Bill of Rights.

With an understanding of the historical background of the numerous language issues in South African history, we will now move on and examine the various protections of language rights, both in the Constitution as well as the national statutes and various international conventions to which South Africa is party.

¹³ RENSBURG, MALHERBE, and LANDMAN (Friday Group), "Do We Really Mean Multilingualism?" Accessed through www.groep63.org.za/opstelle.htm, p. 35; and Op cit., fn 52, p. 59.

¹⁴ CHEADLE, DAVIS and HAYSOM, "South African Constitutional Law: The Bill of Rights," Butterworths, Durban, 2002, p. 548.

¹⁵ BARKER, Harry, "Language in the Courts: English – the Unifying Medium?" De Rebus Article, October 1998.

¹⁶ Op cit. fn 14, p. 549.

2. South African Law and Case-Law

a) South African Law: The Constitution

The Constitution of the Republic of South Africa makes it very clear that it is the supreme law of the land: "... law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."¹⁷ As such, it is within the context of Constitutional guarantees and obligations that all statutes and case-law in South Africa must be examined. This is equally true for the conduct of state agents, including members of the criminal justice system.

Found among the Founding Provisions of Chapter I of the Constitution is Section 6 which deals with the question of languages. Section 6 (1) lists the eleven official languages of South Africa. Of the eleven, nine are indigenous African languages. The other two, English and Afrikaans are essentially European languages in both their structure as well as their treatment by previous colonial and post-colonial regimes.¹⁸ This interpretation of "indigenous languages" is emboldened by a study of s. 6(2). This section seeks to recognize the "historically diminished use and status of the indigenous languages of our people" as well as create an obligation on the state to take "practical and positive measures to elevate the status and advance the use of these languages."¹⁹ The use of the word "practical" in this section is important as it also accompanies the other Constitutional provisions regarding language rights and has been key to many of the judgments that have dealt with language rights, particularly in the context of the criminal justice system.

The next subsection structures the use of language by the national government, the provincial governments as well as the language needs of the country's municipalities.²⁰ Once again, when governments are determining which language to use, they are given a

¹⁷ Constitution of the Republic of South Africa, Act 108 of 1996, s. 2.

¹⁸ There is debate about whether Afrikaans should be considered an indigenous language due to the fact that it developed independently and apart from its Dutch ancestor through the influence of its use in Africa:

Op cit. fn 3, p. 141

Op cit fn 15.

For the purposes of this paper which seeks to examine the legal issues regarding language use in criminal courts, the term "indigenous languages of South Africa" means the nine official languages listed in s. 6(1) of the Constitution, if one excludes English and Afrikaans. Although many African languages are spoken in South Africa, to include them in the above term would require a change in the text of s. 6(1).

¹⁹ S. 6(2) Constitution Act, 108 of 1996.

²⁰ S. 6(3)(a)(b) Constitution Act, 108 of 1996.

number of criteria to take into account. Among these criteria are “usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned.”²¹ It should be noted that “practicality” stands alone from usage, expense and regional circumstances. This will be further explored in the section on practicality below.

Another subsection that has played an important role in the interpretation of language rights in court has been s. 6(4). This subsection requires that the national and provincial governments monitor their use of official languages. But the subsection further provides that “(w)ithout detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.”²² This provision that all official languages must be treated equitably has as its only qualification that this guarantee of equity may not prevent the practical and positive measures that the state must take to “elevate the status and advance the use of” indigenous languages that have been historically disadvantaged by years of colonial and white-minority rule. It is thus easy to see how issues of practicality have become so pivotal in the debate surrounding language rights in court and especially of the policy of making English the sole language of record in South African courts. This will be further discussed below.

The final subsection to s. 6 provides for the creation of a Pan-South African Language Board. This Board is given the responsibility of promoting and developing the country’s official languages as listed in s. 6(1) as well as the Khoi, Nama and San languages, truly indigenous in their own right, and sign language.²³ The Board also has the job of promoting and ensuring respect for languages that have cultural significance for communities in South Africa, such as German, Greek, Hindi and Urdu as well as religious significance such as Arabic, Hebrew and Sanskrit.²⁴ In all, 26 languages are enumerated for protection and promotion by the language board, but it should be noted that this is not at all a closed list. S. 6(5)(b)(ii) is worded in very broad terms and denotes a fundamental respect for language use in this country.

²¹ S. 6(3)(a) Constitution Act, 108 of 1996.

²² S. 6(4) Constitution Act, 108 of 1996.

²³ S. 6(5)(a)(i)(ii)(iii) Constitution Act, 108 of 1996.

²⁴ S. 6(5)(b)(i)(ii) Constitution Act, 108 of 1996.

A superficial examination of s. 6 of the Founding Provisions of the Constitution would lead one to feel confident that all of the official languages are to be protected and their use promoted under the new constitutional regime in South Africa. Later provisions are language rights, however, are far less generous and the interpretation of these rights has not lived up to the promise of its wording.

The Bill of Rights, the “cornerstone of democracy in South Africa,”²⁵ contains a number of provisions regarding the protection of language and the daily needs that one might have for their use. Section 29(2) provides that everyone has the rights to receive education in the official language(s) of their choice, but this right is qualified by reasonable practicability. Practicability is used again as a criteria that the state must take into account when looking at educational alternatives. Section 30 states that everyone has the right to use the language of their choice as long as such use is consistent with the provisions of the Bill of Right. This right is not limited to official languages, but is subject to both it’s “internal qualifier” as well as the s. 36 limitations clause which delineates the circumstances inn which the rights contained in the Bill may be limited in an open and democratic society.²⁶ It is important to note that s. 6 is not subject to the limitations clause and may only be limited by its own internal qualifiers and the fundamental ideals of the Constitution.

Section 31 gives persons belonging to cultural, religious and linguistic communities the right to enjoy their culture, religion and language as well as the right to form and maintain associations formed around these activities. This section also contains the internal qualifier which limits this right to activities consistent with the Bill.

Of particular importance to this paper are the rights contained in s. 35 of the Bill of Rights, and more specifically, s. 35(3) which give an open-ended list of the rights necessary for a “fair trial.” Section 35(3)(k) provides that: “Every accused person has a right to a fair trial, which includes the right – 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.”²⁷ This section has been examined by a number of cases which will be

²⁵ S. 7(1) Constitution Act, 108 of 1996.

²⁶ Op cit. ftn 14, p. 549.

²⁷ S. 35(3)(k) Constitution Act, 108 of 1996.

studied in the next chapter. Suffice it to say, there are a number of aspects to this provision which can be quickly reviewed in order to better understand the case-law. One such issue is derived from the wording of the subsection. This section guarantees the right of the accused to be tried “in a language that the accused person understands.” In South Africa, as with many jurisdictions around the world, this has been interpreted as a right to a trial, not necessarily in first language or languages of the accused, but rather in a language in which the accused person understands.²⁸ As already mentioned, this decision is in line with other jurisdictions that have similar wording and provision for the language used in court.²⁹ The context for these decisions is the debate about whether the right to language use in court is perceived as a language right and therefore a cultural right protected by the Bill of Rights as well as a number of international conventions, or merely a right to communication which would imply a right to a fair trial³⁰ and need not invoke cultural rights.³¹ This appears to be the interpretation that has thus far been relied upon in courts. This trend, however, may be changing as can be seen by a recent South African judgment, S v. Pienaar³² which was heavily influenced by the changing tide in Canadian jurisprudence regarding the respect of language and cultural rights in the court setting.

This interaction between language rights vs. communication rights in South African and international case-law will be explored more in depth in the following section. It is hoped, however, that the particular circumstances of the South African legal system may lead to an expanded use of the courts as a place for cultural and linguistic development.

Another important element of s. 35(3)(k) is once again the use of practicability test for language rights. This test is a change from the wording in the equivalent section of the Interim Constitution which stated that an accused person had the right to “be tried in a language which he or she understands or, failing this, to have the proceedings

²⁸ Mthethwa v. De Bruin NO and Another 1998 (3) BCLR 336 (N), p. 338.

²⁹ Guesdon v. France, Communications No. 219/1986, UN Doc A/45/40 Vol. 2 (1990); and Yves Cadoret and Hervé Le Behan v France, Official Records of the General Assembly, Supplement 40 (A/46/40), Nos 221/1987 and 323/1988 as reported in CASSIM, p. 29.

³⁰ Op cit. fn 14, p. 554.

³¹ Op cit. fn 11, p. 28.

³² S v. Pienaar 2000 (2) SACR 143 (NC).

interpreted to him or her,”³³ where the term “failing this” threatened to cause confusion in interpretation. This term has been replaced with the idea of practicability in s. 35(3)(k). The test is invoked when the court determines that it is not “practicable” to try the accused in a language that he or she understands. If the test is successful, the accused then has a right to have the proceedings interpreted into a language that he or she understands. Some judges have seen this as a right to have the proceedings interpreted into the accused person’s official language of choice,³⁴ however that would no doubt be subject to a practicability test depending on the language requested.

As will be seen in the case-law, judges have had difficulty in justifying when it is impractical to conduct a trial in any language other than English or Afrikaans. As it stands now, English and Afrikaans are the only two languages of record in South African courts. Courts have begrudgingly accepted the Constitutional right to conduct trials in other indigenous languages, but have called for a sole language of record to be introduced in order to reduce the “impracticalities” that a multilingual justice system would create.³⁵ Often, courts use the linguistic make-up of the judiciary as justification for only using English and Afrikaans as the languages of record. A major point of concern is that trials which result in automatic reviews or appeals will be costly and could result in delays for the accused due to translation services necessary for the majority of the Bench who are currently mostly Afrikaans and English-speaking with little or no knowledge of indigenous African languages.³⁶

The change in trend seen in *Pienaar* where it was decided that the accused person has the right to a trial in his or her own official language not only relied on the right to use and promote one’s language, but also referred to the practical problems stemming from the use of interpreters in court.³⁷ There has been significant study done on the impact of the dependence on interpreters in criminal courts, particularly where there is a high number of unrepresented accused. There exists the danger of interpreters being given and accepting additional roles in a courtroom that may tend to compromise their role as

³³ S. 25(3)(i) Constitution of the Republic of South Africa Act 200 of 1993; and

Op cit. fn 38, p. 359.

³⁴ *Mthethwa*, p. 338.

³⁵ *S v. Matomela*, 1998 (3) BCLR 339 (Ck).

³⁶ *Matomela*, p. 342; and

Op. cit., fn 2.

³⁷ *Pienaar*, para 17 et ss.

an unbiased mouthpiece for the actors in court. This phenomenon and its subsequent problems will be studied further in the section on Interpretation in the Courtroom.

Finally, s. 34(4) states that information given to a person and not necessarily an accused, must be given in a language that the person understands. This includes effectively informing an accused person, for example, of rights upon arrest in which the right also includes informing the accused person³⁸ or in effectively communicating the charge against him or her.³⁹

As seen through a glance of the dispositions in the Constitution relating to the use as well as the right to use language, the generous provisions of s. 6 are tempered by the concerns over practicality in the subsequent guarantees. This is especially true for s. 35(3)(k) where issues over practicality concerns have allowed for a situation where the pre-1994 privileged status of English and Afrikaans as the only languages in the country's courtrooms to continue. Practicality concerns have spawned a movement towards the establishment of English as the sole language of record, thereby increasing the need for court interpreters.

We will now study the evolution of South African case-law regarding this issue to see the evolution of these debates and the direction in which both the judiciary and the legislature may take the question of language in court.

b) South African Law: The Statutes

As stated earlier, language has had an important place in the development of the South African criminal justice system. Statutes and Rules of the Court have long recognized the multilingual reality of the court system. Since 1993, these statutes have been modified and reinterpreted with the values and imperatives of the Constitution in mind. Therefore, despite numerous references to the two official languages of South Africa in various statutes, there is no reason to believe that these dispositions remain limited to English and Afrikaans,⁴⁰ even if they remain so in practice.⁴¹

³⁸ STEYTLER, Nico, "Constitutional Criminal Procedure," Butterworths, Durban, 1998, p. 119.

³⁹ Op cit. ftn 38, p. 230.

⁴⁰ Op cit. ftn 3, p. 146.

The Magistrates' Courts Act 32 of 1944 provides for the provision of an interpreter if, in the opinion of the court, the accused is not sufficiently conversant in the language in which evidence is being given.⁴² This section is applicable irrespective of whether the representative of the accused understands the language spoken or not. It is interesting to note that the onus is put on the court not only to provide the interpreter, but also to determine whether the accused is sufficiently conversant in the language of the court. The court is also responsible to determine whether the accused "appears" sufficiently conversant in the language in which the interpreter is interpreting. This puts the onus on the magistrate to provide a proper and competent interpreter for the accused. Failure to do so can result in an irregularity of the trial.⁴³

One aspect of this Act that has been examined in case-law has been the meaning of a "competent" interpreter. As mentioned above, the magistrate has the responsibility to provide a competent interpreter if the accused appears not to be sufficiently conversant. Therefore, an interpreter who does not appear to understand the language that the accused understands is not competent to act for him. The principle is that the accused must be able to understand the proceedings at all times.⁴⁴ This principle may appear to be simple, but there are many circumstances in which this irregularity may manifest itself to produce a faulty interpretation and thus breach the accused's rights to a fair trial. Such circumstances range from an interpreter's blatant inability to speak a certain

⁴¹ MOEKETSI, R.H., "Redefining the Role of the South African Court Interpreter," Newsletter of the National Association of Judiciary Interpreters and Translators, Vol. 8, Nos. 3-4, Summer-Fall, 1999; and

Op cit. fn 38:

In Steytler's text "Constitutional Criminal Procedure," the author states that because English and Afrikaans were the designated languages of record and that all laws passed before 1996 were still valid unless subsequently modified and therefore English and Afrikaans are still the languages of record. It is then submitted that a) the wording of the statute refers to "either of the official languages" when addressing the court and recording the proceedings, and "either" could easily be grammatically replaced with "any" when referring to more than two languages as is now the case, and b) the decision in S v. Matomela acknowledged the constitutional right of the court to decide to proceed in a language other than English and Afrikaans.

⁴² Magistrates' Courts Act 32 of 1944, Section 6(2) reads:

"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 evidence or not."

⁴³ S v. Abrahams 1997 (2) SACR 47 (C)

⁴⁴ Abrahams, p. 49.

language,⁴⁵ to an improper swearing-in of ad hoc interpreters,⁴⁶ to an interpreter's incompetency due to inebriation.⁴⁷ It is worth noting that s. 6(2) Magistrates' Courts Act only applies to criminal proceedings and does not obligate the magistrate in civil matters.

One of the difficulties that arise from a multilingual system for records is the prospect of automatic review in the Criminal Procedure Act.⁴⁸ One of the concerns raised in *Matomela*, in which the judge *in obiter* suggested that the Department of Justice should adopt a sole language of record, is that for matters that are subject to review, the time necessary to properly translate the record as well as additional documents necessary for the judges that do not speak the language of record for that case.⁴⁹ As the judge in *Mthethwa* pointed out, it becomes impractical to review cases in a language other than English or Afrikaans (for example, isiZulu in this case), because at that moment, there was only one High Court judge who was sufficiently fluent in isiZulu to understand the record, and a review requires at least two judges.⁵⁰ These concerns have been among the most hotly debated and will be seen in more depth in the following section.

c) South African Case-Law

As language issues have always been important to the historical and political make-up of South Africa, it is not surprising that case-law on this issue goes deep into the history of the legal system. The imposition of Dutch on the local indigenous people causes enormous difficulties amplified by the tense relations already experienced by the different parties concerned. After the British conquest of the Cape Colony, the Dutch and those speaking the Cape variant of Dutch, did their best to ensure that their language would not be assimilated or neglected. The legal provisions subsequently provided to the Dutch language became another source of contention which the courts were delegated to decide.⁵¹ The subsequent development of Afrikaans into a fully

⁴⁵ *S v. Ngubane* 1995 (1) SACR 384 (T)

⁴⁶ *S v. Ndala* 1996 (2) SACR 218 (C); and

S v. Siyotula 2003 (1) SACR 154 (E)

⁴⁷ *S v. Swarbooi* [2003] JOL 11461 (E)

⁴⁸ Criminal Procedure Act 51 of 1977, s. 302 et ss.

⁴⁹ *Mthethwa*, p. 338.

⁵⁰ *Mthethwa*, p. 338.

⁵¹ *Queen v. Wetton* (1885-1906) 2 Buch AC 71: A decision of the Court of Appeal regarding an 1885 judgment from the Aliwal North Circuit Court where the Appeals Court refused to quash an indictment written in English only, but allowed the accused to object to being tried until he had

fledged legal language in the 20th century and the protections afforded it in the various Constitutions throughout that time gave it a protection within the system itself. However, as noted above, the African indigenous languages were left under-developed in the absence of government support or use. They are now in a position that requires modernization and promotion.⁵²

The advent of the Final Constitution in 1996 has created an opportunity for such advancement. Some authors have even called it a constitutional requirement.⁵³ How have the courts reacted to this opportunity? As we have seen from the above section, despite the generous provisions in statutes and Constitutional guarantees, practicalities may stand in the way of this progress. A review of a selection of the jurisprudence from the country's High Courts reveals how the debate has evolved under the Constitution.

In a 1993 judgment, decided without the use of a Bill of Rights, the judge of the Transvaal High Court decided in S v. Lesaena⁵⁴ that although fair trial provisions and the Magistrates' Courts Act require an interpreter if the accused is unable, in the magistrate's opinion, to understand the language of the court, an interpreter cannot be forced on an accused who wishes and is able to use that language.⁵⁵ During a trial involving the Road Traffic Act, the accused had applied for Legal Aid but was refused and therefore decided to defend himself.⁵⁶ When the defendant began to cross-examine a state witness, the magistrate had to clarify the defendant's question to the witness. The accused then answered the magistrate's question in Afrikaans (the language of record for that court). He was then told to speak through the interpreter.⁵⁷ When it came time for his own testimony, he again asked if he could speak Afrikaans, but the magistrate again told him to speak through the interpreter.⁵⁸ The High Court judge decided that the right to an interpreter for a fair trial does not create an obligation to use

been serviced with the indictment and notice of trial in both English and Dutch as was his right in the 1884 Dutch Language Judicial Use Act.

⁵² Op cit., fn 53, p. 54; and

KASANGA, L., "Language Use and Challenges in a Multicultural, Multilingual Post-apartheid South Africa: A view from Applied Linguistics," Université da la Réunion, Faculté des Lettres et des Sciences humaines, ORACLE: www2.univ-reunion.fr/~ageof/text/74c21e88-291.html.

⁵³ MADIBA, Mbulungeni, "Towards a Model for Terminology Modernisation in the African Languages of South Africa," Language Matters, Vol. 32, 2001, p. 54.

⁵⁴ S v. Lesaena 1993 (2) SACR 264 (T)

⁵⁵ Lesena, p. 265.

⁵⁶ Lesena, p. 264.

⁵⁷ Lesena, p. 264.

⁵⁸ Lesena, p. 265.

the interpreter if the accused is able to express themselves in one of the two official languages of the court (that being English and Afrikaans at that time).⁵⁹ The judge decided that such an irregularity as not allowing the accused to use the language of his choice vitiated the trial and the conviction was set aside.⁶⁰ An interesting note to this judgment is the reasons why the judge thought that an accused would prefer to speak the language of the court, namely, that Afrikaans may “be a more suitable vehicle for the expression of nuances and distinctions appropriate to court proceedings...” because “(h)e might plausibly have reasoned that the vigour and force of the indigenous language might be debilitated in translation.”⁶¹ We will see how 12 years later, this concern may be a common-place characteristic of the courtroom.

In S v. Ngubane,⁶² the Transvaal High Court had a chance to interpret s. 25(3)(i) of the Interim Constitution. As stated above, this was the precursor to s. 35(3)(k) of the so-called final Constitution and had a slightly different wording:

- s. 25(e) Every accused person shall have the right to a fair trial, which shall include the right:
 - (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her;⁶³

The accused was a Zulu-speaker and certain witness statements were given in Afrikaans.⁶⁴ It became obvious to the magistrate that the interpreter was not strong in isiZulu and that the accused had not understood what was happening during the proceedings.⁶⁵ The matter was sent for review to the High Court before a decision on conviction had been reached. The High Court agreed to hear the review since it involved a fundamental right to a fair trial.⁶⁶ The court thus found that the accused had had his Constitutional right to a fair trial infringed.⁶⁷ It was suggested by the State Prosecutor that the trial may be salvaged if the evidence was played back by audio tape to the new interpreter for translation for the accused.⁶⁸ The judge refused this remedy stating that the right to interpretation should “be construed as meaning that the

⁵⁹ Lesena, p. 265.

⁶⁰ Lesena, p. 266.

⁶¹ Lesena, p. 265.

⁶² S v. Ngubane 1995 (1) SACR 384 (T)

⁶³ S. 25(3)(i) Constitution of the Republic of South Africa Act 200 of 1993 as reported in Ngubane, p.385.

⁶⁴ Ngubane, p. 384.

⁶⁵ Ngubane, p. 384.

⁶⁶ Ngubane, p. 385.

⁶⁷ Ngubane, p. 385.

⁶⁸ Ngubane, p. 385.

interpretation should take place simultaneously with the testimony given by the witness” and that “the interpretation will be in a language which the accused fully understands and not into a language which he understands partially...”⁶⁹ It was therefore decided that the proceedings *a quo* would be set aside and that the matter would be reheard by another magistrate, presumably this time with a competent interpreter.

Another decision decided under the Interim Constitution was S v. Ndala.⁷⁰ In this case, the magistrate was concerned not only with the competence of the interpreter, but also by the fact that he had not properly been sworn-in under Magistrates Courts Rule 68. The matter was sent for review by the High Court. The court reiterated the obligations of magistrates under s. 6(2) of the Magistrates’ Courts Act declaring that it is the magistrate’s duty to determine whether the accused is “sufficiently conversant” in the language of evidence and, if not, to provide that person with the services of a “competent” interpreter.⁷¹ Failing to use a competent interpreter will lead to a gross irregularity and subsequent invalidation. A competent interpreter must be able to give a “true and correct”⁷² interpretation of evidence as is implicitly guaranteed by s. 25(3)(i) of the Constitution.

The court then examined the issue of swearing-in and the requirement of swearing-in interpreters under Rule 68.⁷³ The court said that if the interpreter had not been duly sworn in, then he or she would be unable to administer the oath to witnesses as contemplated by s. 165 Criminal Procedure Act. This would have the effect that the evidence given by the accused could not be used as evidence.⁷⁴ There would be the additional problem of the interpretation being given truly and correctly by someone who is not “conscience bound”⁷⁵ to interpret in this way. Once again, the court refused to allow a competent interpreter to listen and certify that the evidence given had been

⁶⁹ Ngubane, p. 385.

⁷⁰ S v. Ndala 1996 (2) SACR 218 (C)

⁷¹ Ndala, p. 221.

⁷² The terms “true and correct” are taken from the headnote of the JUTAst decision. The terms used in the original Afrikaans decision are “juis en getrou” on p. 221.

⁷³ Ndala, p. 221.

⁷⁴ Ndala, p. 223.

⁷⁵ This term is also taken from the headnote. The original term used in the Afrikaans version is “gewetensverpligting” at p. 223.

correct. The judge found that because that accused person's fundamental right to a true and correct interpretation had been infringed, the proceedings would be set aside.⁷⁶

The issue of the obligations of magistrates under s. 6(2) of the Magistrates' Courts Act was brought back to the fore in S v. Abrahams.⁷⁷ In this 1997 decision, there was no mention of s. 35(3)(k) of the Final Constitution, but the prerequisite for a fair trial, namely that the accused could understand the proceedings at all times, was an important element in the decision. The accused had been charged, among other things, of assault and was sentenced to six months in prison.⁷⁸ At trial, the accused needed the assistance of an interpreter as he was hearing-impaired and communicated using sign language.⁷⁹ The trial was conducted in Afrikaans, but the interpreter repeatedly told the court that his Afrikaans was weak.⁸⁰ The interpreter also had to interrupt proceedings a number of times to indicate that he was unable to follow the proceedings and ask if everyone could speak more slowly. A number of reports had been introduced in Afrikaans, including a report by a probation officer at sentencing.⁸¹ The court pointed out on review once again that the onus of finding a competent interpreter falls on the magistrate.⁸² Not calling a competent interpreter is an irregularity that vitiates the proceedings.⁸³ The magistrate claimed in his report that it appeared to him that the accused understood some of the testimony. The judge dismissed this since, first of all, the magistrate does not understand sign language and therefore would not know what is being interpreted to the accused⁸⁴ and secondly, that the accused has the right to understand the proceedings at all times.⁸⁵

It is interesting to note that the above decision does not involve one of the official languages enumerated in s. 6(1) Constitution Act, 1996, but rather a "promoted" language under s. 6(5)(a). It is clear by this decision as well as later decisions that this section is designed to protect an accused's right to understand the proceedings against him or her regardless his or her language or method of communication.

⁷⁶ Ndala, p. 224.

⁷⁷ S v. Abrahams see ftn 43 supra.

⁷⁸ Abrahams, p. 48.

⁷⁹ Abrahams, p. 48.

⁸⁰ Abrahams, p. 48.

⁸¹ Abrahams, p. 49.

⁸² Abrahams, p. 49.

⁸³ Abrahams, p. 49.

⁸⁴ Abrahams, p. 49.

⁸⁵ Abrahams, p. 49.

One of the more ground-breaking decisions in the interpretation of s. 35(3)(k) of the Constitution has been Mthethwa v. De Bruin NO and Another.⁸⁶ It is in this decision that we start to see how the courts will interpret the practicality test in the language provisions of the Constitution. The accused was a school teacher charged with stealing a motor vehicle.⁸⁷ When arraigned, he requested that his trial be conducted in isiZulu, his mother tongue.⁸⁸ The application was denied and he sought a review of the application by the High Court.⁸⁹ The judge began by establishing that Mr. Mthethwa was in fact a school teacher and could speak English.⁹⁰ He then continued by pointing out that although 98% of the cases in that magistrate's court involved isiZulu speaking defendants, the practicalities of the situation suggest that it would be impossible to conduct trials in that language because:⁹¹

- 4 out of the 37 regional magistrates could speak isiZulu
- 81 out of the Attorney-General's 256 prosecutors could speak isiZulu and 6 out of the Attorney-General's 41 advocates could speak the language; and
- only one out of the 22 judges in the Natal Division of the High Court could speak isiZulu.

The make-up of the judiciary of the Natal Division was an important factor in this decision. The fact that the vast majority of practitioners in the criminal justice system are unable to work with the language commonly spoken by accused persons led the court to decide that it would be impractical to expect that cases could be heard in the indigenous language of the area.⁹² This is especially true for the High Courts who have the responsibility of overseeing and reviewing many of the decisions in the lower magistrate courts, since these reviews must be heard "by no less than two judges," and there was only one able to do so at that moment.⁹³ The judge stated that the provision is clear:

"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 the right to be tried in a language that he understands or, if that is not practicable, to have the proceedings interpreted in that language."⁹⁴

⁸⁶ Mthethwa v. De Bruin NO and Another, see fn 28 supra.

⁸⁷ Mthethwa, p. 337.

⁸⁸ Mthethwa, p. 337.

⁸⁹ Mthethwa, p. 337.

⁹⁰ Mthethwa, p. 337.

⁹¹ Mthethwa, p. 337-338.

⁹² Mthethwa, p. 338.

⁹³ Mthethwa, p. 338.

⁹⁴ Mthethwa, p 338.

A careful reading of the judgment, however, does give rise to the hope that current impracticalities may not remain indefinitely. At the beginning of the paragraph from which the above quotation was taken, the judge says: “Under these circumstances, as they obtain in this province *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.”⁹⁵ (my emphasis). It appears that by qualifying this statement as the circumstances exist at present, that the situation may change to allow for trials in indigenous languages which would be understood by increasing numbers of indigenous language speakers gaining positions in the upper judiciary. This phenomenon has already been recorded by people working as interpreters in courts who have noticed a growing tendency for interpreters used to translate for no one except the record in situations where the magistrate, prosecutor and defendant all speak the same language.⁹⁶ The problems for the accused resulting from such a situation will be explored later. Suffice it to say that as the monumental changes that are sweeping all spheres of South African society find their way through the judiciary, the linguistic “circumstances” that led to the finding of impracticability in *Mthethwa* will change.

On the heels of the decision in *Mthethwa* came another decision from the High Court in Bisho that followed much the same lines. In *S v. Matomela*,⁹⁷ the court was faced with the issue of the magistrate, the prosecutor and the accused who all spoke the same indigenous language and, due to a shortage of interpreters at the time, the magistrate chose to conduct the trial in that language, in this case, isiXhosa.⁹⁸ The facts of this case are somewhat important and explain in part why it was so urgent to use the indigenous language as the language of record. The accused was charged with breaking a maintenance order and pleaded guilty to the charge.⁹⁹ The sentence had conditions which included deducting the amounts owed from his salary. On the day of the trial, there was a shortage of interpreters. However, it was also recognized that further delaying the matter would not only be detrimental to the interests of the accused, but to the complainant as well who was dependant on the money owed.¹⁰⁰

⁹⁵ *Mthethwa*, p. 338.

⁹⁶ INGG, Judith, “Current Developments in Court Interpreter Training in South Africa” *Proteus*, Vol. VII, No. 4, Fall, 1998. Accessed through: www.najit.org/proteus/back_issues/inggs.htm

⁹⁷ *S v. Matomela* 1998 (3) BCLR 339 (Ck)

⁹⁸ *Matomela*, p. 340.

⁹⁹ *Matomela*, p. 340.

¹⁰⁰ *Matomela*, p. 341.

The presiding magistrate approached the regional magistrate about this problem and it was decided that since all parties were isiXhosa speaking, the Constitution would permit that the trial could continue in that language.¹⁰¹ When the case came before the High Court on automatic review, the judge requested an explanation and “full answers” as to why the record was completely in isiXhosa.¹⁰² In his report to the High Court judge for the review, the regional magistrate speaking on behalf of the presiding magistrate stated, “I did not want the presiding officer to act as an interpreter.”¹⁰³

The reasons that the Regional Magistrate gave were based in law and the Constitution. He reported that s. 6(1) Constitution Act, 1996 lists isiXhosa as one of South Africa’s official languages.¹⁰⁴ Read with sections 6(2) and (4), he relied on the imperative that “practical measures to advance the use of the Xhosa language must be taken” and that “all official languages must enjoy parity of esteem and be treated equitably.”¹⁰⁵ He also relied on s. 35(3)(k) and felt it the “most persuasive” argument as it gives the right to be tried in a language which the accused understands and would therefore permit a trial in isiXhosa.¹⁰⁶ He further stated that “(n)o prejudice would be caused to anyone in Court at that moment if Xhosa was used.”¹⁰⁷ Tshabalala, J., the presiding Judge, found the reasons “fair and reasonable in the circumstances.”¹⁰⁸ He also found, however, that the widespread use of indigenous languages, especially as more members of indigenous language groups are appointed to positions in the criminal justice system and to courts of the country, would create problems in the future.¹⁰⁹ He stated that in the absence of legislation in terms of language in court as contemplated by s. 171 of the Constitution, which allows the legislature to establish procedures in courts, the Constitutional provisions are binding.¹¹⁰

It is interesting to note here that the Interim Constitution clearly allowed an accused person and witnesses to use the “South African language of his or her choice” during

¹⁰¹ Matomela, p. 341.

¹⁰² Matomela, p. 340.

¹⁰³ Matomela, p. 341.

¹⁰⁴ Matomela, p. 341.

¹⁰⁵ Matomela, p. 341.

¹⁰⁶ Matomela, p. 341.

¹⁰⁷ Matomela, p. 341.

¹⁰⁸ Matomela, p. 341.

¹⁰⁹ Matomela, p. 341.

¹¹⁰ Matomela, p. 342.

proceedings and require those proceedings to be interpreted into a language that the accused person understands.¹¹¹ This section also made explicit mention that the record could be kept in any official language, provided that the status of existing languages of record are not be diminished (i.e. English and Afrikaans).¹¹² This was a right to language rather than a right to effective communication, but it was not included in the 1996 Constitution leaving the language of record issue subject to interpretation or legislative intervention.

Matomela is thus well known for the suggestion, in obiter, that the Department of Justice, “for practical reasons and for better administration of justice,”¹¹³ adopt a sole language of record for the court system that could be used by all court officials whatever their own language may be.¹¹⁴ The Department of Justice and Constitutional Development has considered this option and, quoting the case, proposed English as the sole language of record in a 2000 speech by the minister, Dr. Penuell Maduna.¹¹⁵ As will be seen, later cases have thrown this proposal into an uncertain future.

The duties and obligations of magistrates under s. 35(3)(k) were further clarified in the case of S v. Chauke and Another.¹¹⁶ Two men were accused of housebreaking and elected to represent themselves.¹¹⁷ The problem arose from the fact that the magistrate did not properly explain the dangers of being convicted for an alternative competent verdict, which vitiated their s. 35(3)(a) rights to be informed of the charge with sufficient detail.¹¹⁸ More importantly for our purposes, the reviewing judge found it difficult to ascertain whether the accused had been tried in a language that he understood or had the proceedings interpreted into the language.¹¹⁹ The judge stated that the question of whether an accused was tried in a language which he or she understands is a question of fact and must therefore be determine by recourse to the

¹¹¹ S. 107(1) Constitution of the Republic of South Africa Act 200 of 1993 as reported in STEYTLER, p. 359.

¹¹² S 107(2) Constitution of the Republic of South Africa Act 200 of 1993 as reported in STEYTLER, p. 359.

¹¹³ *Matomela*, p. 342.

¹¹⁴ *Matomela*, p. 342.

¹¹⁵ Speech by Dr. Penuell M. Maduna, Minister of Justice and Constitutional Development at the Opening of the Justice Colloquium 19 October 2000. Accessed through: www.info.gov.za/speeches/2000/001208345p1006.htm

¹¹⁶ S v. Chauke and Another [1998] JOL 1874 (V)

¹¹⁷ *Chauke*, p. 1.

¹¹⁸ *Chauke*, p. 4.

¹¹⁹ *Chauke*, p. 4.

record of the proceedings.¹²⁰ Thus, the judge warned magistrates and interpreters that magistrates must make it clear in the record that the accused person's s. 35(3)(k) rights had been respected and that the trial was conducted in a language that the accused understood.¹²¹

The judgment gives an indication of how other courts may examine a record in order to ascertain whether s. 35(3)(k) rights had been respected. This gives reviewing courts direction when studying a record to determine whether the language provisions of the accused's right to a fair trial had been met. This judgment is also important as it gives magistrates the responsibility of ensuring that the record reflects whether the accused was tried in such a language. This is an important detail in any record, given the myriad of languages used in court and the daily difficulties in finding appropriate interpreters for a given session or accused.

An example of such difficulties can be found in Tshabalala v. S.¹²² In this case, the court was notified by defence counsel that the accused was isiZulu-speaking, but the appropriate interpreter was busy in another courtroom.¹²³ The accused agreed to use an interpreter who spoke isiXhosa due to the closeness of the two languages.¹²⁴ The magistrate agreed and language was not an issue for the rest of the trial.¹²⁵ On appeal, the High Court judge reviewed the record and found that there was no indication that she did not understand the questions or answered inappropriately.¹²⁶ From this finding of fact (as in *Chauke*) the judge found that the application had no merit and dismissed that part of the appeal.¹²⁷ The judge, however, did mention that perhaps it would have been more appropriate to have waited for an interpreter who spoke isiZulu, but mentioned as well that the accused's acceptance and subsequent silence on the issue during trial "indicates that she waived her right to an interpreter of her choice" as suggested by the State representative.¹²⁸ If the accused has a right to an interpreter of her choice, does this stem from the Constitutional right or the dictates of fundamental

¹²⁰ Chauke, p. 4.

¹²¹ Chauke, p. 6.

¹²² Tshabalala v. S. [1999] 1 All SA 677 (C)

¹²³ Tshabalala, p. 689.

¹²⁴ Tshabalala, p. 689.

¹²⁵ Tshabalala, p. 689.

¹²⁶ Tshabalala, p. 690.

¹²⁷ Tshabalala, p. 690.

¹²⁸ Tshabalala, p. 690.

justice? Most likely, the Constitutional right does not give such a broad meaning since it states that the accused has the right to interpretation into “that language,” referring to the language understood in the first part of s. 35(3)(k). It may stem from the continuing confusion between language and cultural rights as opposed to the right of communication in court. If the right to interpretation in the language of *choice* does exist, however, it most likely stems from the dictates of fundamental justice.

This language of choice debate is followed in S v. Grace¹²⁹ where the court found that an Afrikaans-speaking accused had been tried completely in English. It is unclear whether the accused understood the language in court, but the judge found it fit to declare that the magistrate had an obligation to respect the accused’s right to use the language of her own choice.¹³⁰ It is once again unclear where the right to a trial in the accused’s language is based.

As mentioned above, the Department of Justice heeded the *obiter dictum* in *Matomela* and proposed in 2000 that English be adopted as the sole language of record for all courts in South Africa. The debate which was generated from this proposal led some to question whether the use of Afrikaans, which many Black practitioners do not speak, is blocking the appointment of Black justices to South African benches.¹³¹ Others have argued against the proposed government policy believing that elevating the status of any of the official languages to the detriment of the others is unconstitutional.¹³²

In the midst of this debate, the High Court in the Northern Cape decided that the Constitution guaranteed not only a right to a trial in a language one understands, but in one’s own language as well as the right to communicate with counsel in that language, either directly or by means of an interpreter. S v. Pienaar¹³³ represents a dramatic shift from the gathering jurisprudence surrounding s. 35(3)(k). The accused in this case faced drug charges and was sentenced accordingly. During the trial, the accused had been accepted for legal aid and was assigned counsel who only spoke English, which

¹²⁹ S v. Grace [1999] JOL 5110 (T)

¹³⁰ Grace, p. 2. The Afrikaans version states: “... dat sy (the magistrate) ‘n verpligting het om die beskuldigde se reg om die taal van sy eie keuse te gebruik, te eerbeiding.”

¹³¹ WHITTLE, Barbara, “The Jury is Still Out on Court Language,” *De Rebus: News*, August, 2003.

¹³² MANGENA, Maboku, “Language of Record in the Courts: A different view,” *De Rebus: Letters to the Editor*, February, 2000.

¹³³ S v. Pienaar, *op cit.*, fn 32.

the accused did not speak and therefore asked that she withdraw.¹³⁴ It was at this point, the judge decided, that the magistrate should have explained the accused's right to a legal representative with whom he could communicate in his own language or through an interpreter.¹³⁵ As this right to counsel was never properly explained to the accused, his right to a fair trial had been violated and therefore the sentence and conviction were set aside.¹³⁶

The judge also examined the question of whether the accused had the right to a trial in Afrikaans in the Northern Cape, despite the Department of Justice's intention to make English the sole language of record in South African courts. As in *Mthethwa*, the judge resorted to the statistics to prove his point. In this case, however, the judge felt that since 72% of cases are heard in Afrikaans compared to 1.4% in English and the fact that a large percentage of the population of the Northern Cape does not understand any English,¹³⁷ it would be impossible to say that a trial in Afrikaans is impracticable. He further stated that where a court does find it impracticable, it is due to a failure on the part of the Department of Justice to respect the provisions of the Constitution relating to language.¹³⁸ The judge relied on a number of provisions read with each other to come to this conclusion:

- s. 6(1) Magistrates' Courts Act: this provides that either of the official languages may be used at any time of a trial;¹³⁹
- s. 6(1) Constitution Act, 1996: this section lists Afrikaans as one of the official languages of South Africa and therefore may be used in courts;¹⁴⁰
- s. 6(2) Constitution Act, 1996: the judge found this subsection more to the point as elevating English above the other official languages would come into conflict with the provisions of taking "practical and positive measures to elevate the status and use of indigenous languages;"¹⁴¹
- s. 6(3) Constitution Act, 1996: the issue of "practicality" was examined using this article. As stated in an above section the government may take into account several factors when choosing the use of official

¹³⁴ Pienaar, para. 4. .

¹³⁵ Pienaar, para. 37.

¹³⁶ Pienaar, para. 46.

¹³⁷ Pienaar, para 14.

¹³⁸ Pienaar, para 31.

¹³⁹ Pienaar, para. 23

¹⁴⁰ See fn 41 supra regarding whether the two official languages contemplated by the Magistrates' Courts Act of 1944 would now include all eleven official languages as listed in the Constitution.

¹⁴¹ Pienaar, para. 24.

languages such as usage, practicality, expense regional circumstances as well as the needs and preferences of the population as a whole or in the province concerned. The court examined the situation in the Northern Cape and found that using English in the courts of a province where the majority are Afrikaans-speaking would be in conflict with each of those factors.¹⁴²

- s. 6(4) Constitution Act, 1996: finally, the elevating of English as the only official language of record would be in direct conflict with the provisions of this article that stipulate that “all official languages must enjoy parity of esteem and must be treated equitably.”¹⁴³

The judge went on to say that an interpretation of s. 35(3)(k) was not necessary as s. 6(1) of the Magistrates’ Courts Act and s. 6(1) of the Constitution give the accused the right to a trial in Afrikaans. No interpretation of s. 35(3)(k) could restrict this right.¹⁴⁴ It was thus the obligation of the government to ensure that the languages spoken in the Northern Cape enjoy the parity of esteem and equitable treatment that the Constitution guarantees them.¹⁴⁵ He then reviewed the judgment in *Matomela* agreeing with the Senior Magistrate’s opinion of the constitutionality of the use of a language other than English or Afrikaans in court, but disapproved with Tshabalala J.’s recommendation of one language becoming the designated language of record.¹⁴⁶ A quote from the Canadian case of *R v. Beaulac*,¹⁴⁷ which will be examined more in depth in the section on international jurisprudence, sums up his point that language rights “can only be enjoyed if the means are provided.”¹⁴⁸ Thus, Buys J. came to four decisions:¹⁴⁹

1. that the accused had the right to a fair trial;
2. that this right included the right to be tried in Afrikaans;

¹⁴² Pienaar, para. 25.

¹⁴³ Pienaar, para. 26.

¹⁴⁴ Pienaar, para 29: Dit is nie vir my in hierdie saak nodig om verder aandag aan die uitleg van art 35 (3) (k) te gee nie. Ek het reeds hierbo bevind dat weens die bepalings van 6 (1) van die Wet op Landdroshowe en art 6 (1) van die Grondwet, ‘n beskuldigde die reg het om in Afrikaans verhoor te word. Volgens my oordeel kan daar nie ‘n uitleg van art 35(3)(k) gegee word wat daardie reg beperk nie. So ‘n uitleg sou direk in stryd wees met die bepalings van art 6 van die Grondwet dat die Nasionale Regering minstens twee amptelike tale moet gebruik asook die bepaling dat die status van inheemste tale deur praktiese en daadwerklike maatreëls verhoog moet word en hulle gebruik bevorder moet word. So ‘n beperkende uitleg van art 35(3)(k) sou ook in stryd wees met die bepaling in art 6(4) dat alle amptelike tale gelykheid van aansien geniet en billik behandel moet word.

¹⁴⁵ Pienaar, para 30.

¹⁴⁶ Pienaar, para. 32.

¹⁴⁷ *R v. Beaulac*, [1999] 1 S.C.R. 768 as accessed through www.scc-csc.gc.ca/judgments/index_e.asp

¹⁴⁸ Pienaar, para. 35.

¹⁴⁹ Pienaar, para. 37.

3. that this right included the right to the assistance of a legal representative with whom he could communicate directly, or in exceptional cases where this was not practicable, through an interpreter; and
4. that the magistrate had the obligation to explain these rights to the accused.¹⁵⁰

The judgment in *Pienaar* has added fuel to the fire of the debate surrounding the use of language in court. Not allowing an argument based on practicalities to be used to restrict the use in court of the language of the majority of the province has added a dimension to the use of practicality as a test which would allow the widespread use of interpreters in court. Declaring English as the sole language of record in the Northern Cape would be unconstitutional, according to Buys, J., not only because of the obligations put on the state to promote the official languages of South Africa, but also because of the impracticalities that would be caused by the widespread use of interpreters in courts where a dominant language is clear.

In reading this decision, however, one must ask certain practical questions about how it may be interpreted in other parts of the country. One such question would be whether it can be used in the case of an indigenous language. Afrikaans, as stated earlier has been developed into a modern legal language while South Africa's indigenous languages were intentionally under-developed. Would this state of indigenous languages allow for a successful impracticality argument? This may be particularly true given the fact that Afrikaans is, today, readily understood by High Court judges and higher in the judiciary for reviews and appeals. The judge points out that Afrikaans was once regarded in this way as well and that the legislature chose to include the use of all eleven official languages so that on day that too could be used as languages in court.¹⁵¹

The counter argument has thus been made with regards to introducing English as the sole language of record in South African courts. This decision has been used to protect language use in court and especially, not to diminish the status and use of Afrikaans in court.¹⁵² Perhaps the *bellum juridicam* has turned a new leaf.

¹⁵⁰ *Pienaar*, para37.

¹⁵¹ *Pienaar*, para 27-29

¹⁵² RENSBURG: these arguments are not always in support for the use of indigenous languages as well.

One example of the impracticalities of widespread use of interpreters was seen in S v. Lekheto.¹⁵³ In this case, the accused did not have legal representation. At the sentencing stage, the accused was invited to address the court when the magistrate asked: “What do you say?”¹⁵⁴ The magistrate did not explain what was meant by this and had given the responsibility of explaining the rights of the accused of addressing the court at this stage to the interpreter.¹⁵⁵ The judge found that a magistrate has a duty to explain rights to accused. “Such duty cannot be delegated to the interpreter.”¹⁵⁶ An interpreter should not “originate” explanations, but only interpret the explanation given to the accused.¹⁵⁷

Another case of an unrepresented accused not having his rights properly explained to him was S v. Van Staden.¹⁵⁸ After a trial in a magistrate’s court, the case was referred to a regional magistrate’s court for sentencing as contemplated in the Criminal Procedure Act 51 of 1977.¹⁵⁹ At that stage, the senior magistrate asked why an interpreter had not been used and sent the case to the High Court for review.¹⁶⁰ At that level, the judge reviewed the record and found that although the accused seemed “fairly at home” in English, he should have had his language rights explained to him by the magistrate.¹⁶¹ The conviction was therefore set aside for want of a fair trial.¹⁶²

The right of communication in s. 35(3)(k) is as we have seen, one of the prerequisites for a fair trial.¹⁶³ The right to participate and understand the proceedings is a right in fundamental justice. A violation of either of those principles may lead to a vitiating of the trial proceedings, without having to prove the prejudice.¹⁶⁴ This remedy, however, is not the only one with which judges equip themselves.

¹⁵³ S v. Lekheto 2002 (2) SACR 12 (O)

¹⁵⁴ Lekheto, para. 7.

¹⁵⁵ Lekheto, para. 7.

¹⁵⁶ Lekheto, para. 12.

¹⁵⁷ Lekheto, para. 12.

¹⁵⁸ S v. Van Staden [2003] JOL 10887 (T)

¹⁵⁹ Van Staden, p. 1.

¹⁶⁰ Van Staden, p. 2.

¹⁶¹ Van Staden, p. 2.

¹⁶² Van Staden, p. 3.

¹⁶³ Op cit. ftn 14, p. 554.

¹⁶⁴ Op cit. ftn 38, p. 365.

Contrary to the decision in *Ngubane*, the court in *S v. Siyotula*¹⁶⁵ felt that no prejudice would come to the accused if an improper interpretation was reinterpreted by another interpreter for the record. The accused was a public prosecutor charged under the Corruption Act 94 of 1992. He made use of an interpreter throughout his trial.¹⁶⁶ The case was only partially heard when it was sent to the High Court for review after it was found that the testimony of two of the state's witnesses as well as the accused's own testimony had been interpreted by an unsworn interpreter.¹⁶⁷

The judge found that employing the same remedy suggested in *Ngubane* and *Ndala* would not be appropriate.¹⁶⁸ He relied rather on the solution in *S v. Naidoo*¹⁶⁹ which allowed the testimony from the two state witnesses to be reinterpreted in open court. This was considered a more "practical and sensible" method of dealing with the irregularity of the unsworn interpreter.¹⁷⁰ It was decided that as long as no prejudice would come to their case, such an alternative would be suitable. Prejudice was defined as "prejudice in the conduct of a party's case."¹⁷¹ One of the reasons why the accused's case had not been prejudiced, in the opinion of the court, was because he was a public prosecutor in the Port Elizabeth magistrate's court and therefore "conducts cases every day of his life in a language which is not his mother tongue."¹⁷² One of the state witnesses testified in English which was the language that he chose to use when conducting cases. The other state witness testified in Afrikaans. According to the judge, it was common practice in the Eastern Cape for English-speaking court officers to ask questions to Afrikaans-speaking witness in English and allow the witness to respond in Afrikaans if they so chose.¹⁷³ It was only when the witness did not understand the question that an interpreter would be used. It was because of this situation in the courts in which the accused worked as a prosecutor that despite the fact that he said he was not fluent in Afrikaans, "this cannot mean that he does not understand evidence given in his court in Afrikaans."¹⁷⁴ Because he supposedly

¹⁶⁵ *S v. Siyotula*: see fn 46 supra.

¹⁶⁶ *Siyotula*, p. 156.

¹⁶⁷ *Siyotula*, p. 157.

¹⁶⁸ *Siyotula*, p. 158.

¹⁶⁹ *S v. Naidoo* 1962 (2) SA 625 (A)

¹⁷⁰ *Siyotula*, p. 159.

¹⁷¹ *Siyotula*, p. 159.

¹⁷² *Siyotula*, p. 159.

¹⁷³ *Siyotula*, p. 160.

¹⁷⁴ *Siyotula*, p. 159.

understood the testimony of the two witnesses, the judge was satisfied that his right to understand the language of the testimony was not infringed and therefore his case would not be prejudiced if the testimony was given again with proper interpretation.¹⁷⁵

With regards to his own testimony, it was decided that it should be stricken from the record since it was not properly interpreted as well as not made under a duly sworn oath and the defense's case should start afresh with the choice of re-testifying or not.¹⁷⁶ This was not seen to prejudice the accused's case because a) he would have no legitimate reason to change his testimony and b) the magistrate being an experienced judicial officer, he would be able to "disabuse his mind" of any impressions already formed during his initial testimony.¹⁷⁷ It was in this way that the judge felt would be the appropriate way to remedy the situation as the prejudice caused in this case would not lead to unfairness or a miscarriage of justice.

The court distinguished this case from *Ngubane* and *Ndala* based on the fact that in those two cases, the accused were unrepresented as well as the fact that in *Ngubane*, the accused had not fully understood the language that the interpreter had used.¹⁷⁸ It would appear, however, that not all courts would make such efforts to distinguish from past cases. The right to proper interpretation was upheld in *S v. Ndlovu*¹⁷⁹ where the proceedings were set aside due to the fact that a major portion of the evidence had not been interpreted into a language with which the accused was comfortable.¹⁸⁰ The judge relied both on *Pienaar* to void the proceedings due to a "gross infringement" of his s. 35(3)(k) right to a fair trial as well as on *Abrahams* to indicate that the magistrate had a duty to explain these rights to the accused.¹⁸¹ It should be noted that the judge make these findings despite the fact that the accused was represented by legal counsel.

The magistrate's duty to provide a competent interpreter as contemplated by s. 6(2) of the Magistrates' Courts Act was further explained in *S v. Swarbooi*¹⁸² where the fact

¹⁷⁵ *Siyotula*, p. 161.

¹⁷⁶ *Siyotula*, p. 161.

¹⁷⁷ *Siyotula*, p. 161.

¹⁷⁸ *Siyotula*, p. 160.

¹⁷⁹ *S v. Ndlovu* [2003] JOL 10570 (T)

¹⁸⁰ *Ndlovu*, p. 1.

¹⁸¹ *Ndlovu*, p. 2.

¹⁸² *S v. Swarbooi* [2003] JOL 11461 (E)

that the interpreter was under the influence of intoxicating liquor and that the interpretation was probably not correct from a reading of the record required a remedy.¹⁸³ Relying on *Siyotula*, the judge found that no prejudice would be caused if the evidence of the accused for that day was given afresh with another interpreter.¹⁸⁴ It should be noted that it was only the accused's testimony from that session that was affected by the irregularity. The trial was ordered to continue and the accused's testimony from that session be stricken from the record.¹⁸⁵

Pienaar was once again relied upon in *S v. Mlambo*¹⁸⁶ to enforce an accused's right to a legal representative with whom he could communicate in his own language. The accused elected to represent himself after apparently problems in communicating with his lawyer. The court assumed from the questions and answers in the record that this was most likely due to a language barrier since he had requested an isiZulu-speaking attorney several times during the proceedings. Choosing to represent oneself must be "an informed and voluntary election."¹⁸⁷ To meet the right requirement to the right to legal interpretation, legal representation must be "effective."¹⁸⁸ Since counsel could not communicate with his lawyer in his own language, the judge decided that he had not had effective representation. This was one of the fair trial violations that lead to vitiating the proceedings.

Another challenge facing the courts is the rise in the number of people in South Africa who do not speak any of the country's official languages. This was the case in *Mponda v S*¹⁸⁹ where the accused, originally from Malawi, spoke only basic English and had some knowledge of other languages, as evidenced by the record, but not enough to be able to understand the interpretation provided.¹⁹⁰ Eventually, the court approached the Malawian Embassy for a translator who spoke the language of the accused.¹⁹¹ An interpreter was found, but the record is unclear whether he spoke the same language

¹⁸³ *Swarbooi*, para. 10.

¹⁸⁴ *Swarbooi*, para. 19.

¹⁸⁵ *Swarbooi*, para. 24.

¹⁸⁶ *S v. Mlambo* [2004] JOL 12553 (D)

¹⁸⁷ *Mlambo*, para 13.

¹⁸⁸ *Mlambo*, para. 14.

¹⁸⁹ *Mponda v. S* [2004] JOL 12886 (C)

¹⁹⁰ *Mponda*, para. 17.

¹⁹¹ *Mponda*, para. 24.

since the magistrate had to ask several times if they were following the proceedings.¹⁹² The record also neglected to mention whether the casual interpreter had been properly sworn-in. The attorney representing the accused also reported communication difficulties with his client. Because of these language difficulties, the court decided that the accused had not had his fair trial rights respected which was, once again, one of the factors leading to the conviction being set aside.¹⁹³ The court suggested that the Department of Justice and Constitutional Development establish a board of interpreters competent in other African languages spoken by large communities in South Africa. This judgment illustrates the continuing difficulties with interpreters in court and recognizes that the right to a trial in a language that the accused understands includes languages not mentioned in the Constitution.

Finally, the issue of a sole language of record for South African courts was recently revisited. Once again, in *S v. Damoyi*¹⁹⁴ the court found itself with a lack of interpreters for a case that had already been postponed several times. As all of the judicial officers present were proficient in isiXhosa, it was decided to proceed in that language rather than postpone the matter again in order to wait for an interpreter.¹⁹⁵ The case was brought to the High Court for review. At that stage, the judge agreed with the finding in *Matomela* that the use of an indigenous language was constitutional and that the proceedings had been in accordance with the principles of justice.¹⁹⁶ The judge was not satisfied, however, with the delays that were caused to the review court because of the difficulties in transcribing the portion of the record in isiXhosa into English.¹⁹⁷ The judge reviewed the issue of the parity of official languages as guaranteed by s. 6(4) of the Constitution Act, 1996 and found that matters of practicality would forced him to agree with the recommendation in *Matomela* of the adoption of a sole language of record for courts. “Sanity would tip the scale in favour of English” since it is the language most often used in international commerce and transactions.¹⁹⁸ The judge reviewed the case-law behind the development of the issue for English as the sole language of record and disagreed with the finding in *Pienaar*,

¹⁹² *Mponda*, para. 27.

¹⁹³ *Mponda*, para. 38.

¹⁹⁴ *S v. Damoyi* 2004 (1) SACR 121 (C)

¹⁹⁵ *Damoyi*, para. 3.

¹⁹⁶ *Damoyi*, para. 4.

¹⁹⁷ *Damoyi*, para. 4.

¹⁹⁸ *Damoyi*, para. 18.

stating that s. 6 of the Constitution supercedes s. 6 of the Magistrates' Courts Act and therefore the right to be tried in Afrikaans is not in conformity with s. 6 of the Constitution.¹⁹⁹ It is unfortunate that the judge did not develop this reasoning further.

A review of the case-law surrounding language issues in the courtroom highlights a number of themes that have been important in the debate, particularly in the last eleven years of constitutional development:

1. **Interpretation:** interpreters have long been commonplace in South African courtrooms. The new constitutional requirements, however, have made issues of interpretation critical to a fair trial. These issues included proper training, an adequately staffed corps of interpreters, balancing of the rights to a timely trial when no interpreter is available, proper swearing-in of interpreters who can then swear-in other witnesses, namely the accused and the role that interpreters play in a courtroom.

2. **Constitutional Development:** courts have been asked to define the constitutional provisions relating to fair trials as well as the protection and promotion of language use in courts. Is the right guaranteed in s. 35(3)(k) a language right or simply a communication right in order to understand the proceedings? Does the imperative of advancement of indigenous languages in s. 6 change the nature of this right? Courts have as well had to grapple with the idea of "practicability" and when it is appropriate to invoke practicality issues in order to serve the administration of justice. Older statutes still in force after the adoption of the Constitution have also required legal interpretation to relate them to the new legal order, namely for our purposes, the Magistrates' Courts Act.

3. **Language of Record:** the courts of the country appear to be divided with regards to the suggestion made by certain judges that English should be adopted as the sole language of record for South African courts. This suggestion has been supported by the Department of Justice and Constitutional Development, although no clear policy has yet been introduced.²⁰⁰ Some courts, however, have been less enthusiastic about the adoption of a sole language of record for the country's courts and have gone so far as to declare that such a move would be unconstitutional.

4. **Remedies:** what is the appropriate remedy a violation regarding the language rights of the accused? As an essential element of the right to a fair trial,

¹⁹⁹ Damoyi, para. 16.

²⁰⁰ Damoyi, para. 6

both in fundamental justice as well as the enumerated fair trial provisions in s. 35 (3) of the Constitution, this remedy may lead to vitiating the proceedings or, post-conviction, to setting aside the conviction and sentence. However, courts have also looked for more “practical and sensible”²⁰¹ alternative remedies.

These themes are not unique to South Africa, but in many court systems which serve a multilingual population. In the next chapter, we shall examine the provisions and case-law in international and foreign jurisdictions with an eye on how those jurisdictions have dealt with these issues.

3. International and Foreign Perspectives

a) Language Rights in International Law

There is no one instrument in international law which focuses on language rights. The language rights recognized internationally have been included in a variety of conventions and documents. One of the most widely accepted is art. 14(3)(f) of the International Covenant on Civil and Political Rights (ICCPR) which makes provision for “the free assistance of an interpreter if he cannot understand or speak the language used in court.”²⁰²

As seen by the wording of the above provision, it offers similar rights of communication rather than language rights as does s. 35(3)(k) Constitution Act, 1996, when it stands alone. This is evidenced by the decision of the United Nations Human Rights Committee (UNHRC) in the case of Dominique Guesdon v. France.²⁰³ Guesdon had been accused of vandalizing French street signs and was brought before the French *Tribunal correctionnel*. There he demanded to address the court in his native language of Bréton with the assistance of an interpreter. He also planned to present 12 witnesses who would also testify in Bréton. The tribunal refused the application which required that the accused and his witnesses address the court in French, and the case was brought before the UNHRC who upheld the tribunal’s decision. They indicated that since Guesdon and his twelve witnesses were proficient in the French language, his right to a fair trial had not been violated. Art. 14(1) of the

²⁰¹ Siyotula, p. 159.

²⁰² DE VERENNES, F., “Language, Minorities and Human Rights,” *International Studies in Human Rights*, Vol. 45, Martinus Nijhoff Publishers, The Hague, 1996, p. 185: Art. 14(3)(f) of the International Covenant on Civil and Political Rights (as reported in text).

²⁰³ Dominique Guesdon v. France Communication No 219/1986, UN Doc. A/45/40 Vol. 2 as reported in DE VERENNES, op cit., ftn 202, p. 186 and CASSIM, op cit., ftn 11, p. 29.

ICCPR was designed to ensure procedural equity in criminal proceedings and not necessarily to limit the rights of the state to use one official language for court.²⁰⁴

A similar finding was made by the UNHRC in Yves Cadoret and Hervé Le Behan v. France²⁰⁵ where the UNHRC found that once again, because the parties were sufficiently conversant in the language of the court, they were not entitled to a state-funded interpreter. It is only when there is difficulty in understanding or expressing oneself that the court must provide the services of an interpreter.²⁰⁶

Another area of the Covenant which has been invoked to protect language rights is Art. 19 which, among other things, provides for freedom of expression.²⁰⁷ The UNHRC in *Yves Cadoret* dealt with this argument rather negatively finding that not being able to speak the language of their choice in French courts did not raise issues under Art 19(2) and therefore was not admissible.²⁰⁸

Similar provisions for language rights in court are found in regional conventions. The European Convention for the Protection of Human Rights and Fundamental Freedoms contains at art. 6(3)(e) an identical provision to the ICCPR. In the case of Isop v. Austria²⁰⁹ from the European Commission on Human Rights, the Commission found similarly to the UNHRC that the accused did not have the right to use Slovene in Austrian courts which use exclusively German. The Commission also found that the accused's understanding of the German language did not require the use of an interpreter. The European Court on Human Rights found for another three applicants' rights to an interpreter under art. 6 of the ECHR in German courts seeing as they could not speak the German language.²¹⁰ But the European Court qualified this right in

²⁰⁴ Op cit. ftn 11, p. 29. See footnote 28 in article.

²⁰⁵ Yves Cadoret and Hervé Le Behan v. France, Official Records of the General Assembly, Supplement 40 (A/46/40), Nos. 221/1987 and 323/1988 as reported in CASSIM Op cit., ftn 11, p. 29.

²⁰⁶ Op cit., ftn 202, p. 187.

²⁰⁷ Op cit., ftn 202, p. 38.

²⁰⁸ Op cit., ftn 202, p. 40.

²⁰⁹ Isop v. Austria Application 808/60, 5 Yearbook of the European Convention on Human Rights 108 as reported in DE VERENNES, op cit. ftn 202, p. 185.

²¹⁰ Luedicke, Belkacem, and Koç v. Germany 28 Nov. 1978 Series A no 29 as reported in STEYTLER, Op cit. ftn 38, p. 360.

Kamasinski v. Austria²¹¹ when stating that this right does not extend to a written translation of all written material or documents. “The interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before court his version of events.”²¹² Notification of the charge, however, is given special attention as art. 6(3) of the European Convention requires that the accused be notified of the charge in a language that he or she understands.

The question of languages is particularly important for the international and internationalized courts that have proliferated since the beginning of the 1990’s. Following the stipulations in the ICCPR, interpretation is a right in all international courts.²¹³ However, these provisions have caused delays and problems in its administration, much like the predictions of South African judges who argue for one language of record in court to reduce these delays. Both the International Criminal Tribunal for the former Yugoslavia (ICTY) and for Rwanda (ICTR) have experienced long delays waiting for the translations of the numerous documents used as evidence in proceedings.²¹⁴ In addition to these practical problems have been the cross-cultural misunderstandings when translating concepts such as “rape” or “murder” that may have different meanings not only across lines of language, but over cultural lines as well.²¹⁵ The quality of interpretation varies as well depending on the resources available to the court in question. Courts which are relatively well resourced, such as the ICTY, have better quality interpretation than courts with less resources such as the Special Court for Sierra Leone or the courts being established in Cambodia. The worry is that these delays and problems may cause the proceedings to be found to violate the fair trial requirements of fundamental justice.²¹⁶

²¹¹ Kamasinski v. Austria 19 Dec. 1989 Series A no 168 as reported in STEYTLER, Op cit. ftn 38, p. 360.

²¹² Op cit. ftn 38, p. 361.

²¹³ ROMANO, C., NOLLKAEMPER, A., and KLEFFNER, J., “Internationalized Criminal Courts and Tribunals,” Oxford University Press, 2004, p. 342.

²¹⁴ Op cit., ftn 213, p. 342.

²¹⁵ Op cit., ftn 213, p. 343; and

Op cit., ftn 230, p. 7.

²¹⁶ Op cit., ftn 213, p. 342.

b) Language Rights in Foreign Jurisdictions

The rights to language use in criminal courts vary from one jurisdiction to another depending on a number of factors. Much like the case in South Africa, a country's history, population, and political climate influence the law on language protection and the languages used in courts. The following section will look at some Canadian cases for constitutional comparison, as it the only foreign case-law examined in the South African cases reviewed above, as well as a brief look at how other multilingual societies deal with the issue of language in court.

i) Canada and Language Rights in Criminal Court

The Canadian law on language rights reflects the country's historical deep-rooted divisions based on language. Language has played, and continues to play, a pivotal role in the Canadian legal and political scene. This is evidenced by the fact that one-third of the Canadian Charter of Rights and Freedoms is devoted to language rights.²¹⁷ This "political compromise," however, has led courts to interpret language rights differently than the other rights in the Charter. Before delving into the issue of language rights in the criminal justice system, it may be necessary to explain the way in which the justice system in Canada is governed. In terms of s. 91 of the Constitution Act of 1867,²¹⁸ the federal government has the power to legislate the criminal law while s. 92 of the same act gives the power of administrating these courts to the provincial legislatures. This has resulted in a common criminal law for the country, the Criminal Code of Canada,²¹⁹ with somewhat varied administration of courts for each of the ten provinces. It should be noted that the Canadian Charter of Rights and Freedoms, entrenched in the Constitution, applies equally to federal as well as provincial governments as per s. 32 (1)(b).

The Constitution Act of 1867 protected language rights through s. 133 which allowed, among other language guarantees with respect to the use of English or French with the

²¹⁷ NEWMAN, Warren, "Understanding Language Rights, Equality and the Charter: Towards a Comprehensive Theory of Constitutional Interpretation," *National Journal of Constitutional Law*, August 2004, p. 363.

²¹⁸ Constitution Act of 1867 (Canada)

²¹⁹ Criminal Code of Canada

government, that “either of those languages may be used by any person in any Pleading or Process issuing from any Court of Canada established under this Act, or in or from all or any of the Courts of Quebec.”²²⁰ For the most part, courts have applied this section restrictively. After the advent of the Charter, this restrictive interpretation was continued by the Supreme Court of Canada in the 1986 trilogy²²¹ on language rights and the Constitution. In *MacDonald*, the English-speaking complainant was given a summons in French only while in *Bilodeau*, the French-speaking complainant was given a summons in English only. In *Société des Acadiens*, the francophone rights group made an application to be heard by a French-speaking judge. In each of these decisions, the Supreme Court took a restrictive approach to both s. 133 of the Constitution Act, 1867 as well as s. 19 of the Charter of Rights and Freedoms. It was ruled that as a “political compromise,” these language provisions should be interpreted more narrowly than the other rights and freedoms included in the Charter as an exercise of judicial restraint.²²² The broad terms of these rights being available for “any Person” in s. 133 and s. 19 meant that they were equally open to officers of the court as well as the accused or complainants. The judges noted, however, that the principles of a fair trial still apply and anyone who does not understand the language spoken in court must be provided with an interpreter.

This narrow and restrictive interpretation of constitutional language rights has been re-examined in the recent case of *R v. Beaulac*.²²³ This involved a criminal trial and therefore s. 530 and 530(1) of the Criminal Code of Canada were applicable. These sections deal with the language rights of accused in criminal courts and allow an accused to make an application for his/her trial to be conducted before a judge or a judge and jury, as the case may be, who speak the official language (French and

²²⁰ SHARPE, SWINTON, and ROACH, “The Charter of Rights and Freedoms,” 2nd Edition, Irving Law: Essentials of Canadian Law Series, 2002, p. 280: s. 133 Constitution Act of 1867 (as reported in text).

²²¹ The “trilogy” refers to three judgments: *MacDonald v. Montreal (City)* [1986] 1 S.C.R. 460, *Bilodeau v. Manitoba (Attorney General)* [1986] 1 S.C.R. 449, and *Association of Parents for Fairness in Education v. Société des Acadiens du Nouveau-Brunswick* [1986] 1 S.C.R. 549 as reported in NEWMAN op cit. fn 217, p. 367.

²²² Op cit., fn 220, p. 285.

²²³ *R v. Beaulac* [1999] 1 S.C.R. 768.

English)²²⁴ of the accused. This section is an imperative for applications made by the accused, but s. 530(4) allows the justice of the peace or judge to consider if the “best interests of justice” would be served if the trial were to continue in the official language of the accused. If the language of the accused is not an official language of Canada, this section allows the judge or justice of the peace to decide in which official language the accused is most proficient.

The decision in *Beaulac* is consistent with other Supreme Court of Canada recent decisions regarding language rights. The principle of “minority protection” has been elevated to a constitutional principle thereby shedding light on the Court’s new direction for protecting language rights across Canada.²²⁵ This case was quoted in *Pienaar* examined above among other Canadian cases not necessarily dealing with language in criminal courts, but of the role that language plays in an individual’s identity. The judge in *Pienaar* took note of the fact that official language use in court was an “absolute right” after studying the statutory rights and subjective ties of language with self.

The Canadian cases, however, can be distinguished from the South African situation on a number of fronts. Firstly, there is no provision in the Constitution such as s. 35(3)(k) of the South African Constitution that alludes to the right to a trial in a language that the accused understands. The Canadian law is now clear in that an accused has the right to a trial in French or English upon application. The limiting of the language of the courtroom to two official languages does not take into account the aboriginal languages of Canada,²²⁶ but also reduces the debate about language use in the court system. Both jurisdictions do, however, have provisions for the use of interpreters if the accused does not understand the language of proceedings.²²⁷

²²⁴ S. 16(1) Charter of Rights and Freedoms, Constitution Act of 1982 (Canada).

²²⁵ *Reference re Succession of Québec* [1998] 2 S.C.R. 217 as reported in NEWMAN, p. 369 in which the federal government asked the Supreme Court of Canada the legal opinion regarding a possible secession of the province of Quebec from the Canadian federation.

²²⁶ *Op cit.* fn 14, p. 547.

²²⁷ S. 35(3)(k) Constitution of the Republic of South Africa and s. 14 Constitution Act of 1982 (Canada)

Secondly, there is the question of practicality. This issue will be explained further, but it is important to note that English and French are both developed legal languages in their own right. The indigenous languages of South Africa, as has already been noted, were intentionally under-developed. However, some countries in Africa have made strides of modernizing their languages in order for them to be used in spheres of government including courts. One such jurisdiction is Malawi, which shall be studied more closely in the next section.

ii) Other Foreign Jurisdictions

Countries which have struggled to free themselves from colonial bonds have often turned to their own languages in order to give their governing structures a more indigenous visage.²²⁸ Unfortunately, as the judges noted in the *Mponda* decision, the colonial scramble for places like Africa caused arbitrary lines to be drawn, thereby including many different languages and cultures into one state entity.²²⁹

In Malawi, for example, there are 15 African languages spoken.²³⁰ English, however, has been retained as the country's official language whereas Chichewa is the "national language" used for communication to the masses.²³¹ English is also the language used for court proceedings. This has created not only a system where most people feel frustrated and culturally ostracized, but also a system that is dependant on interpreters as only 0.0052% of the country's population uses English at home.²³² This type of system can lead to conflicts between lawyers and interpreters who both understand the languages spoken and disagree with the way the other is interpreting. Often the interpretation is redundant as all of the legal officers and parties speak the same language. These problems can be potentially be transcribed to South Africa and will be explored in the section on Interpretation.

²²⁸ MUTASA, "Language Policy and Language Use in South Africa - An Uneasy Marriage," *South African Journal of African Languages*, Vol. 20, Issue 3, 2000, p. 2.

²²⁹ *Mponda*, para 26.

²³⁰ KISHINDO, Pascal, "Language and the law in Malawi: A Case for the Use of Indigenous Languages in the Legal System," *Language Matters*, 2000, p. 2.

²³¹ *Op cit.*, ftn 230, p. 3.

²³² *Op cit.*, ftn 230, p. 3 - 4.

Other countries as well have adopted a single language for the judiciary. India, for example, has retained English as its language of record for the higher courts, but in the lower courts, indigenous languages may be use beside English.²³³ Sometimes, judgments are written in the indigenous language, but must be translated to English if they are sent to higher courts for review or appeal.²³⁴

In China, the numerous dialects of Chinese are all considered official, but Mandarin Chinese is taught to all school children and is used by courts throughout the country.²³⁵ As we have seen, a number of countries have differing policies on the use of language in their courts. Jurisdictions such as Canada have limited themselves to two official languages for courts with the right to interpretation for anyone who does not speak those languages. The constitutional principles have linked language with an individual's identity and baggage of rights. Other jurisdictions that are emerging from colonial administrations which imported their own languages and legal systems have opted to retain those languages for reasons of unity and practicality.

South Africa, however, has provided in its Constitution a system which respects the individual's attachment to language as in Canada, but with eleven official languages, nine of which have historically not been used as legal languages. In the next sections, we shall explore more in depth the issues facing the South African criminal court system and examine possible recommendations.

4. Interpretation in South African Courtrooms

Interpreters have played an important role in South African courtrooms for a long times as is evidenced by the 1944 Magistrates' Courts Act requiring magistrates to find competent interpreters for accused persons who do not understand the language of the court. This role, however, has been the subject of study and some criticism by researchers and court officers. The interpreter often finds their position as a

²³³ HLOPHE, J.M., "Official Languages and the Courts," South African Law Journal, Vol. 117, Part 4, 2000, p. 695.

²³⁴ Op cit ftn 15, p. 3.

²³⁵ Op cit ftn 15, p. 3.

communicator between the two contesting parties who, by duty, has to serve the two impartially,²³⁶ compromised as such by their position in the court hierarchy as their position as the cultural link between speakers of African indigenous languages speakers and a system that often feels overwhelming and beyond touch. This section will examine the role that court interpreters play in the courtroom, especially in the context of a criminal justice system where the majority of accused is male, African, poorly educated and unrepresented in court.²³⁷

Interpreters are employed by the Department of Justice on a full-time or part-time basis and on average speak seven languages, including the two *de facto* languages of record, English and Afrikaans.²³⁸ There is normally one interpreter assigned to a court who will interpret for the prosecution, defense, magistrate and, of course, the record. Despite their constant place in the courtroom, they are generally considered low in the courtroom's hierarchy, perhaps due to their historically imposed view as an "unfortunate and undesirable necessity."²³⁹

Prerequisites for a position as a court interpreter are a high school senior certificate and knowledge of another language. The pay is not generally regarded as good and hopes for advancement can be limited.²⁴⁰ Many study at the same time in order to become state prosecutors or attorneys in "the more elegant law profession."²⁴¹ Interpreters often find themselves in a difficult position as not only an interpreter of words, but also of cultural differences. Some interpreters actively play an advocacy role in court²⁴²

²³⁶ MOEKTSI, R.H., "Redefining the Role of the South African Court Interpreter," Newsletter of the National Association of Judiciary Interpreters and Translators, Vol. 8 Nos. 3 - 4, Summer-Fall, 1999.

²³⁷ MOEKTSI, R.H., "Some Observations on Answers to Courtroom Questions," South African Journal of African Languages, Vol. 19, Issue 4, April, 1999.

²³⁸ Op cit., ftn 236, p. 3.

²³⁹ INGGS, Judith, "Current Developments in Court Interpreter Training in South Africa," Proteus, Vol. VII, No. 4, Fall, 1998, p. 1.

²⁴⁰ Op cit., ftn 239, p. 1 - 2.

²⁴¹ Op cit., ftn 236, p. 4.

²⁴² Op cit., ftn 239, p. 1.

while others assimilate themselves into the workings of the courtroom and take on duties which ought to be filled by other court officers.

As advocates, an interpreter can add information that may not have been provided by the magistrate or prosecutor. For example, many accused are skeptical about the provision of legal aid as the idea that the State who is prosecuting them on one hand is also willing to pay for their own lawyer on the other. The interpreter might therefore be inclined to add additional information to the accused, being aware already of this confusion.²⁴³ They may also be delegated the duty of explaining the details of court proceedings, such as explaining court procedure or explaining rights to accused. This practice was criticized in *Lekheto* where the interpreter was given the responsibility of explaining to the accused their rights to address the court at sentencing. This irregularity contributed to the setting aside of the conviction of the accused.

The interpreter is sometimes called upon to bridge cultural gaps between the different officers in courts.²⁴⁴ Legal concepts often do not translate or are uninterpretable because of the significance that a legal concept may have in one language that does not exist in another. A typical example is the terms “guilty” and “not guilty”. These terms have been developing in English for nearly 1000 years, however in other languages, such as isiZulu, this term has not been fully developed.²⁴⁵ The answer therefore to the question may not be what is expected by the court and therefore the interpreter will attempt to fit the accused person’s answer into either guilty or not guilty. Even in situations where the accused has representation with whom he or she can communicate in his or her own language, the practitioner may have difficulty expressing a legal concept that does not have an equivalent in an indigenous language. Thus, even outside of a courtroom, the development of these concepts would play a role in improving access to justice.²⁴⁶

²⁴³ Op cit., ftn 236, p. 4.

²⁴⁴ STEYTLER, Nico,, “Implementing Language Rights in Court: The Role of the Court Interpreter,” *South African Journal on Human Rights*, 1992, p. 210.

²⁴⁵ Op cit. ftn 244, p. 212.

²⁴⁶ Op cit., ftn 53, p. 70.

There are also instances where the interpreter's role in the courtroom leads to him or her taking on duties that should be filled by other actors in the courtroom. This can lead to negative effects for an accused who sees the interpreter as another player in his prosecution. An interpreter may also assimilate the "values and attitudes of their court superiors" in the hierarchy.²⁴⁷ In this way, a courtroom that is negative towards defendants and does not take care of unrepresented defendants in particular, may be reflected by the negative, or sometimes derogatory,²⁴⁸ attitude of the interpreter. The difficulties with relying on interpreters were highlighted by the judge in *Pienaar* who found that interpretation in the courtroom increases delays, increases phenomenally costs, and can lead to a decrease in the quality of testimony of witnesses.²⁴⁹

Formal training for interpreters is a recent phenomenon. Whereas training in the past has consisted mostly of an overview of court procedures, now a diploma at universities across South Africa are giving many already practicing interpreters a structured curriculum including both the fundamentals of court interpretation as well as an introduction to law and court procedure.²⁵⁰

A criticism of the role of interpretation in a courtroom should not be seen as a negative reflection on interpreters themselves. Interpreters work under very difficult conditions, as does much of the criminal justice system, balancing between the fundamentals of their position and the realities of the courtroom. Courtroom interpretation will always remain an essential part of the South African justice system. But it must be noted that the difficulties arising in the case-law examined above often stem from systemic problems outside the control of the interpreters themselves. The two cases involving the use of indigenous languages as the language of record both involved a lack of interpreters and the courts' unwillingness to postpone an accused's matter any later due to delays that had already been incurred.²⁵¹ An increasing problem, as well was seen in

²⁴⁷ Op cit. fn 244, p. 220.

²⁴⁸ Op cit. fn 244, p. 217.

²⁴⁹ *Pienaar*, para 17, 18 and 20.

²⁵⁰ Op cit. fn 239, p. 2.

²⁵¹ See *Matomela* and *Damoyi*

Mponda where the number of cases requiring interpretation of languages not commonly spoken in South Africa. In addition to the problem of finding interpreters who speak these languages, the procedural difficulties in the courtroom itself may exacerbate the situation requiring a translation from the foreign language into the language of record then into an indigenous language, for those who cannot speak the language of record, and then back again. Those are problems that other jurisdictions have already experienced and cause long delays during the hearings themselves.²⁵²

Another phenomenon that is becoming more and more common and would surely increase if English was adopted as the sole language of record in courts, is the situation where the officers of the court and the defendant all speak the same language and the interpreter is not interpreting for the benefit of anyone in the courtroom, but merely for the record.²⁵³ This has led to a “cumbersome and time-consuming” process. It can also lead to a situation where the parties in court disagree over the interpretation of what is being said rather than the substance of the statement.²⁵⁴

Interpretation is an essential part of any courtroom in a multilingual society. But as stated by the court in *Pienaar*, interpreted testimony is “second best”²⁵⁵ to the witness and especially the accused, being able to give testimony and follow proceedings in their own language. The duties given to magistrates in s. 6(2) of the Magistrates’ Courts Act must also oblige them to monitor the activities of interpreters in their courtrooms to ensure that the accused, who is more often than not unrepresented, is receiving a proper interpretation of the proceedings, as close as possible to a situation where they are in a language that he or she understands.²⁵⁶

²⁵² Op cit. fn 230, p. 12.

²⁵³ Op cit., fn 239, p. 2.

²⁵⁴ Op cit. fn 230, p. 11.

²⁵⁵ *Pienaar*, para 20.

²⁵⁶ Op cit., fn 244, p. 221.

5. Practicability in the Language Provisions of the Constitution

As stated in s. 35(3)(k) of the Constitution, interpretation should be used when it is not practicable to conduct the trial in a language which the accused understands. It has been noted that this is the alternative only when the test for practicability has been met.²⁵⁷ As seen from the examples of case-law selected above, it appears that this test is met when the accused does not understand one of the languages of record still used in courts today. In fact, it is only when the provision is reversed, and an interpreter is not available, that the proceedings may then be conducted in the languages that the accused understands.²⁵⁸ Both of those cases, however, strongly recommended the adoption of one language of record to reduce the problems posed to the administration of justice. The one case that did speak against the adoption of English as the sole language of record has been in favour of the accused's right to use Afrikaans as his mother tongue during his trial. As will be seen below, this would not pose the same practical problems which the courts in *Matomela* and *Damoyi* decried.

What are these practicality problems to which the above cases were referring? One such practicality is the delays and the costs involved in translating a record into English or Afrikaans which for the majority of the judiciary, are the only official languages that they speak.²⁵⁹ One of the leading cases in exploring this line of thought was *Mthethwa*.²⁶⁰ In this case, the judge gave a clear picture of the linguistic make-up of the judiciary in the Natal Division of the High Court. In 1998, when the judgment was rendered, there was only one judge of the twenty-two in the division who was able to speak isiZulu, the language in which the complainant wanted to have his trial conducted. The judge noted that in order for appeals and reviews to be heard, there must be at least two judges available to hear the matter. The linguistic make-up of the officers of the magistrate courts revealed a similar situation, as only 81 out of the 256 prosecutors in the regional courts had isiZulu as their first language.²⁶¹ Judge Hlophe,

²⁵⁷ Op cit. fn 38, p. 362.

²⁵⁸ See *Matomela* and *Damoyi*

²⁵⁹ Op.cit., fn 2, p. 2.

²⁶⁰ *Mthethwa*

²⁶¹ *Mthethwa*, p. 337 - 338.

Judge President of the Cape High Court gave a similar view of the linguistic situation of legal officers in the Western Cape in a radio interview in October, 2003.²⁶²

Another impracticality that has been alluded to, but not fully investigated, has been the costs incurred by translating all of the documentation presented in court as well as the interpretation of the record should it be sent to review by a higher court. As the majority of the reviews in the case-law cited earlier have been sent mid-trial, it is easy to see how such delays could impair the administration of justice. And financial resources are scarce in the criminal justice system at the best of times. An additional, and potentially unforeseen, burden on the limited resources of the State may indeed be detrimental to the administration of justice.

The problem of practicality was, on the other hand, also examined by the court in *Pienaar*. The judge found in that case that the State would not be able to meet the practicability test if it were to deny the use of Afrikaans in Northern Cape courts where 72% of cases in those courts were conducted in Afrikaans.²⁶³ The costs involved, as well as the obligations of parity of languages in s. 6 of the Constitution, would make any practicality argument fall as a failure on the part of the Department of Justice to not properly support the language needs of the Northern Cape as per their constitutional obligations. Others have argued that the judiciary cannot “hide behind the facade of practicability” to allow the continuation of the dominance of English and Afrikaans in the judiciary forever leaving African languages under-developed and in an inferior position to these languages.²⁶⁴

The issues pertaining to practicality are extremely important considering the burdens currently being placed on the criminal justice system. However, to rely on the legacy of apartheid and the intentional exclusion of all but white English and Afrikaans-speaking professionals from the judiciary is misplaced and not in accordance with the principles of advancement and equality of previously disadvantaged languages as well as groups and cultures for that matter.²⁶⁵ As the judiciary stands today, it may indeed be

²⁶² Op. cit., fn 2, p. 2.

²⁶³ *Pienaar*, para. 14.

²⁶⁴ Op cit., fn 132.

²⁶⁵ Op cit., fn 233, p. 694.

impractical to have records written in indigenous languages for the higher courts. But as the judge stated in *Mthethwa*, those were the circumstances “at present.”²⁶⁶ The judiciary, however, is changing and more and more speakers of indigenous languages are being appointed to positions in magistrate courts and above.²⁶⁷ Eventually, this argument may no longer be valid. At that point, it will be necessary to re-evaluate the impracticality of using African indigenous languages in the country’s courts. If, however, a policy of adopting English as the sole language of record is implemented, it may preempt any rights that accused persons would have to a trial in a language that they understand.

6. English as the Sole Language of Record

It has already been established that the vast majority of accused people standing before the country’s magistrates’ courts are speakers of South Africa’s indigenous languages. The majority require interpreters when dealing with a court system that functions in English and Afrikaans. The role of the interpreter varies from court to court and may lead to problems caused by the improper expectations on interpreters in the courtroom. We have, however, also looked at the issues of practicability that determine whether a person will have a trial in a language that he or she understands or have the proceedings interpreted into that language. We have also established that in reality, the only languages for which an interpreter would not necessarily be used are English and Afrikaans. These impracticalities have led courts in two judgments, *Matomela* and *Damoyi*, to suggest to the Department of Justice and Constitutional Development that to aid in the administration of justice, one language of record should be adopted for the entire country, and according to Yekiso, J. in *Damoyi*, “sanity” would point to the English language for such a role. This proposal has been given its approval by the Department; however a judgment against this policy may have delayed its implementation. But is it inevitable?

As it stands at the moment, South Africa’s criminal justice system is still in a state of transition where the majority of the actors in the legal system have little to no knowledge of the nine official indigenous languages spoken by the majority of their

²⁶⁶ *Mthethwa*, p. 338.

²⁶⁷ *Op cit.*, fn 233, p. 695.

defendants. This is especially true of the high judiciary, i.e. the High Courts and above, where reviews and appeals of magistrate decisions are heard.

Also, there are incredible cost burdens that all spheres of the public sector are currently facing. These costs may make it prohibitive to interpreting records and translating documents used in court.

There has been another advantageous result of South Africa's constitutional reforms. Jurisdictions in other parts of the world are beginning to examine and use jurisprudence emanating from the higher courts of South Africa.²⁶⁸ English being the international language of trade and commerce would make South African jurisprudence available to influence the law in various jurisdictions around the world.²⁶⁹

On the other hand, South Africa has given itself a wide-ranging Bill of Rights entrenched in a Constitution that seeks to repair the damage done by colonialism and minority rule. One domain in which the Constitution was particularly broad was the development and advancement of its indigenous languages. Section 6, among the founding provisions of the Constitution, puts great responsibility on the part of government institutions to promote and advance the use of indigenous languages while not derogating from the pre-existing official languages of the country. The task at hand is monumental considering the state of under-development in which indigenous languages find themselves, especially when it comes to the language-specific field of law.

When applying the Constitution provisions, however, it would appear that the adoption of English as the sole language of record would be unconstitutional and therefore invalid. Section 6(1) is very clear when it lists certain indigenous and non-indigenous languages as official languages for the country. Section 6(2) is also clear in the imperative that it gives government to take "practical and positive measures" to elevate the status and use of indigenous languages. Is the phrase "practical and positive" referring to the practicality problems that the courts have used in order to explain why indigenous languages should not be used as languages of record, or is it rather referring

²⁶⁸ HLUBI, Melusi, "English *is* one of the Official Languages," De Rebus: Letters to the Editor, April 2000; and

Op. cit., ftn 2
²⁶⁹ Damoyi

to the implementation in practice and positive measures? The government may have the responsibility to use indigenous languages in the practice of government work in order to elevate their status and use.

Section 6(3)(a) requires that the national government may use certain languages for the functioning of government, but that at least two official languages must be used. This imperative would not allow the government to implement one sole language of record. However, this section also gives certain factors that may be taken into consideration when deciding which languages to use. These include usage, practicality, expense, regional circumstances and the balancing of the needs and preferences of the local population. Therefore, such a language policy for courts may include English as a language of record, but the second language that the government is required to use, should reflect the needs and preferences of the population of that High Court division. This may be difficult in divisions where a wide range of languages are spoken, but a policy that is suited to regional needs would alleviate some of the burden that local residents feel when they are in court.

It would appear from the case-law that, besides the language competencies of the higher judiciary, expense is the factor that is the most prohibitive in implementing a language policy to allow the use of indigenous languages in court. This cost, however, is bound to decrease as more judges and court officers are appointed who speak the language of their division.

Lastly, there is the language of s. 35(3)(k) of the Bill of Rights that must be taken into consideration. Accused persons have first, the right to a trial in a language that they understand and secondly, a right to interpretation into a language that they understand if it is not practicable to conduct the trial in the language. In order for the interpretation to be resorted to, therefore, it is necessary that magistrates can show that it was impractical to hold the trial in a language that the accused understands which, even for indigenous language speakers, will sometimes be an indigenous language, but sometimes not. Eight out of ten people have their matters settled in lower courts and do not have to resort to an appeals process.²⁷⁰ Therefore, for a constitutionally approved

²⁷⁰ Op. cit., fn 2, p. 9.

fair trial where the majority of accused are unrepresented and the majority speak an indigenous language, accused persons should not be barred from having a trial conducted in a language that they understand. In effect, adopting a policy of one sole language of record would *prevent* the majority of accused from having a trial in a language that they understand, which would appear *not* to be the intention of the wording of s. 35(3)(k).

Finally, is it appropriate to use the criminal court as an instrument of historical reconciliation and advancement? Should the courts be used to recognize “the historically diminished use and status of the indigenous languages of our people?”²⁷¹ If indigenous languages are going to enjoy the parity of esteem and equitable treatment to which their speakers have a right in s. 6(4) of the Constitution, all spheres of the government must reflect the movement towards reconciliation and advancement. Removing the courts from this obligation will in fact alienate the majority of people who appear before them. This can have far-reaching social effects as not only does it make the court proceedings incomprehensible to the ear, but removes connection of the defendant to the law which they are accused of breaking. The effects may be long term because “when people do not understand the law or misunderstand it, they are less likely to comply with the law or exercise their rights under it.”²⁷² This is disturbing for a country that is fresh from conflict and still in a stage of healing. When an accused’s only connection to the law is through an interpreter, their removal from their connection may cause the alienation created by minority rule to continue.

7. Conclusions and Recommendations

It is therefore submitted that the adoption of English or any other official language as the sole language of record is unconstitutional and would limit an indigenous speaker’s right to a fair trial if the exercise of proving impracticality of conducting a trial in a language which the accused understands without the need for an interpreter was removed. It is not suggested that impracticalities do not exist. But as seen earlier, the dependence on interpreters may not only lead to additional practicality problems in the courtroom, but would distance an accused person from the law of their government.

²⁷¹ S. 6(2) Constitution Act 108 of 1996.

²⁷² Op cit. fn 11, p. 25.

It is therefore recommended that instead of advocating for the use of English as the sole language of record in the lower courts, the Department of Justice should examine ways in which the use of indigenous languages could be incorporated into the court system. This may be done by adopting indigenous languages that are widely spoken in a certain high court division as languages of the court. The appointment of judges and magistrates in those areas, as well as prosecutors and legal aid board attorneys should reflect language use in that area. It may be necessary to use interpreters in the court of certain judges, either for the accused or for the judge him or herself²⁷³, but that is the situation in which it is appropriate to prove the impracticality of expecting all judges or all prosecutors to know all eleven indigenous languages. But excluding them outright as needing interpretation rather than the status as a language of record would be in conflict with the imperative provisions of s. 6 of the 1996 Constitution.

The world, however, is turning more and more towards South African jurisprudence. This is not a trend that should be discouraged. Therefore, it would be recommended, as Hlophe J. suggested in a radio interview²⁷⁴, that a language of record be adopted for the higher courts, such as the Supreme Court of Appeals and the Constitutional Court. Section 6(3) requires the use of at least two official languages in all government policy. Therefore, English may be adopted as the language of record along side the dominant language used in the actual court proceedings. This would be in conformity with the policies of other multilingual developing societies such as China and India.

Interpretation remains an important element in every courtroom of the country. It is hoped, however, that with the adoption of a policy that allows the use of indigenous languages in the courtroom, the resources normally allocated to interpreters may be used for translation services of documents and records. South Africa's transition has come a long way, but trends toward restrictive interpretation of language rights may not permit the reconciliation of a non-racial society upon which the Constitution is based. Removing the majority of accused from the court process by imposing a language barrier will continue to give the impression of a foreign legal system in one's own country. This removal will not ensure the value of human dignity and advancement of human rights that all South African are guaranteed by their Constitution.

²⁷³ Op. cit., fn 2, p. 3 – 4.

²⁷⁴ Op. cit., fn 2, p. 8.

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