South African Law Reform Commission

DISCUSSION PAPER 183

REFORMING THE SOUTH AFRICAN CRIMINAL PROCEDURE ACT TO UPHOLD LANGUAGE RIGHTS

PROJECT 151: THE REVIEW OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

(A SUB-PROJECT OF THE REVIEW OF THE CRIMINAL JUSTICE SYSTEM)

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REQUEST FOR COMMENTS

This Discussion Paper is part of a series of discussion papers developed by the South African Law Reform Commission's (SALRC or Commission) under Project 151 (Review of the Criminal Act 51 of 1977 (CPA)).

The Discussion Paper has been prepared to elicit responses from various stakeholders and interested members of the public and to serve as a basis for the Commission's deliberations during its consultative process on the discussion paper. Following an evaluation of the responses and any final deliberations on the matter, the SALRC will issue a report on this subject, which will be submitted to the Minister of Justice and Constitutional Development. The views, conclusions and recommendations in this paper are not the final views of the Commission.

The paper is published in full to provide persons and bodies wishing to comment or to make suggestions for the reform of this area of the law with enough background information to enable them to place focused submissions before the SALRC. The SALRC will assume that respondents agree to the SALRC quoting from or referring to comments and attributing comments to respondents unless representations are marked "Confidential". Respondents should be aware that the SALRC may, in any event, be required, under the Promotion of Access to Information Act 2 of 2000, to release information contained in representations. Respondents are requested to submit written comments or representations on the Discussion Paper to the SALRC by no later than 30 September 2026. Comments can be sent by email or post. However, comments by email are preferred.

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ABBREVIATIONS AND ACRONYMS

	Acronym	Explanation
1.	CC	Constitutional Court
2.	CJS	Criminal Justice System
3.	CPA	Criminal Procedure Act 51 of 1977
4.	DoJ&CD	Department of Justice and Constitutional Development
5.	DPP	Director of Public Prosecutions
6.	FLIs	Foreign Language Interpreters
7.	MCA	Magistrates Court Act 32 of 1944
8.	NDPP	National Director of Public Prosecutions
9.	NPA	National Prosecuting Authority
10.	NPA Act	National Prosecuting Authority Act 32 of 1998
11.	OCJ	Office of the Chief Justice
12.	PanSALB	Pan South African Language Board
13.	SA	South Africa / South African
14.	SALRC	South African Law Reform Commission
15.	SALRC Act	South African Law Reform Commission Act 19 of 1973
16.	SCA	Supreme Court of Appeal
17.	SLIs	Sign Language Interpreters
18.	ZACC	Constitutional Court of South Africa
19.	ZASCA	Supreme Court of Appeal of South Africa

EXECUTIVE SUMMARY

Dr Martin Luther King Jr explained: All life is interrelated. We are all caught in an inescapable network of mutuality, tied into a single garment of destiny. Whatever affects one directly affects all indirectly. (King Jr 1967 https://soundcloud.com/user-763792570/dr-martin-luther-king-jr-achristmas-sermon-1967.) Harper Lee, the American novelist who authored “To Kill a Mockingbird,” said: “You never really understand a person until you consider things from his point of view. Until you climb inside of his skin and walk around in it” (p36). South Africans are constantly walking into others’ shoes to gain a better understanding of the others’ situation. South Africa is characterised by great heterogeneity, reflecting its inclusive Ubuntu ideals. Ubuntu refers to community and not solitude.

Understanding, respect, acceptance, and tolerance are part of the South African tapestry that culminated in the Constitutional principles enunciating dignity, equality and freedom for all. These constitutional imperatives are enshrined in the Bill of Rights. Amongst these constitutional imperatives is the right to a fair trial. This right is guaranteed to all persons within South Africa’s territorial jurisdiction and forms part of the criminal process. Part of the right to a fair trial, is to be tried in a language of the person’s understanding. The problem is that not all persons in South Africa speak or understand South African languages. Against the grain of our constitutional ethos, it is thus morally, ethically and constitutionally essential that all persons are afforded every opportunity to meaningfully engage in criminal processes in a language that they understand. Thus, language rights come to the fore. This is the nub of this discussion paper.

The discussion paper sets out South Africa’s obligations to respect, protect, ensure and promote language rights as it pertains to the constitutional guarantee of the right to a fair trial. Examining language rights in the Criminal Procedure Act necessarily invokes the context within which the law was crafted. This law is part of the apartheid legacy, which has received little attention by lawmakers despite the cries of victims and the judiciary alike. A South Africa that essentially used language as a subjugation tool with recognition of English and Afrikaans defied the majority spoken, written and understood languages. Three decades ago, the democratic South African Constitution recognised language rights of persons within the criminal justice system that is not fully recognised in the Criminal Procedure Act; and criminal proceedings. This does not take cognisance of spoken, used and recognised language rights. This defect must be remedied for

meaningful comprehension toward the justice. Therefore, this paper addresses this lacuna commencing with a historical background and moving through the constitutionally entrenched language rights landscape that culminates in potential amendments to the Criminal Procedural Law.

This paper unpacks the meaning and content of language rights in a criminal justice setting particularly within the context of section 35(3)(k) of the Constitution which enshrines the right -

> "to be tried in a language that they understand or, if that is not practicable, to have the proceedings interpreted in that language."

The paper also considers the expansion of the right to an interpreter beyond the arrested, detained and accused persons and the right to be accorded to every person involved in the criminal justice system. It discusses, in greater detail, the following principles which are key to the right to an interpreter in South African criminal justice system:

(a) the right to an interpreter;
(b) the need for legislation on the provision of court interpretation;
(c) the state's obligation to provide interpretation services; and
(d) the competence of court interpreters.

This paper evaluates whether, and to what extent, language rights are secured in the different stages of criminal proceedings, and the criminal justice system. The analysis is situated within South Africa's constitutional framework and demonstrates how constitutional supremacy, the Bill of Rights, and language protection provisions, particularly sections 35(3)(k) and 6, mandate positive state action to ensure meaningful participation by individuals who do not speak the court's language of record.

The paper concludes by recommending legislative reforms that are necessary to give effect to constitutionally entrenched language rights in criminal proceedings.

CHAPTER 1: THE EVOLUTION OF LANGUAGE RIGHTS UNDER SOUTH AFRICA'S DEMOCRATIC CONSTITUTION

A Introduction

1.1 Cote[1] provides a brief narration of the history of languages in South Africa. When the first settlers of the Dutch East India Company (V.O.C.) arrived at the Cape in 1652, they imposed a written body of law and the Dutch language. Following the conquest of the Cape by the British and its subsequent annexation in 1806, the British not only transplanted English Law into the country, but also imposed English as the official language in the administration of South Africa and the courts. With the establishment of the Union of South Africa Act of 1910, English and Dutch became the country's 's official languages. Later Afrikaans, which evolved from the Dutch language, was accepted as part of the Dutch language. Gradually Dutch was abandoned and Afrikaans became the official language of the Republic along the already recognised English language.

1.2 African languages of South Africa did not receive the same or equal recognition as Afrikaans and English. It was not until the adoption of the Constitution of the Republic of South Africa of 1993[2] (Interim Constitution) that African indigenous languages were given constitutional recognition as official languages. Language usage and interpretation are inextricably linked, most especially in court proceedings.

1.3 During apartheid, black South Africans were routinely subjected to judicial proceedings conducted entirely in languages they did not understand. A person who cannot understand judicial proceedings cannot meaningfully participate in exercising their rights. Interpreters, when present, were untrained, underpaid, and often appointed on an ad hoc basis. Hence, the Truth and

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1 Cote D, "The Right to Language Use in South African Criminal Courts" Research Dissertation for Master of Laws (LL.M.) with Specialisation in Criminal Justice (2005) University of Cape Town (UCT), p3.

2 Constitution of the Republic of South Africa 200 of 1993.

Reconciliation Commission noted the justice system became an instrument of oppression rather than a forum for fairness.[3] Mostly, the practical use of apartheid language, unfortunately persists to this day.Apartheid

1.4 Although court interpretation emerged as a distinct profession in the twentieth century, it is still defined differently by many scholars. Lebese[4] explains that interpretation is often defined by describing the roles played by interpreters, notes how different scholars describe interpreters as helpers, conduits; communication facilitator; bilingual, and bicultural specialist.

1.5 The significance of language developmental history cannot be over emphasised. Language is understood to be an expression of identity, dignity and equality that permits access to justice.

1.6 The post-1994 democratic transition, anchored in the Constitution of the Republic of South Africa, 1996[5] (the Constitution), in its Preamble, declares the intention to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights." In this spirit, all pre-constitutional legislation must be interpreted through the lens of the Constitution, which is the supreme law of the land.[6]

B Language as a constitutional imperative: Sections 6 and 30

1.7 The Constitution is the bedrock of democracy, enshrining rights of all persons and affirms democratic values of human dignity, equality and freedom. Language is an essential component of human dignity, identity, and justice intersecting human rights. This human rights imperative found recognition and entrenchment of official languages in the Constitution. Key constitutional provisions impact a person's language rights in South Africa. Pursuant to the supremacy clause,

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3 Truth and Reconciliation Commission of South Africa *Report*, Vol. 5 (1998) 251.

4 Lebese S, "A pilot study on the undefined role of court interpreters in South Africa" (2011) Southern African Linguistics and Applied Language Studies, 29:3, 343-357, at 344.

5 Constitution of the Republic of South Africa, 108 of1996 (the Constitution).

6 Section 2 of the Constitution..

any law or conduct inconsistent with the Constitution is invalid.[7] The State is constitutionally obliged to respect, promote, and fulfil rights contained in Chapter 2, which is the Bill of Rights.[8] Chapter 2 of the Constitution enshrines language rights.

1.8 Prior to the Constitution Eighteenth Amendment[9] which amended section 6 of the Constitution, eleven official languages in the Republic in subsection 6(1), namely, Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu were recognised under the Constitution. The Constitution Eighteenth Amendment incorporated sign language as the twelfth official language.[10]

1.9 The Constitution, in ssubsection 6(2) enjoins the State to "take practical and positive measures to elevate the status of and advance the use of these languages." Section 6(5) establishes a Pan South African Language Board (PanSALB) with the mandate to monitor and promote the use of all official languages. Khumalo notes that its oversight has been "largely passive, underfunded, and disconnected from the judicial machinery where language inequality is most acutely felt."[11] The Constitution's entrenchment the parity of official languages is clear.[12] The lack of institutional coordination between PanSALB and the Department of Justice and Constitutional Development (DoJ&CD) reveals a vacuum that continues to disadvantage marginalised language use in the courts.

1.10 The right to equality states that, everyone is equal before the law and has equal protection and benefit of the law.[13] The State is prohibited from unfairly discriminating on the ground of

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7 Section 2 of the Constitution.

8 Section 7 of the Constitution.

9 Act No. 03 of 2023: Constitution Eighteenth Amendment Act, 2023.

10 Section 6 of the Constitution.

11 L Khumalo, 'The Right to be Heard in Your Own Tongue: Judicial Abdication and the Interpreter Standard' (2023) SAJHR 45

12 Section 6(4) of the Constitution.

13 Section 9(1) of the Constitution.

language, inter alia.[14] Equality is underpinned by the right to dignity.[15] The use of the word, "everyone," grants every person within South Africa's territorial jurisdiction, irrespective of citizenship, access to the courts in an understandable language.[16]

1.11 Section 30 of the Constitution complements section 6 by recognising every person's right "to use the language and to participate in the cultural life of their choice," provided such exercise is consistent with the Bill of Rights. While this section is often associated with cultural expression, it has a clear procedural dimension. When a person stands in a court of law, their ability to use and understand their own language is an expression of cultural identity and personal dignity which is part of constitutional transformation.[17] When the State fails to ensure that an accused understands the court proceedings, it effectively compels language assimilation, forcing individuals to navigate a legal system foreign to their language and cultural identity in direct violation of constitutionally entrenched rights.[18]

C Brief reflection on multilingualism by the three arms of the State

1.11 Despite South Africa's progressive constitutional commitment to human rights and multilingualism, limited access to language rights in South Africa remains a stark reminder of the

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14 Section 9 of Act 108 of 1996. Equality 9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

15 Section 10 of Act 108 of 1996. Human dignity 10. Everyone has inherent dignity and the right to have their dignity respected and protected.

16 Section 34 of Act 108 of 1996. Access to courts 34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

17 Currie and J de Waal, The Bill of Rights Handbook (6th edn, Juta 2021) 653)

18 In *S v Matomela* 2007 (1) SACR 179 (E)

apartheid. Implementation gaps, institutional preference for English, and resource shortages still limit equal access to justice, education, and public services for many citizens.

1.12 An official language is the language or one of the languages that is declared or accepted by a State as a language through which it conducts its official business and through which government communicates with its citizens. It bridges communication gaps in diverse nations. The twelve official languages stated under section 6 of the Constitution are languages through government carries its business.

1.13 The Use of Official Languages Act 12 of 2012 was enacted by Parliament in 2012 with the aim to effect to the State's obligations under section 6(3)(a) of the Constitution. The Act requires national departments, public entities and state-owned enterprises to adopt language policies that prescribe the use of at least three official languages spoken locally for government communication.

1.14 Notable among these policies is the Government Communication and Information System (GCIS) language policy.[19] The GCIS is the government's communication agency, an organ of state that seeks to ensure the dissemination of government information and messages to the public in a coherent manner and upholding constitutional imperatives. The language policy states the following principles, among others:

(a) that its objective is to promote multilingualism to ensure effective and efficient communication between government and the public in accordance with the objectives of the Act and the Constitution. (Clause 4.1)

(b) it shall endeavor to communicate in all 11 official languages, where necessary and practicable. The languages used should also take into consideration people with disabilities. (Clause 8.1.1)

(c) it shall consider the usage, practicality, resources, regional circumstances and the balance of the needs and preferences of the public it serves when deciding on the official language(s) to be used. (Clause 8.1.2)

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[19] Language Policy of the Government Communication and Information System chrome https://www.gcis.gov.za/ /GCISLanguagePolicyJune2016.pdf

1.14 the GCIS Policy provides for internal and other formal communication with third parties in English having regard to usage, practicality, resources, regional circumstances and the balance of the needs and preferences of the public. The communication may be translated from English into the requested language(s). (Clause 9.2)

1.15 Laubscher[20] contends that the Use of Official Languages Act is designed to institutionalise multilingualism, its effectiveness has been limited by weak enforcement mechanisms, vague standards and inadequate institutional commitment.

1.16 Other policies that are relevant for purposes of this paper are the Language Policy of the Department of Justice and Constitutional Development[21] (DoJ&CD Language Policy) and the Language Policy of the Office of the Chief Justice[22] (OCJ Language Policy). As it will become evident later in this paper, these two policies provide a useful yardstick to promote multilingualism in the courts and the broad administration of justice.

1.17 The Use of Official Languages Act does not apply to the courts (the Judiciary) or the legislature. In relation to the courts this is explicit from clause 14 of the DoJ&CD Language Policy which states the following:

> 14.1 The use of official languages in court, including court interpretation services, court processes, court documents and recording of court proceedings, shall be regulated, consistent with section 171 of the Constitution, by the Rules of Court or any other applicable legislation.

1.18 The OCJ Language Policy which was promulgated after the DoJ&CD language policy[23] contains a similar clause which excludes its operation in the courts, which states as follows:

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20 Laubscher R., "Evolution of Language Rights in South Africa: Reflections on AfriForum v University of the Free State and Recognition of Official Languages over 30 years" Constitutional Court Review (2025) Volume 15, 241–270 at 248.

21 Language Policy for the Department of Justice and Constitutional Development published in Government Gazette No. 42422 of 26 April 2019.

22 Language Policy of the Office of the Chief Justice published in the Government Gazette No. 39749 of 26 February 2016.

23 The Office of the Chief Justice was proclaimed as a national department on 23 August 2010 under Proclamation No. 44 of 2010.

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

1.19 Other than section 6(2) of the Magistrates Court Act, 1944[24] (MCA) and relevant provisions in the CPA, there is no legislation that concerns the question of language use in court proceedings or judicial processes. Both the MCA and the CPA are old-order legislation[25] that were enacted prior to the 1994 democratic dispensation and are not suited for the post-apartheid legal system anchored on the rule of law.

1.20 In the absence of a legislative framework specifically regulating and operationalising multilingualism as the language of record in courts, courts rely on the resolution of the Heads of Courts of March 2017. The Heads of Court, relying on the recommendation of the Heads of Court's Committee on court language policy established in 2003, deemed it fit to recommend that English be the court language of record.[26]

1.21 The debate regarding the language of record appears not to have been put to rest by the 2017 Resolution of Heads of Court. Delivering the keynote address at the public lecture under the theme "Language Rights as a Means to Accessing Justice: Understanding Court Proceedings, Including Judgments, in Your Own Language"[27] Chief Justice Maya noted that the right of access to justice, as enshrined in the Constitution, includes language equity in court proceedings. This, she explained, required deliberate and systemic interventions, including the provision of real-time, high-quality interpretation services, the availability of court judgments in litigants' preferred languages, and the training of judicial officers to uphold and advance the country's language diversity. As such, she advocated for drastic policy reforms to give effect to these principles.[28]

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24 Magistrates Courts Act 32 of 1944.

25 Old-order legislation is defined under in Schedule 6 the Constitution as legislation enacted before the previous Constitution (Interim Constitution) took effect;

26 Resolutions of the Heads of Court of March 2017: https://www.judiciary.org.za/ Heads of Court resolution on the language ofrecord.pdf

27 At a public lecture convened by PANSALB in March 2026 at the University of Walter Sisulu.

28 Judiciary Newsletter March 2026, Q4 Issue, p 3.

1.22 It is, however, in respect of the right to education where the Constitutional Court has grappled with the question of language policy. In *Afriforum and Another v University of Free State*[29] *(Afriforum)* one of the questions the court had to decide on was:

> *whether the University acted inconsistently with its obligations in terms of section 29(2) of the Constitution in adopting a policy that phases out Afrikaans as a co-equal medium of instruction with English;*

1.23 Section 29(2) of the Constitution provides that, in part, "everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable".

1.24 The court held that the practicability test involves considering equity, practicability and the need for redress. The court held that it would be unreasonable to maintain a language policy that has proved to have entrenched racial segregation or discrimination.[30] It therefore found that the policy phasing out Afrikaans as a co-equal medium of instruction with English was consistent with section 29(2) of the Constitution. Similarly, in *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others*[31] the Constitutional Court ruled in favour of the university in its decision to phase-out the 2014 Language Policy that sustained Afrikaans as a core-medium of instruction. It accepted the university's stance that the cost of sustaining fully parallel medium English/Afrikaans undergraduate tuition could not be justified, given other, often competing, claims on its resources.

1.25 In relation to Parliament, the *Joint Rules of Parliament* provide that all Bills introduced in Parliament be in two official language one of which must be English. The reason behind the predominant usage of English in Parliament is that it is the only official language understood by all Members of Parliament. In addition, the *Use of Official Languages Act* requires all government departments to identify a language policy through which three official languages are used in all communication based on factors such as locale and usage. In terms of the Rules of Parliament, Bills in Parliament are produced in only two official languages, one of which must be English.

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29 *Afriforum and Another v University of Free State* (CCT101/17) [2017] ZACC 48; 2018 (2) SA 185 (CC); 2018 (4) BCLR 387 (CC) (29 December 2017).

30 *Afriforum*, at para 46.

31 *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* (CCT 311/17) [2019] ZACC 38; 2019 (12) BCLR 1479 (CC); 2020 (1) SA 368 (CC) (10 October 2019).

1.26 The Independent Panel Assessment of Parliament Report[32] noted that the practice of limiting the Bills to be published in only two languages leads to exclusion and disempowerment of certain communities. Furthermore, it is noted that Parliament's oversight practices currently do not include processes to oversee multilingual compliance within executive departments and other organs of state. Further, the Panel further proposed that the recommendations of this report on multilingualism in Parliament be considered by the institution and appropriate steps taken to address the challenges identified.

1.27 Masombuka,[33] in her research study, describes the three units of Parliament's Language Services Section (LSS) which provides language services to Parliament. These three units are the Interpreting Unit which provides interpretation services of both houses of Parliament, Committees and at public hearings; the Reporting Unit, which deals with the recording of member speeches and SONA debates records, also transcribing and collating debates; and the Translation Unit which provides translations and general language services, including editing, indexing and assists with the publishing of Hansard. Masombuka further notes that Parliament, despite its fully fletched language services section, has not shown to be exemplary in advancing multilingualism. For example, she highlights that English is still the dominant language that is used in all debates, proceedings, communications and documents of Parliament including Hansard publications.[34]

D Systemic Challenges

1.28 The constitutional guarantee of language rights presents significant challenges throughout the criminal justice system, from crime reporting, arrest, bail applications, trial, to appeal and review proceedings. These challenges are intrinsic to court interpretation and translation during criminal proceedings, transcription of court records and all related documentation.

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32 Report of Independent Panel Assessment of Parliament 2009), https://pmg.org.za/docs/090116report.pdf at 72.

33 Masombuka E.L "A Critique of Multilingualism in South Africa's Post-Democratic Parliament with particular reference to the use of Selected Minority Languages" A study submitted in fulfilment of the requirement for the Master of Arts Degree at Rhodes University, School of Languages & Literatures (African Language Studies Section) (2018) Rhodes University.

34 Supra, at p. 108.

1.29 Several systemic factors further exacerbate language access. These are, inter alia, growing criminal case backlog; limited proficiency of many presiding officers in South Africa's official languages; shortage of adequately trained interpreters; absence of interpreter qualifications from court records; migration of skilled interpreters to the better-remunerated private sector; inadequate training of police officers in dealing with individuals who experience language barriers.

CHAPTER 2: INCORPORATING LANGUAGE RIGHTS IN THE NEW CRIMINAL PROCEDURE LEGISLATION

A Language as an expression of identity and self-worth

2.1 Gaurav and Gulati[35] contend that beyond being a mere tool for facilitating communication, language reflects who we are, binds us to our communities, and guards our inner dignity. In their research, the authors examined the complex relationship between language and identity, concluding that language is not just a tool for communication but is also a key element in the formation and expression of cultural identity. They argue that by understanding the complex relationship between language and identity, and by developing policies, educational approaches, and institutional practices that are responsive to this relationship, we can create more equitable and inclusive environments that support the healthy development of diverse language identities.

2.2 The Deputy Minister of Justice and Constitutional Development, Andries Nel, in his keynote address during the public lecture at the University of Mpumalanga,[36] explained how Indigenous languages must become languages of jurisprudence, not just interpretation. He explained the triumvirate role of language as follows: (a) as a language used in legal proceedings, where a witness testifies in it, an accused person follows evidence through it, or a litigant consults through it; (b) as a legal language whereby it develops a sufficiently stable technical vocabulary to express legal rules, institutions and procedures; (c) as a language of jurisprudence. At this level, language does not merely carry legal ideas. Language generates legal concepts, forms of reasoning and theories of justice from intellectual resources. Judgments are conceived and written in it. Doctrine

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35 Gaurav and Gulati "Language: The First Identity", https://www.academia.edu/122525484/Language The First Identity.

36 Keynote address by Andries Nel, Deputy Minister of Justice and Constitutional Development on the occasion of the Public Lecture on Indigenous Languages and the South African Justice System at the University of Mpumalanga, Mbombela Campus on 28 July 2026,

is debated in it. Students learn to reason legally through it. Communities bring concepts embedded in it into conversation with the Constitution.

2.3 Achieving equal status for Indigenous languages alongside English and Afrikaans in the South African judicial system remains a complex challenge that requires significant reforms and long-term development. Government, through the DoJ&CD, OCJ, PanSALB and the courts have an important have an important role to play in this regards.

B Aligning criminal procedure to constitutional imperatives

2.4 Constitutional supremacy requiring that every exercise of public power and every legislative provision comply with the Constitution, [37] in that all legislation, including pre-constitutional statutes such as the CPA, be interpreted and applied consistently with the values and rights contained in the Bill of Rights. Therefore, the continued constitutional validity of the CPA depends upon its constitutional compatibility. In *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa*, the apex court recognised that every exercise of public power must conform to constitutional principles, while section 39(2) requires all legislation to be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights. [38]

2.5 Although South African courts have progressively recognised that meaningful participation in criminal proceedings depends upon language understanding, the legislative framework has not kept pace with constitutional rights. The result is an enduring statutory lacuna that leaves the protection of language rights largely dependent upon judicial discretion rather than express legislation.

2.6 The CPA cannot function as self-contained procedural law. Rather, it operates within a democratic constitutional framework, demanding its provisions be interpreted consistently with

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37 Justice Pius Langa, Transformative Constitutionalism Stell. L. Rev.

38 Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC).

the guarantees of dignity, equality, access to courts and the right to a fair trial. This constitutional obligation has particular significance for language rights, where the procedural provisions of the CPA remain notably underdeveloped.

2.7 This chapter, therefore, examines the constitutional relationship between the CPA and the Constitution's language rights in criminal proceedings. It begins by examining the existing legislative framework, the CPA, and identifying its structural deficiencies. Then, it looks at the constitutional provisions protecting language rights, followed by an examination of the developing South African jurisprudence on language justice in criminal proceedings.

2.8 Finally, the chapter considers how the CPA should be interpreted consistently with constitutional imperatives and demonstrates the necessity for legislative reform to ensure constitutional compliance.

C Absence of adequate language rights protection in the CPA and other key legislation

2.9 In South Africa, the CPA is the principal statute regulating criminal procedure. This Act legislates every stage of the criminal justice process. It prescribes the mechanisms through which criminal liability is determined and establishes the procedural safeguards intended to ensure fairness throughout criminal proceedings.

2.10 The CPA has undergone numerous amendments since the advent of constitutional democracy. Although most of the amendments have rationalised aspects of the Act, its basic architecture originated during apartheid, when English and Afrikaans occupied a privileged position within the administration of justice.[39] No amendment made in the three decades of the democracy has sought to address language rights gaps in the CPA.

2.11 Consequently, the CPA contains only fragmented provisions relating to language and interpretation and does not comprehensively guarantee the constitutional language rights of

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[39] Dugard, Human Rights and the South African Legal Order (Princeton University Press, 1978), p. 95

arrested, detained, accused or convicted persons. Thus, the CPA language provisions fall short of the constitutional language imperative.

2.12 It is important to make reference to language use in civil proceedings where there has been some developments, albeit, not that significant, that may be of assistance in the language reforms in criminal proceedings. In respect to the superior courts language is dealt with in rules 60 and 61 of the Uniform Rules of Court[40] as mended. Rule 60, which deals with translation of documents states as follows:

> **60. Translation of documents**
>
> (1) If any document in a language other than an official language of the Republic is produced in any proceedings, it shall be accompanied by a translation certified to be correct by a sworn translator.
> (2) A translation so certified by a sworn translator shall be deemed *prima facie* to be a correct translation and admissible as such upon its production.
> (3) If no sworn translator is available or if, in the opinion of the court, it would not be in the interests of justice to require a sworn translation, whether by reason of the expense, inconvenience or delay involved, the court may, notwithstanding the provisions of sub-rule (1), admit in evidence a translation certified to be correct by any person who it is satisfied is competent to make such translation.

2.13 Rule 61, which deals with interpretation, states as follows:

> **61. Interpretation of evidence**
>
> (1) Where evidence in any proceedings is given in any language with which the court or a party or his representative is not sufficiently conversant, such evidence shall be interpreted by a competent interpreter, sworn to interpret faithfully and to the best of his ability in the languages concerned.
> (2) Before any person is employed as an interpreter the court may, if in its opinion it is expedient to do so, or if any party on reasonable grounds so desires, satisfy itself as to the competence and integrity of such person after hearing evidence or otherwise.
> (3 Where the services of an interpreter are employed in any proceedings, the costs (if any) of interpretation shall, unless the court otherwise orders be costs in the cause: Provided that where the interpretation of evidence given in one of the official languages of the Republic is required by the representative of a party, such costs shall be at such party's expense.

2.14 In respect of the Constitutional Court, r*ule 13(4)(a) and (b)* of the Rules of the Constitutional Court states as follows:

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40 Rules Regulating the conduct of proceedings of the Provincial and Local Divisions of the High Court South Africa as amended published in GNR 48, G. 999 of 12 January 1965.

4(a) Argument may be addressed to the Court in any official language and the party concerned shall not be responsible for the provision of an interpreter.

(b) Should a person wish to address the Court in an official language other than the language in which such person's written argument is couched, such person shall, at least seven days prior to the hearing of the matter in question, give written notice to the Registrar of his or her intention to use another official language and shall indicate what that language is.

2.15 In relation to translation of documents Rule 25 of the Rules of the Constitutional Court states as follows:

25. Where any record or other document lodged with the Registrar contains material written in an official language that is not understood by all the judges, the Registrar shall have the portions of such record or document concerned translated by a sworn translator of the High Court into a language or languages that will be understood by such judges, and shall supply the parties with a copy of such translations.

2.16 Provisions relating to language in the CPA are contained in Chapter 22 of the Act under the heading "Conduct of proceedings". The first provision is section 161, which states as follows:

"Witness to testify *viva voce"*

(1) A witness at criminal proceedings shall, except where this Act or any other law expressly provides otherwise, give his evidence *viva voce*.

(2) In this section the expression "*viva voce*" shall, in the case of a deaf and dumb witness, be deemed to include gesture language.

2.17 Section 165 includes sign language interpretation although not expressly stated in the section. Persistent endeavours to protect the language rights communication impairments culminated in the adoption of the constitutional amendment which incorporated sign language as the twelfth official language under section 6 of the Constitution. Prior to this Amendment, the protection of the rights of communication impaired persons derived mainly from the UN Convention on the Rights of People with Disabilities (CRPD). Article 2 of the CRPD defines language to include spoken and signed languages and other forms of non-spoken languages.

2.18 The second provision is concerned with how oaths, affirmations or admonitions may be administered by or through an interpreter. The section states as follows:

(165) Where the person concerned is to give his evidence through an interpreter, the oath, affirmation or admonition under section 162, or 164 shall be administered by the presiding judge or judicial officer or the registrar of the court as the case may be, through

> the interpreter or by the interpreter in the presence of the presiding judge or judicial officer, as the case may be.

2.19 Section 165 was amended by section 2 of the Criminal Law Amendment Act (Act 135 of 1991), the purpose of which was to provide for witnesses to give be able to give evidence through an intermediary appointed under section 170A(1) of the CPA. In terms of the latter amendment, the oath, affirmation or admonition may be administered by the presiding judge or judicial officer or the court's registrar through the intermediary; or intermediary in the presence presiding judge or judicial officer, as the case may be. The amendment sought to emphasise that the interpreter, registrar or intermediary does not independently administer the oath, but that the presiding officer must be present to oversee the process. This section does not accord any constitutional language rights to the accused in criminal proceedings.

2.20 Therefore section 165 of the CPA merely empowers an interpreter to administer an oath, provided it is done in the presence of the presiding officer. This is the legal position under the CPA. The question whether it is appropriate for an interpreter to perform what appears to be a judicial function falls outside the scope of language rights protection.

D Intersection of language rights and right to a fair trial: section 35

2.21 The foundation of language justice in criminal proceedings is section 35(3)(k), which guarantees every accused person the right –

> "to be tried in a language that they understand or, if that is not practicable, to have the proceedings interpreted in that language."

2.22 Section 35(3)(k) comprises two parts. Firstly, every accused person, irrespective of citizenship has a right to a fair trial which includes the right to have that trial conducted in a language that the accused understands. If it is not practical to have the trial conducted in the language an accused understands. In the second instance, that is, where is not practicable for the trial to be conducted in a language the accused understands, then it is obligatory that the court proceedings must be interpreted in that language. Language refers to the constitutionally recognised official languages; and a language that the accused understands, which may not be an officially recognized South African language. These two parts, namely, language and

interpretation practicability are discussed below, considering the systemic challenges mentioned earlier.

2.23 The criminal justice process is communicative intensive. Every procedural step depends upon the ability of the individual concerned to understand information conveyed by police officials, prosecutors, judicial officers and legal representatives. Language therefore serves as the mechanism through which constitutional rights become capable of meaningful exercise in the criminal justice process. Section 35 addresses the rights of arrested, accused and detained persons. Specifically, s35(3)(k) addresses language.

2.24 From the moment of arrest, communication has constitutional significance. An arrested person must understand the reasons for the arrest, the nature of the allegations and the rights that immediately arise upon arrest. Similar considerations arise during detention, the first court appearance, bail, plea proceedings, trial, sentencing, appeal and review. Throughout the criminal justice process, language understanding enables the accused to make informed decisions, instruct legal representatives, challenge evidence, present a defence and participate meaningfully in proceedings that may result in adverse outcomes. [41]

2.25 The administration of criminal justice depends not only upon procedural compliance but upon meaningful communication and participation. Consequently, the legitimacy of the criminal process rests upon ensuring that language barriers do not undermine substantive fairness. Criminal proceedings frequently involve accused persons whose home language differs from that ordinarily used within the justice system. Effective communication therefore becomes indispensable to the practical realisation of constitutional rights throughout criminal proceedings.

2.26 Anyone who is arrested on suspicion of committing an offence has a set of rights intended to protect their human dignity,[42] that must be communicated promptly.[43] It stipulates that any person arrested must be informed “promptly” of their right to remain silent and the consequences of remaining silent, further ensuring that individuals were fully aware of their rights in a language they understood.

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41 *S v Mhlungu and Others* 1995 (3) SA 867 (CC) para 59.

42 Section 35 of Act 108 of 1996.

43 Section 35(2)(c).

2.27 Every detainee has the right to challenge the legality of their detention in court and must be released if the detention is found to be unlawful.[44] Section 35(1)(d) broadened the scope by establishing the right of an arrested person to be informed of the charge or the reason for continued detention at their first court appearance. These expanded rights of arrested persons beyond the initial period of detention, making it clear that individuals must be informed of the reasons for their continued detention at the earliest possible stage.

2.28 Similarly, the provisions of section 6 of the MCA providing for the right to interpretation are inadequate. Section 6(1) provides for the language to be employed in proceedings and states as follows:

> (1) Either of the official languages may be used at any stage of the proceedings in any court and the evidence shall be recorded in the language so used.

2.29 Thus, proceedings could only be conducted in Afrikaans or English which were the only recognised official languages at the time and be recorded in any of the two languages.

2.30 Section 6(2) provides for instances where evidence is given in any other language except the two languages of record. It states as follows:

> (2) If, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given, is one of the official languages or of whether the representative of the accused is conversant with the language used in the evidence or not.

2.31 Important observations from the above section of the MCA is that it is the court that calls upon a competent interpreter to interpret for the accused. It is also the court (magistrate) who must ensure the competency of the interpreter. The duty on the magistrate to ensure that the interpreter called meets the required language proficiency and skills.

2.32 Over the years, the responsibility of appointing court interpreters including their training has been the responsibility of the DoJ&CD. The question whether the courts or the Judiciary

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44 Section 35(2)(d)

should have a say in the appointment of court interpreters is discussed later, under chapter 3 of this paper.

E Application of the right to fair trial beyond the arrested, detained and accused's rights

2.33 It is important that fair trial rights in section 35 are not merely viewed in the lens of the arrested, detained and accused persons but are given a wider meaning. In *S v Dzukuda and Others; S v Tshilo*[45] at page 455, the Constitutional Court held that the right to a fair trial under section 35 of the Constitution is a comprehensive, integrated right. Its precise content must be established on a case-by-case basis, with a core purpose of ensuring that innocent people are not wrongly convicted.

2.34 Globally, fair trial rights for an accused are enshrined in the Constitution under the Bill of Rights, while the procedural rights of crime victims have historically been left to ordinary national legislation or victims' charters.

2.35 In 2004, Cabinet approved the Service Charter for Victims of Crime (hereafter referred to as the Victims Charter) as part of government's Integrated Victim Empowerment Policy, 2005, which sought to provide a comprehensive and integrated response to victims of crime. It sets out different processes and responsibilities that a victim can expect from the criminal justice system. It also determines the minimum standards that victims can expect from government departments. These Minimum Standards, which were intended to serve as a guideline for service providers (police, prosecutors, social workers, magistrates, health, correctional service and education personnel) include:

> *the right to information during the police investigation and court trial in the language understood by the victim.*

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45 *S v Dzukuda and Others; S v Tshilo* 2000 (2) SACR 443 (CC).

2.36 Despite its noble intentions, the Victims' Charter remains a mere expression of the government's policy with no mechanisms of enforcement. It has also not attained the status of a white paper, which is the established process of policy formulation within the government circles.[46]

F Section 35(3)(k) Qualifier: "If Not Practicable" Meaning?

2.37 Firstly, this language guarantee is not a procedural formality; it is the means through which other fair trial rights acquire substance. Secondly, the term "practicable" introduces a dissension between the constitutional equality ideal and the realities of state resource limitations. Whether the trial is conducted in the language that the accused understands, or it is being interpreted in that language, the primary objective is to safeguard the accused meaningful participation in the proceedings. In *S v Makwanyane and Others*[47] *(Makwanyane)* the court emphasised that fair trial rights include the ability to comprehend legal proceedings and participate meaningfully in one's defence, which is impossible without understanding the language used in court. It also reflects a broader commitment to transformative constitutionalism, aimed at redressing historical injustices and dismantling systemic inequalities. In *S v Zuma and Others*[48] *(Zuma)*, the Constitutional Court further contended that the fairness of a trial must be judged, not by form but by substance, and fairness cannot exist in a context of incomprehension.

2.38 The accused has the right to present and challenge evidence, and not to be compelled to give self-incriminating evidence. Critically, every accused person has the right to be tried in a language they understand or to have proceedings interpreted and translated into that language if necessary. The Constitution further requires that whenever the Constitution or law requires that information be given to any person under this section, that information must be conveyed in a language that the person understands.

2.39 Section 35(3)(k) serve two purposes. Firstly, they recognise the multilingual nature of South Africa and protects the accused from exclusion through incomprehension. The disjunctive

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46 For further discussion on the unenforceability of the Victims Charter, see Discussion Paper 170 published by the SALRC titled "*Protection of the Rights of Victims of Crime in Criminal Proceedings (Reflections on previous investigations pertaining to victims of crime)*, para 38 – 40.)

47 *S v Makwanyane and Others* (1995 (3) SA 391 (CC).

48 *S v Zuma and Others*[48] 1995 (2) SA 642 (CC).

of the qualifier “if that is not practicable” acknowledges resource realities which a State experiences but must not be read as an excuse for injustice. A court’s purposive interpretive mandate in section 39(2) requires that in roads on language rights be narrowly construed. Erasmus cautions, “practicability cannot mean convenience; it must mean genuine impossibility.”[49]

2.40 The constitutional text itself limits the right: the accused has the primary right to be tried in a language he understands *unless that is not practicable*, in which case interpretation must be provided. [50] The phrase “if that is not practicable” has been the source of ongoing judicial and administrative interpretation. The State often invokes “limited resources” as justification for failing to provide trained interpreters and translation services.

2.41 In *S v Matomela* 2007 (1) SACR 179 (E), the court rejected the argument that resource shortages excused the absence of an isiXhosa interpreter. It held that fairness requires “not the mere presence of translation, but translation that renders the process intelligible.[51] The court’s reasoning illustrates that the constitutional test of practicability is one of substantive impossibility. The State must demonstrate that all reasonable measures were taken to ensure comprehension before invoking resource constraints.

2.42 The constitutional text, jurisprudence, and scholarly writing make clear that the right under section 35(3)(k) is strong, but the word “practicable” imposes an internal modifier. Courts have consistently held that this does not entitle accused persons to the language of their preference, in the absence of understanding or practicality. This creates an interpretive challenge. In *S v Feni* 2005 (2) SACR 148 (E), the accused was tried in English despite his limited proficiency in that language. Although an interpreter was provided, the court found that interpretation errors did not materially affect the outcome.[52]

2.43 This conclusion, however, violates a minimalist reading of section 35(3)(k), reducing language equality to a question of administrative convenience. Erasmus argues that constitutional

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[49] Erasmus, *Constitutional Law and Human Rights in South Africa* (Butterworths, 2000) 193

[50] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 56.

[51] *S v Matomela* 2007 (1) SACR 179 (E).

[52] *S v Feni* 2005 (2) SACR 148 (E).

interpretation must focus on "substantive realisation, not mere procedural formality."[53]The practical implications of this section are profound. A fair trial requires more than the presence of an interpreter. It requires effective communication that ensures comprehension and participation. When interpretation is inadequate, delayed, or inaccurate, the trial itself becomes constitutionally defective, regardless of the outcome.

2.44 Thus, when engaging in the balancing exercise as spelt out in section 36 of the Constitution, the following is important:

1. **Practicability** is the threshold to justify departing from a trial in an understood language. Courts have held that "practicable" does *not* mean "convenient" or "preferred" but rather whether it is feasible in the circumstances, such as the availability of interpreters, court capacity.
2. **Understanding** is required: the accused must understand the language used or through an interpreter, and the interpretation must be accurate, simultaneous where required, and comprehensible. Partial understanding is not sufficient; the standard is that the accused "fully" understands, or as fully as reasonably possible. [54]
3. **Fairness and Fundamental Right**: The limitation is only acceptable if fairness is preserved. If the lack of interpretation / language accommodation means the accused cannot comprehend charges, cross-examine, know what is happening, and such, then there may be a breach of fair trial rights.

2.45 Like all constitutional guarantees, language right under section 35(3)(k) is subject to limitation. It is not absolute, and the clause "if that is not practicable" works like a built-in limitation, akin to "reasonable and justifiable limitation" criterion. When the court cannot conduct a proceeding in a language the accused understands, it must provide interpretation.

Where Tension Arises

- **Determining practicability**: What counts as "practicable"? Is lack of interpreter acceptable? Delays? Cost constraints? Courts have sometimes deferred to practical constraints, but this raises the risk of unfair trial if the reason for non-interpretation is weak.

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[53] G Erasmus, Constitutional Law and Human Rights in South Africa (Butterworths, 2000) 124)

[54] *Republic v Patrick Mbatha* [2015] eKLR.

- **Extent of understanding**: What does "understands" mean in practice? Courts have required full understanding, not partial. In *S v Duna*, for example, it must be a language fully understood, and not partially.[5]
- **Language of record**: Even if a trial can be held in a language the accused understands, often records are kept in another language often English. That raises comprehension issues for appeals, reviews, or later stages of litigation.
- **Mother tongue versus familiar language**: Many accused persons might understand English or Afrikaans sufficiently, but their mother tongue is an indigenous language. The constitutional right does *not* guarantee mother tongue, only "language that he understands" or interpretation. The difference matters in accessing justice.[55] The Court in *Kotole* showed that when interpretation is poor, the accused may suffer prejudice; yet not every case of language mismatch is adequately remedied.

G Salient jurisprudence on language rights in criminal proceedings

2.46 A survey of pertinent cases brings out the intersection between constitutionally chosen language and right to interpretation, which are interdependent. Several cases have clarified what the right to interpretation means and what it does *not* mean in practice, especially regarding the limitation clause, when it may be not *practicable* to have the trial conducted in a language the accused fully understands, and when interpretation must be provided.

2.47 The following cases highlight re-emphasise significant principles that are worthy of consideration in the language rights reform:

(a) Mthethwa v De Bruin NO & Another (1998)[56]

2.48 In *Mthethwa v De Bruin NO & Another (Mthethwa),* the applicant understood English, but requested that the trial be conducted in isiZulu, which is his home language. The court refused. The High Court in that matter held that section 35(3)(k) does *not* confer a right to have a trial in a

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55 *Namakula,* C. S. (2019). *When the tongue ties fair trial: the South African experience*. *South African Journal on Human Rights, 35*(2), 219-236.

56 *Mthethwa v De Bruin NO & Another*

language of one's choosing; only a right to a trial in a language understood by the accused, or, if that is not practicable, interpreted into such language.[3]

(b) S v Damoyi (2003)[57]

2.49 In *S v Damoyi (Damoyi)* the court considered whether an accused had an entitlement to be tried in Afrikaans. The court reaffirmed what *Mthethwa* held, that the constitutional right is not a right to insist on one's language of choice but a right to understand the proceedings, either by having the trial in a language the accused understands, or by means of interpretation.[4]

(c) S v Feni (2005)[58]

2.50 In *S v Feni (Feni)* the accused, a Xhosa-speaking accused, was convicted of theft in proceedings conducted primarily in English. The interpreter assigned to the case admitted to limited familiarity with legal terminology. On appeal, the defence argued that the interpretation had been inadequate and that the accused had not fully understood the proceedings. The Eastern Cape High Court upheld the conviction, reasoning that the accused's answers indicated "sufficient understanding." The judgment's implicit assumption that minimal participation implies understanding undermines the constitutional commitment to substantive equality. Khumalo's critique of *Feni* highlights this, saying, "The court effectively collapsed the constitutional standard of meaningful understanding into an evidentiary test of apparent coherence, disregarding the interpretive complexity of multilingual communication.[59]

(d) S v Duna (2006)[60]

2.51 In *S v Duna* (*Duna*), the court stressed that interpretation must happen *simultaneously* with testimony, and in a language the accused "fully understands," not merely paraphrased.

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57 *S v Damoyi*

58 *S v Feni* 2005 (2) SACR 148 (E)

59 Khumalo 57

60 *S v Duna* (2006)

(e) S v Matomela (2007)[61]

2.52 In *S v Matomela* (1998), the magistrate did not have interpreters for a case that had already been postponed several times. Rather than postpone it again to wait for an interpreter, it was conducted in isiXhosa, the language all judicial officers present were proficient in. In the High Court of the Cape Provincial Division, the Judge agreed with the finding in *S v Matomela* (1998) that the use of an indigenous language was constitutional and that the proceedings had been in accordance with justice. The delays that were caused for the review court because of the difficulties in transcribing the record in isiXhosa into English, however, were a cause of dissatisfaction to the Judge. Because of matters of practicality, he propagated a sole language of record for courts: "The solution to problems such as the one raised in this matter could be the introduction of one language of record in court proceedings [...] such a course would not only be economical but would be in the best interest of justice. After all, English already is a language used in international commerce and international transactions are concluded exclusively in the English language."[62] Additionally, Yekiso J stated at para 122 that "If parity of the eleven official languages were to be adhered to in court proceedings, it could result in a considerable strain on resources, which could, in turn, impact negatively on the quality of service delivery and efficiency in the administration of justice."

2.53 In *Matomela*, the accused objected to being tried in English, requesting that proceedings be conducted in isiXhosa. The court agreed, holding that language participation is integral to equality and dignity. The judgment stands as a rare but powerful example of judicial adherence to constitutional values. Significantly, the court linked language rights to the transformative constitutionalism, holding that "to deny an accused the right to be tried in their own language is to perpetuate the very inequality that the Constitution seeks to eradicate." This interpretation moves beyond administrative convenience and locates language within the legal architecture of post-apartheid justice. The *Matomela* decision has since been cited as persuasive authority for the proposition that "practicability" must be tested against constitutional reasonableness, not bureaucratic limitation.

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61 *S v Matomela* 2007 (1) SACR 179 (E)

62 S v Damoyi 2004 para 18.

(f) Oosthuizen and Another v S (2024)[63]

2.54 This more recent case illustrates the judiciary's ongoing struggle with language justice. The two accused, Afrikaans-speaking farmers, were tried in English. The court provided an interpreter, but one accused later claimed that the translation failed to convey key nuances of witness testimony. The High Court acknowledged deficiencies but found no "material irregularity.[64]

2.55 Section 165 of the CPA provides that interpretation must be "to the satisfaction of the court," a subjective standard that leaves fairness contingent upon judicial discretion rather than objective criteria. Devenish argues that such discretion undermines constitutional certainty, "The fairness of a trial cannot depend on the language assumptions of the presiding officer; it must rest upon verifiable procedural guarantees.[65] *Oosthuizen* thus reinforces the urgent need for legislative reform.

(g) Sayed and Another v Levitt NO and Another (AR101/2011, 5582/2010)[66] [2012] ZAKZPHC 38; 2012 (2) SACR 294 (KZP) (25 June 2012)

2.56 The matter concerned serious irregularities relating to interpretation services during criminal proceedings involving foreign accused persons. The Court examined whether inadequate interpretation undermined the constitutional right to a fair trial, including the effective exercise of the right to legal representation.

2.57 At paragraph 4, the Court emphasised that section 6(2) of the Magistrates' Courts Act must be read together with section 35(3)(k) of the Constitution. The Court further referred to section 35(4) of the Constitution, which requires that constitutional rights must be explained to accused persons in a language they understand. Paragraph 4 contains one of the most important statements in the judgment:

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63 *Oosthuizen and Another v S*

64 *Oosthuizen and Another v S* [2024] ZAECMKHC 101.

65 Devenish 228

66 *Sayed and Another v Levitt NO and Another* (AR101/2011, 5582/2010) [2012] ZAKZPHC 38; 2012 (2) SACR 294 (KZP) (25 June 2012).

> "Inasmuch as it is of fundamental importance to receive legal representation it is important to understand and follow the evidence, because without such understanding the right to a fair trial would be meaningless and non-existent."

2.58 This paragraph is constitutionally significant because it directly links the right to legal representation; language comprehension; and meaningful participation in criminal proceedings. The Court held that the right to an interpreter entail "continuous, precise, and competent translation of everything that is said in court." [67]

2.59 Section 35(3)(k) thus functions as the constitutional linchpin of language justice. The *Feni*, *Oosthuizen*, and *Matomela* cases collectively reveal a fragmented jurisprudence, oscillating between minimalism and transformation.

2.60 Additionally, the Court focussed on its role in ensuring credible interpreter services when it criticised the use of an ad hoc interpreter: who was not properly sworn; whose competency had not been established; and whose interpretation was difficult to understand. The Court stressed that presiding officers bear a duty to ensure the competence of interpreters; and the fairness of proceedings through proper communication safeguards.

2.61 The Court referred to previous authorities confirming that courts must formally satisfy themselves regarding the expertise and competency of interpreters. At footnote 27 and the accompanying discussion, the Court cited *S v Mponda* which held that presiding officers should formally verify the expertise of casual interpreters. The Court also relied on *S v Lin* which recognised the importance of qualified interpretation in criminal proceedings.

2.62 In *Feni*, the Court found that the thirty-month delay in translating legal proceedings into English compromised the accused's fundamental rights to a fair trial. In *Oosthuizen*, the Court found that record keeping should be in English, and that interpretation services must be rendered where an accused chooses to speak a language different from that of the Court.

2.63 The Court remarked as follows at para 6:

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[67] *R v Tran* [1994] 2 SCR 951.

"The magistrate missed the point. He knows full well that he has a duty to get an interpreter to interpret the language spoken by the accused or witness, as the record should be in English. I do not understand Mr Landman to have meant to deprive his client of the right to speak Afrikaans. Indeed, Mr Van Straten was entitled to speak Afrikaans as long as same would have been interpreted into English for record purposes. This is what happens when a person speaks in isiXhosa or isiZulu. The same would apply to any one of the other official languages."

2.64 Here, the Court per Tshabalala J, as he then was, with Pickard JP concurring remarked:[68]
The constitutional provisions … referred to above [i.e. section 6(1) read with 6(2) and (4) of the Constitution] are binding unless there was one official language for the courts. In order to arrive at such a situation national legislation would have to be passed for that purpose. I anticipate that instances like the present case will occur more frequently in the future and the problems arising therefrom will become greater and greater. This is necessarily so when one considers that more and more judges and magistrates whose mother tongue is one of the official indigenous languages are finding their way on to the benches of South African courts. The same applies to the increase in the number of prosecutors and practitioners from indigenous language groups. The Constitution as it presently stands entitles people of the same language group to conduct the whole case in their language only providing it is one of the official languages. This is a matter that I consider should receive the urgent attention of the national legislature before injustices occur as a result of the present situation.[69]

(h) Esyas v Magistrate McKenzie Paarl Magistrates Court and Others (7881/24)[70] [2024] ZAWCHC 106 (22 April 2024)

2.65 The applicant, an Ethiopian national who did not speak or understand English, sought a review of criminal proceedings in which an admission of guilt fine had been recorded without proper interpretation or comprehension of proceedings. The applicant argued that he did not

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68 *S* v *Matomela* para 8

69 At para 11; S v Damani (DR224/14) [2014] ZAKZPHC 60; 2016 (1) SACR 80 (KZP) (9 December 2014)

70 *Esyas v Magistrate McKenzie Paarl Magistrates Court and Others* (7881/24) [2024] ZAWCHC 106 (22 April 2024).

understand the proceedings; that no interpreter was present; and that his fair trial rights under section 35 of the Constitution had been violated.

2.66 The Court considered section 35(3)(k) of the Constitution; section 35(4) of the Constitution; section 6(2) of the Magistrates' Courts Act 32 of 1944; and broader fair trial principles. At paragraph 15, the Court held: "The right to be tried in a language that the accused understands is essential for the accused to exercise his right to a fair trial." The Court further stated: "an accused person's right to be communicatively present in criminal proceedings is a prerequisite for participation in those proceedings." At paragraph 16, the Court clarified that section 35(3)(k) protects the right to be tried in a language understood by the accused; and where impracticable, the right to interpretation.

2.67 The Court stated that "the structure of the section envisages two distinct rights," and further emphasised that the right is not merely to a language of choice; but it is a right to genuine understanding. Paragraph 18 is one of the most important passages in the judgment. The Court stated that "the purpose of this right is to ensure the meaningful participation of the accused in the proceedings," and continued, "An accused person cannot be expected to participate meaningfully in criminal court proceedings, particularly to challenge and adduce evidence, if he does not understand the language used in court."

2.68 At paragraph 15, the Court referred to section 6(2) of the Magistrates' Courts Act and confirmed that "The failure to do so is a gross irregularity vitiating the proceedings," relying on *S v Mafu*; and *S v Abraham* to reinforce the principle that competent interpretation is indispensable to a fair trial. The Court found that the applicant did not understand proceedings; no interpreter was present; no proper explanation was given the admission of guilt process was fundamentally irregular. Thus, the Court held that "it was highly irregular for the magistrate to finalise the matter in the manner that he did without ensuring that the accused understood the proceedings," concluding that "this irregularity is so gross that it vitiated the entire proceedings." (at para 22)

2.69 In *S v Mokoena* 2008[71] (5) SA 91 (SCA), the Court lamented the "continued reliance on informal interpreter arrangements" and called for legislative intervention. In *S v Tshabalala*[72], the

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71 *S v Mokoena* 2008 (5) SA 91 (SCA).

72 *S v Tshabalala* 2011(2) SACR 263 (GSJ).

High Court noted that the absence of interpreter details in the record "renders it impossible to determine whether the accused's right to understanding was effectively realised. A constitutional reinterpretation of section 165 CPA, therefore, requires that interpreter credentials and the language of record be formally entered into the proceedings to preserve accountability and transparency.

H Interpretation of rights enshrined in the Bill of Rights

2.70 While section 39(2) imposes a clear duty to interpret all law in harmony with the "spirit, purport, and objects of the Bill of Rights," many judicial decisions still reflect a deferential position toward administrative constraints rather than a transformative understanding of equality and dignity.[73] When interpreting the Bill of Rights, judicial bodies must promote democratic values of human dignity, equality, and freedom, and must consider international law, while they may consider foreign law. Courts and forums must promote the spirit, purport, and objects of the Bill of Rights when interpreting legislation and developing common or customary law. The Bill of Rights preserves other recognized rights or freedoms from common law, customary law, or legislation, provided they align with the Bill.

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[73] The right to a fair trial is enshrined in numerous international and regional legal instruments. Among its essential components is the right to understand and participate in criminal proceedings:

(a) The ICCPR's Article 14(3): Everyone shall be informed promptly and in detail, in a language which they understand, of the nature and cause of the charge against them. International Covenant on Civil and Political Rights (ICCPR), 1966. United Nations.

(b) African Charter on Human and Peoples Rights (ACHPR), Article 7 African Charter on Human and Peoples' Rights, 1981. Organization of African Unity (OAU).

(c) European Convention on Human Rights (ECHR), Article 6(3)(e): Minimum rights include the free interpreter assistance if they cannot understand or speak the language used in court. Council of Europe, 1950. *European Convention on Human Rights*.

There are some salient, inter alia, legal dimensions of language rights relevant to all arrested, detained, accused or undergoing trials and hearings, which are:

(a) the right to interpretation and translation in criminal proceedings;

(b) the right to be informed of charges in a language one understands;

(c) the right to participate effectively in legal proceedings; and

(d) the right to access legal counsel and to understand advice given.

2.71 Interpretation of constitutional language guarantee necessitates a purposive approach to interpretation, which locates the CPA away from the intent of its apartheid-era drafters; and through the objectives of the democratic Constitution. Erasmus explains, “language is not a neutral code; it shapes the cognitive and emotional dimensions of communication.[74] Literal translation may therefore distort meaning, especially in emotionally charged testimony or culturally embedded expressions. For example, the isiZulu phrase *ngiyavuma* may convey both acknowledgment and resignation, depending on context. An untrained interpreter translating it simply as “I admit” could fundamentally alter the legal effect of the accused’s statement. True language equivalence demands professional interpreter training and certification. It also requires judges to develop awareness of language diversity and its procedural implications. Currie and De Waal note, “judicial ignorance of language dynamics is itself a form of systemic bias.[75]

2.72 A purposive approach, on the other hand, will reform the CPA abiding by constitutional commitments, inter alia, equality, dignity, and fairness. As Devenish observes, “the law must not be imprisoned by the historical moment of its creation; it must live within the constitutional order of its application.[76] The Constitutional Court’s approach in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*[77]. The Court held that statutes must be “interpreted, where possible, to promote the spirit, purport, and objects of the Bill of Rights.[78] This interpretive principle transforms the CPA from a static procedural code into a living instrument of constitutional justice serving the needs of a dynamic South African society.

I Compliance with International Law

2.73 Section 39(1)(b) of the Constitution requires courts to consider international law when interpreting the Bill of Rights, while section 233 requires legislation to be interpreted consistently with international law wherever reasonably possible. South Africa has ratified the United Nations

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74 Erasmus 201

75 Currie & de Waal 675.

76 Devenish 43

77 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC)

78 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC).

Convention on the Rights of Persons with Disabilities (UNCRPD), which imposes positive obligations on States Parties to ensure accessibility and effective access to justice.

2.74 The proposed amendment gives domestic effect to, among others Article 9 (Accessibility); Article 13 (Access to Justice); Article 21 (Freedom of Expression and Access to Information); and Article 2, which recognises sign languages and communication support as essential components of accessibility. The amendment further reflects the principles contained in General Comment No. 2 on Accessibility and General Comment No. 7 concerning the participation of persons with disabilities.

2.75 In sum, Section 36, read with Sections 35(3) affirms that the right to understand legal information in one's own language is a non-negotiable component of a fair criminal process. Upholding this right is essential not only for procedural fairness but for reinforcing the moral authority and integrity of our Constitution.

J Comparative foreign jurisprudence

2.76 Comparable jurisdictions have progressively moved from informal interpreter appointment systems towards structured legislative frameworks regulating accreditation, ethics and professional competency. Countries including Kenya, Uganda, Australia and New Zealand recognise that effective interpretation is an essential component of procedural fairness and access to justice. The proposed amendment reflects these developments while adapting them to South Africa's multilingual constitutional framework and disability rights obligations.

CHAPTER 3: THE RIGHT TO AN INTERPRETER UNDER SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM

A The history of court interpretation in South Africa

3.1 Through the years court interpretation evolved from a negligible profession under apartheid into a constitutional safeguard for the right to a fair trial and language equality under the democratic era.

3.2 Despite its significance in the country's legal system, the court interpretation profession lacks statutory basis that provides for its comprehensive regulation. Despite its long history, the profession remains undefined in the South African judicial landscape. The South African National Editors' Forum, in its report published in 2022[79] put it bluntly that:

> No legislation specifically defines the role of court interpreters in South Africa. Whether an interpreter's qualifications and standing are acceptable and what their precise role should be, are at the discretion of the presiding officer in any particular case. Translations of documents, however, must be produced by sworn translators who have been tested and certified by a professional peer of seven years' standing or via the South African Translation Institute and then, after application for a swearing-in date, been sworn in before a judge at the relevant local division of the High Court and received certification to that effect.

3.3 Similar to translators, court interpreters are required to take an oath of office before a presiding officer. In terms of rule 68 of the Magistrates Court Rules, every interpreter must, upon entering the office (of an interpreter), take an oath of office before a magistrate that:

> "whenever I may be called upon to perform the functions of an interpreter in any proceedings in any magistrate's court I shall truly and correctly to the best of my knowledge and ability interpret from the language I may be called upon to interpret into an official language of the Republic of South Africa and *vice versa*."

3.4 Unlike translators, there are no entry requirements or qualification for entry into the profession of court interpreter. Court Interpreters are also not regulated under the recently

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79 "Reporting the Courts A guide for South African journalists" published by the South African National Editors' Forum, (SANEF) 2022.

enacted South African Language Practitioners' Council Act, 2024[80], which took effect on 29th of August 2025. The definition of the Act does not include court interpreters. It is designed to regulate legal practitioners who are accredited by the Council established under the Act.

3.5 The courts have generally treated interpretation issues as administrative rather than constitutional, which defies the substantive meaning of language rights. Given that language is primate to understanding and participation, the denial of reasonable and justifiable interpretation violates not only section 35(3)(k) but also sections 9 and 10, which guarantee equality and dignity.

B The accused's right to an interpreter enshrined in 35(3)(k)

3.6 Section 35(3)(k) of the Constitution gives every accused person the right to be tried in a language they understand, if not practicable, to have the proceedings interpreted in that language. From the wording of section 35(3)(k), the accused's right to an interpreter is triggered by his or her lack of understanding of the language of the language of the proceedings.

3.7 Unlike section 29(2) which entitles everyone to receive education in the official language or languages of their choice in public educational institutions if practicable, the entitled to be tried in the language he or she understands. The section is less succinct compared to article 14(3)(f) of the International Covenant on Civil and Political Rights (ICCPR), which states that every individual facing a criminal charge is entitled to 'the free assistance of an interpreter if he cannot understand or speak the language used in court. South Africa ratified the Covenant on 10 December 1998, after having signed it earlier on October 3, 1994.The ICCPR makes explicit mention of and assistance of an interpreter free of charge. Section 35(3)(k) does not mention the word "interpreter" but uses the phrase "to have the proceedings interpreted" in that language. It therefore establishes the legal right to an interpretation service.

3.8 It is evident, from section 35(3)(k) that an accused person does not have an absolute right to choose any language they prefer for their trial, but rather the right to be tried in a language they understand or to have an interpreter provided. The determination of whether the accused

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80 South African Language Practitioners' Council Act, 2024 (Act No. 8 of 2014).

understands the language in which the proceedings are to be conducted is not a question that is left to the accused, but must be answered objectively by circumstances applicable to each case. The right presupposes an objective inquiry that ultimately rests on the court—not solely on the subjective claims of the accused or their legal counsel. In Kruse v S81 the court held that the presiding officer must satisfy him or herself on proper grounds that the accused is able to hear and understand the proceedings at all times and to make him or herself understood. The presiding officer should not simply accept the word of a legal representative in this regard, for an accused's legal representative may be operating under a misapprehension as to the efficacy and accuracy of his or her attempts to communicate with the accused. Nor should the presiding officer be content with his or her own assessment of the situation.

3.9 The position in South Africa differs from the Nigerian criminal justice system where, for example, a view is held that the accused person or his or her legal representative has a duty to inform the court promptly of his inability to understand English language for which his trial is being conducted. Where he or his counsel fails in this duty, he cannot be heard on appeal that he was not given a fair trial.[82]

C The right to an interpreter under international law

3.10 As stated elsewhere in this paper, the right to an interpreter is protected under article 14(3)(f) of the International Covenant on Civil and Political Rights (ICCPR). Similarly, Article 6 (3)(e) of the European Convention on Human Rights and Fundamental Freedoms of 1950 provides that the accused is entitled to free assistance of an interpreter if he/she cannot understand or speak the language used in court. Michael[83] avers that whilst international instruments does not expressly mention the right to translation, this in practice, has been found to be inherent in the right to an interpreter.

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81 *Kruse v S* (A100/2018) [2018] ZAWCHC 105; [2019] 4 All SA 287 (WCC) (27 August 2018).

82 See Ogwezzy M. "Communication of an interpreter and fair trial under Nigerian criminal justice system" International Journal of Legal Discourse 2016; 1(1): 213–233, at 224.

83 Michael C.O "Communication of an interpreter and fair trial under Nigerian criminal justice system" International Journal of Legal Discourse 2016; 1(1): 213–233, at p. 220.

3.11 Paragraph (g) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* the in Africa[84] (*Principles and Guidelines on the Right to a Fair Trial*) provides, under the the essential elements for a fair hearing, in respect of the defendant-

> "an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body;"

3.12 South Africa signed, ratified and deposited the African Charter on Human and People's Rights, under which the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance* were adopted, on 09 July 1996.The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance* were formally adopted by the African Commission on Human and Peoples' Rights on May 29, 2003**,** during its 33rd Ordinary Session in Niamey, Niger.

3.13 It is an accepted principle that Member States of the African Union are, upon ratification of the African Charter, are bound by its provisions regardless of whether it is formally domesticated into national legislation. Article 1 of the Charter imposes an immediate international obligation to member states to recognise and give effect to its rights.

3.14 More profound within the international realm concerning language rights is the Rome Statute of the International Criminal Court[85] (Rome Statute). Article 67(1)(f) provides enshrines the right of an accused as follows:

> (1) In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
>
> (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

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84 The Principles and Guidelines on the Right to a Fair Trial (2003) were adopted by the African Commission on Human and Peoples' Rights.

85 Rome Statute of the International Criminal Court (1998).

3.15 South Africa has domesticated the Rome Statute in terms of the Implementation of the Rome Statute of the International Criminal Court Act of 200[86] (Implementation of the Rome Statute Act). In terms of this domestication, the Rome Statute became annexed to the Implementation of the Rome Statute Act. The Preamble of the Act states, among others, the following:

> To provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute; …; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstance; to provide for the co-operation by South Africa with the said Court; …"

D The right to a competent interpreter under South African law

3.16 The South African courts have not hesitated to invalidate the proceedings where the competence of an interpreter has come to light. This makes the competence and proficiency in the interpretation role a critical factor in the appointment of court interpreters in South Africa.

3.17 Lebese and Ndhlovu[87] in their study, found that DoJ&CD employs court interpreters who do not have prior knowledge of the interpreting phenomenon and its intricacies. The in-house training takes six weeks, which indicates that court interpreters are not properly trained or sufficiently prepared for their task of interpreting. They postulate that the DoJ&CD needs to change the criteria for the employment of court interpreters to include the requirement of a qualification in interpreting from a higher institution of learning, and this must be a set rule. Further that the in-house training of court interpreters should be improved and extended to a period of at least 12 months so that they can be given sufficient training to enable them to cope with the challenges of interpreting.

3.18 Apart from a short six weeks' course offered by the DoJ&CD through its Bridget Mabandla Justice College, there no prescribed post-matric qualification requirement for court interpreters. Attempts to introduce formal qualification at tertiary following the DoJ&CD's engagement with

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86 Implementation of the Rome Statute of the International Criminal Court Act No. 27 of 2002.

87 Lebese S., Ndlovhu K. "South African court interpreters' perceptions of the phenomenon of interpreting" Southern African Linguistics and Applied Language Studies, (Published online: 26 Nov 2024) at p. 10.

academic institution level appear to have hit a snag. Simelane[88] alludes to the following attempts to establish a court interpreting formal qualification at tertiary level following engagements between the DoJ&CD and universities:

- the University of North-West (former Potchefstroom University for Christian Higher Education) started to offer a University Diploma in Legal Interpreting in 1998. This program was discontinued in 2006.
- The University of Port Elizabeth also introduced an undergraduate Diploma in Legal Interpreting; this has also been discontinued;
- In 2000, the University of South Africa (UNISA) began offering the BA in Court Interpreting which was discontinued in 2009 because of poor response from court interpreters to register for this program.

3.19 The Department of Justice and Constitutional Development's 2022 Annual Report acknowledges severe interpreter shortages, uneven training standards, and reliance on ad hoc or bilingual court staff. Such conditions are incompatible with the constitutional duty of competence. Currie and De Waal explain that "a constitutional right is only as strong as the institutional capacity that sustains it.[89]

3.20 Beyond the challenges acknowledged by the government, several studies have highlighted multifaceted challenges adversely impacting the court interpretation, which mainly stem from the absence of a cogent legislative framework of policy that regulates the profession.

3.21 Comparatively, the National Association of Judiciary Interpreters and Translators (NAJIT), which is a well-known association of interpreters and translators in the US which emerged out of legislation, has a code of ethics and professional responsibilities which bind interpreters.

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88 Simelane B.B "Exploring the role of court interpreters in KwaZulu Natal Province of South Africa" Dissertation submitted in fulfilment of the requirements for the degree of Master of Language Practice at the Durban University of Technology (2-22), at p 22.

89 *The Bill of Rights Handbook* (6th edn, 2021) 670.

E The state's obligation to provide interpretation service

3.21 The right to an interpreter or interpretation service is a fundamental human right protected by section 35(3)(k) of the Bill of Rights. Court Interpretation is provided as part of the public service regulated under 195(1) of the Constitution, which, among others, requires public administration to be professional, accountable, and development-oriented."

3.22 Historically, in many jurisdictions, judicial officers took little interest in the affairs of interpreters who they regarded as merely "helpers" or conduits. Today, modern legal systems recognise interpreters as highly skilled professionals and essential officers of the court who are vital to upholding constitutional rights and ensuring due process. Their appointment and development of interpreters has therefore become a matter of interest to the Judiciary.

3.23 Prior to the establishment of the OCJ in 2010, the DoJ&CD carried the responsibility for providing court interpretation services in all courts. Following the establishment of the OCJ, the responsibility for the appointment of court interpreters in the superior courts lies with the OCJ. The OCJ, in its current form, is a government department under the executive authority of the Minister of Justice and Constitutional Development.

3.24 The provision and management of court interpreters in closely tied to the management of judicial of an independent Judicial branch of the state. Jurisdictions that have undertaken reforms of the judicial management functions have assigned these function to an independent entity responsible for judicial and court administration. Countries that have assigned the appointment and management of interpreters to a functionary or entity outside the Department of Justice include the following:

(a) Under the United States where court interpreters are regulated by the Administrative Office. The Court Interpreters Act, of 1978[90] provides that the Director of the Administrative Office of the United States Courts shall prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters.

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90 The Court Interpreters Act, of 1978 28 USC § 1827.

(b) Under the Kenyan jurisdiction, court interpretation is one of the core function of the Judicia Service Commission. Under the Judicial Service Act[91] the Judicial Service Commission of Kenya is assigned the constitutional and statutory mandate to appoint judicial staff, including court interpreters, while day-to-day deployment, transfers, and administrative management are overseen by the Chief Registrar of the Judiciary and local heads of court stations.

(c) Under the Ghanaian judicial system the appointment of officers and employees of the courts is regulated under the Judicial Service Act of 2020.[92] In terms of section 15(1) of this Act, officers and employees of the courts including court interpreters are appointed by the Chief Justice or other Justice or other officer of the Court as the Chief Justice may direct in writing. In terms of section 15(2) of the same Act, The Judicial Council shall, acting in consultation with the Public Services Commission and with the prior approval of the President, by constitutional instrument, make regulations prescribing the terms and conditions of service of the persons to whom subsection (1) applies.

F The necessity of a statutory framework for court interpretation in South Africa

3.25 Whilst the enactment of the Official Languages Act was an important milestone in the quest to advance multilingualism, it has not been without hassles. Laubscher[93] points to some of the immediate challenges in relation to the Act which emerged with the inclusion of Sign Language as the twelfth official language:

(a) The Use of Official Languages Act, enacted more than a decade prior to the recognition of Sign language, will require urgent update to reflect the inclusion of SASL.

(b) The new constitutional amendment calls for the re-examination of the 'reasonable practicability' standard in section 29(2), particularly considering South Africa's

[91] Judicial Service Commission 1 of 2011.

[92] Ghana Judicial Service Act, 2020 (Act 1057of 2020).

[93] Laubscher R. "Evolution of Language Rights in South Africa: Reflections on *AfriForum v University of the Free State* and Recognition of Official Languages over 30 years" *Constitutional Court Review* 2025 Volume 15, 241–270 https://doi.org/10.2989/CCR.2025.0009

constitutional and international obligations to persons with disabilities. In this context, it is arguable that what is 'reasonably practicable' for deaf or hearing-impaired person cannot be defined solely by institutional cost or historical precedent. Rather, it must reflect a commitment to reasonable accommodation and the elimination of systemic barriers, among others.

(c) Institutions that fail to provide SASL interpretation, support services or instructional inclusion may now find themselves vulnerable to constitutional challenge, not only under section 29(2), but also under sections 9 (equality), 10 (dignity) and 27 (access to education and healthcare).

(d) the jurisprudence on language rights, previously shaped by debates over race, access and the legacy of Afrikaans,[94] must now broaden to include the intersection of language and disability. This may require the Constitutional Court to move beyond its existing analytical frameworks and engage more fully with comparative and international disability rights law.

3.26 Whilst the Use of Official Languages applies to public administration at national government, a similar legislative framework is necessary to the realisation of constitutional imperatives clearly stated in section 6 of the Constitution. There is there, no doubt that South Africa, compared to any other country, needs court interpretation legislation.

3.27 Other role-players in criminal proceedings including the judges, magistrates and prosecutors have separate legislative frameworks pertaining to their function within the criminal justice system. The lack of legislation for court interpreters makes interpreters feel vulnerable and unprotected. Matende, Svongoro and Munyaka[95] who studied the working conditions of court interpreters in Zimbabwe's Magistrates Court, made the following observations in their findings:

> The data that were collected reveal that the job is tough, demanding and stressful, because interpreters lack of proper training, receive low remuneration, face a lack of recognition, and have heavy workloads, in addition to the complex nature of interpreting tasks. In-depth interviews revealed that, although interpreters believed court interpreting

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94 In this regard the author specifically refers particularly to the Constitutional Court jurisprudence in Afriforum v University of Free State [2017] ZACC 48, 2018 (2) SA 185 (CC), *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* [2019] ZACC 38, 2020 (1) SA 368 (CC) and *Chairperson of the Council of UNISA v AfriForum NPC* [2021] ZACC 32, 2022 (2) SA 1 (CC).

95 Matende T., Svongoro P. and Munyaka T. "How does the work environment affect court interpreters" *Journal for Translation Studies in Africa* 2022 (3): 1-21, at p.9.

is a noble profession, it is not given the recognition it deserves by other professionals who work with court interpreters, such as lawyers, magistrates and public prosecutors. Therefore, there was consensus in the in-depth interviews conducted with court interpreters about the lack of recognition of the court interpreting profession in Zimbabwean courtrooms.

3.28 Lebese[96] laments the lack of comprehensive legislation in South Africa regulating the work of court interpreters. This is despite the history of language and cultural exclusion. The author correctly explains that the Personnel Administration Standards (PAS) for Court Interpreters (PAS) which is contained in the Public Service Code is the only post-apartheid legislative instrument that mentions court interpreters. The Code relates to the employment of court interpreters in the DoJ & CD. The PAS does not mention any norms which court interpreters have to abide by when they carry out their task.

3.29 A comprehensive legislative framework is necessary to address the myriad challenges facing the South African criminal courts and administration of justice broadly. The following are among the challenges that require intervention by the legislature:

(a) bring certainty on the question of language of record in view of the inconsistent policies on the subject;

(b) provide clarity on the specific organ of state that will assume the overall mandate and responsibility for providing interpretation services across all the courts;

(c) establishing ethical code of conduct for interpreters and adequate monitoring and accountability measures;

(d) build the requisite capacity to give effect to the Sign Language as the 12th official language in the county;

(e) establish a National Framework Authority for body that will, inter alia, ensure accreditation, qualifications, competence, a code of ethics, monitoring and evaluation.

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96 Lebese S “Do justice to court interpreters in South Africa” *Stellenbosch Papers in Language Plus*, Vol. 43, 2014, 183-208, AT P 202.

G Initiatives by the South African Judicial to enhance language access

3.30 In 2014, the Heads of Court, under Chief Justice Mogoeng, appointed a Court Interpreters Capacitation Committee to investigate ways of addressing challenges of court interpretation in the courts. The Committee was chaired by the now Judge President Aubrey Ledwaba of the Gauteng Division of the High Court. The Committee was established under the umbrella of the Judiciary Case Flow Management Committee. This is indicative of the significance of court interpretation to judicial efficiency.

3.31 The establishment of the Court Interpretation Capacitation Committee was in recognition of how the challenges of severe shortage of qualified or specialised court interpreters directly caused trial postponements, prolonged pre-trial detentions, and added bottlenecks to the court rolls.

3.32 The Heads of Courts interest in the services of court interpreters is consistent with the trend in many jurisdictions where the Chief Justice and the court assumes an active role the role of appointing and management court interpreters. This marks an important shift in judicial governance. For example, Zimbabwe has progressively integrated court interpreters directly into its judicial structures. This positioning shifts them away from being considered mere "civil service clerks" to vital officers of the court. Court interpreters and support staff in Zimbabwe were moved from the traditional public service into the independent Judicial Service under the Judicial Service Act[97] (Chapter 7:18), which commenced on June 18, 2010. This Act confers on the Judicial Service Commission, functions in connection with the employment, discipline and conditions of service of persons employed in the Constitutional Court, the Supreme Court, the High Court, the Labour Court, the Administrative Court and other courts.

[97] Zimbabwe Judicial Service Act (Chapter 7:18).

H Challenges of regional and local dialects

3.33 Court interpreters frequently encounter regional dialects or non-standard variations that they do not fluently grasp, risking critical miscarriages of justice. The dialects mismatch in foreign language interpretation (FLI) are more common.

3.34 Whilst the Constitution recognizes 12 official languages and obliges the state to take 'practical and positive measures to elevate the status and advance the use of indigenous languages' it does not explicitly address dialects or variation within languages. Ramothwala et al[98] contend that this omission creates practical challenges in courtroom settings where speakers may use regional or social dialects that differ from the standardised form. This constitutional silence increases the risk of misinterpretation and may undermine the fairness of trials. Thus, although South Africa's legislative framework promotes multilingualism, the framework does not adequately account for dialectal diversity in legal proceedings. The authors advocate for the development of policy.

3.35 It is also important to note that in 2020, the Constitution Review Committee of Parliament received a submission calling for "Khilovedu" to be declared as a separate additional official language (submission 32 of 2020). The submission by Khutso SK on behalf of Valodagoma NPC, an organisation with the mandate of enhancing, developing and advocating for language, culture, heritage and well-being of Khilovedu, Balovedu and Bulovedu for their betterment.[99] Its consideration of the submission the Committee resolved to engage PANSALB on the submission, which appears to be an on-going process.

[98] Ramothwala T., Mabilo T.J. and Mutangadura J "Policy and practice in South African courtrooms: A case study of Khelovedu" 2026, *Literator* 47(1), a2224. https://doi.org/10.4102/lit.v47i1.2224.

[99] Joint Committee on Constitutional Review Overview on Language Submissions (6 October 2020), https://static.pmg.org.za/201009Official_Language_Status_Recognition.pdf.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

A Incorporation of the language rights in the new Criminal Procedural Law

4.1 This paper shows that the absence of a coherent statutory language framework contrasts sharply with the constitutional guarantee on language rights. Whereas the Constitution recognises language as integral to dignity, equality and fair trial rights, the CPA continues to approach language largely as an administrative issue concerned with interpretation during court proceedings rather than as a substantive constitutional guarantee extending throughout the criminal justice process.

4.2 The absence of comprehensive legislative regulation reveals a significant structural deficiency within the CPA. This legislative lacuna has practical consequences. Empirical studies undertaken by the South African Human Rights Commission have demonstrated continuing deficiencies in the provision of interpretation services within many South African courts, particularly in rural and peri-urban areas where interpreters may be unavailable, inadequately trained or assigned without regard to the language needs of accused persons.[100] These difficulties are compounded where proceedings involve foreign nationals requiring interpretation in less commonly spoken languages, often necessitating ad hoc arrangements involving diplomatic interventions or other external institutions. Such measures, although pragmatic, illustrate the absence of a coherent legislative framework capable of responding consistently to South Africa's language diversity.

4.3 The proposed legislative reforms aim to address legislative gap in the CPA by transforming court interpretation from an ad hoc procedural mechanism into a comprehensive statutory system founded upon professionalism, accessibility, accountability and constitutional rights. By establishing nationally recognised accreditation standards, regulating professional conduct and ensuring the provision of appropriate language assistance, the amendment

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100 SAHRC, *Report on the Right to Access Justice and Equality in South Africa*, 2021.

strengthens the administration of justice and gives meaningful effect to the constitutional guarantees of equality, dignity, fair trial and access to courts.

4.4 The proposed reforms must recognise that meaningful participation in criminal proceedings depends not merely upon the availability of an interpreter, but upon the provision of competent, impartial and professionally accredited interpretation services capable of ensuring effective communication and safeguarding the right to a fair trial.

4.5 It is judicially necessary for the criminal proceeding to be fair. Equality warrants an understanding of the law, the criminal legal process from inception to finalisation, and judicial thought demonstrates a thorough, clear and full understanding of the criminal proceeding. Language is a medium through which the vulnerable person conveys his side of the story, giving effect to not only the viva voce rule, but also giving effect to full enjoyment of the constitutional right in that it permits the presiding body or person within the criminal process to make an objective, impartial and fair decision.

B Leveraging on Artificial Intelligence tool to enhance language access

4.6 Like many occupation and professions, court interpreting and translation as professions are facing existential risks due to the AI evolution. Petrocheilou[101] in her study, observed that interpreters and translators are among the top 40 occupations with highest AI applicability score, with 98% of their work activities overlapping with frequent Copilot tasks with fairly high completion rates and scope. The digital booth, video remote interpreting, online interpreting delivery platforms have made inroads into one of ancient human-driven professions.

4.7 In technologically advanced jurisdictions AI-assisted tools are rapidly becoming a common feature in criminal proceedings, including in interpretation and translation services. This shift is

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[101] Petrocheilou M “Artificial Intelligence and the Future of Interpreting: Professional Interpreters’ Perspectives” January 2026 International Journal of Language Translation and Intercultural Communication 2026(11):15-26

driven by the need to manage heavy caseloads, reduce visual or linguistic backlogs, and lower the high costs associated with human interpreters. South Africa is also exposed to the market-driven interpretation changes.

4.8 It is however important to guard against ethical questions around the reliability and transparency of AI judicial interpretation and translations, as errors and inaccuracies could affect an individual's right to fair trial and access to justice. He postulates that to uphold legal integrity, governments and institutions should establish policies to regulate AI-driven judicial translation. Standardising the quality of translations, implementing checks for terminological consistency and contextual accuracy, and instituting guidelines for error handling can help create a more trustworthy system.

C The importance of an independent regulatory body for court interpreters and translators

4.9 In South Africa, the administration of court interpreters is split between the Doj&cd for the lower courts (Magistrates' Courts) and the OCJ for the superior courts (High Courts, Supreme Court of Appeal, and Constitutional Court). There is no independent, statutory regulatory body or council that oversees, registers, or controls court interpreters and translators nationally. Other legal professionals like attorneys and advocates are regulated by the Legal Practice Council.

4.10 The establishment of a body independent body is not only essential for the professionalisation of the neglected court interpreters and translators' professions, but will also go a long way in addressing existing systemic problems.

4.11 It is also important that the recommended regulatory body for court interpreters be established under the new law of criminal procedure and its composition, powers and functions be determined by way of regulations made by the Minister on the advice of, or in consultation with the Chief Justice, This model of interaction between the Chief Justice and Minister already exists in provisions under the Acts relating to judicial functions of an independent Judicial Branch. For

example, section 49 of the Superior Courts Act, 2013[102] provides for regulations to be made by the Minister on the advice of the Chief Justice on certain administrative aspects pertaining to the courts. Again section 12 of the Judicial Service Commission Act, 1994[103] enjoins the Chief Justice, acting in consultation with the Minister, to compile a Code of Judicial Conduct, which must be tabled by the Minister in Parliament for approval by the latter.

D Proposed formulation of proposed insertion into new Act

4.12 It is necessary that a new provision be inserted in the new criminal procedural law that provide for the following:

(a) restatement the accused rights to a fair trial as stated in section 35(3)(k) of the Constitution;

(b) extension of language rights to witnesses and victims in criminal proceedings;

(c) establishment of a statutory body to regulate court interpreters and translators.

4.13 The following formulation is proposed for insertion in the Bill:

Language rights

(1) Criminal proceedings shall be conducted in the official language that the accused understands, if not practicable, the proceedings be interpreted in the language of the proceedings and the language that the accused understands, vice versa.

(2) Any witness or person who cannot speak or understand the official language of the proceedings or who because of hearing, speaking, or other impairment has difficulty in communicating during court proceedings, shall be entitled to have the proceedings interpreted competently into the language understood by that person and language of the proceedings and vice versa.

(3) There shall be established a Court Interpretation and Translation Committee that shall be responsible for the appointment, accreditation and discipline of court interpreters and translators.

(4) The Minister must, on the advice of the Chief Justice, make regulations regarding the composition, powers and functions of the committee contemplated under subsection (3) which regulations must include, among others:

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102 Section 49 of the Superior Courts Act 10 of 2013.

103 Judicial Service Commission Act 9 of 1994 as amended.

(a) standards for the accreditation and certification of court interpreters, including foreign language interpreters (FLIs) and sign language interpreters (SLIs);

(b) training of court interpreters and translators;

(c) remote and digital interpretation services including Artificial Intelligence(AI) assisted interpretation;

(d) code of conduct and ethical obligations applicable to interpreters and translators;

(e) institutional mechanisms for oversight, monitoring accountability of court interpreters and translators.

(5) Regulations made under subsection (4) must be submitted to Parliament before publication thereof in the *Gazette.*

E Transitional arrangements

4.14 Pending the operationalisation of the Court Interpretation and Translation Committee contemplated under paragraph B above, it is recommended that the Minister consider delegating his or her powers and functions pertaining to the appointment of court interpreters to the Secretary General of the Of the Chief Justice in terms of section 11(4) of the Superior Courts Act. Similarly, the Minister's corresponding powers and functions in relation to the Lower Courts be delegated to the Secretary-General.

F Repeal of section 6 of the Magistrates Act

4.15 The inclusion of a provision in the anticipated new criminal procedural law will necessitate the repeal of section 6 of the MCA.

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