

EXPLORING THE IMPLICATIONS OF THE USE OF OFFICIAL LANGUAGES ACT 12 OF
2012 ON THE ESTABLISHMENT OF THE INDIGENOUS LANGUAGE COURTS IN THE
VHEMBE DISTRICT, LIMPOPO PROVINCE, SOUTH AFRICA

by

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DECLARATION

I, Madumetja Kate Choshi hereby declare that the thesis for the Doctor of Philosophy degree at the University of Venda, hereby submitted by me, has not been previously submitted for a degree at this or any other university, and that it is my own work in design and execution and that all reference material contained therein has been duly acknowledged.

Signature _____ Date _____

DEDICATION

I wish to express my deep gratitude to my children, Joseph, Tumelo and Pholoso, for their compassion and patience during the time of this research, which restricted my horizons of being a good mother. You were all there for me throughout the entire doctoral programme.

To my family and friends - especially my mother, Mmakgabo and elder sisters, Rosina and Johanna and brother, William. My younger sisters and brother, Anna and Modjadjie and Jack who always offered their shoulder for me to ventilate this stressful moment of my life.

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ABBREVIATIONS

“APPI”	:	Accused Person Personal Interviews
“APQI”	:	Accused Person Questionnaire Interviews
“CONPI”	:	Convicted Persons Personal Interviews
“CONQI”	:	Convicted Persons Questionnaire Interviews
“CTOPI”	:	Court Officials Personal Interviews
“CTOQI”	:	Court Officials Questionnaire Interviews
“CIPI”	:	Court Interpreters Personal Interviews
“CIQI”	:	Court Interpreters Questionnaire Interviews
DJ & COND	:	Department of Justice and Constitutional Development
PanSALB	:	Pan South African Language Board
UCT	:	University of Cape Town
Univen	:	University of Venda

ABSTRACT

This study explored the implications of Act 12 of 2012 on the establishment of indigenous languages within the ambit of the Constitution of the Republic of South Africa's Act 108 of 1996 on the use of English and Afrikaans Languages only in the Vhembe District criminal court proceedings. The establishment of the Indigenous Language Courts for the purpose of using indigenous languages, namely Tshivenda, Xitsonga and Sepedi as languages of court was the main objective of this study. This study investigated (a) whether present legally-recognised methods on the use of English and Afrikaans only in criminal court proceedings give effect to the right to a fair trial and (b) what are the implications of the Use of Official Languages Act on the use of English and Afrikaans only in the Vhembe District multilingual criminal courtrooms. This was accomplished through qualitative methods of data collection and analysis, namely in-depth personal interviews and textual analysis of the literature and case law review on the phenomenon under investigation. The interviews were conducted with *samples* of seven categories of participants, namely, the accused persons, the convicted persons, the court officials, court interpreters, the DJ & COND Directors, the PanSALB and one University Centre for African Languages i.e. UCT. Through both methods, it was revealed that the legally enforceable methods that prefer the use of English and Afrikaans as languages of the courts and court records over the accused's indigenous language or their mother-tongue in the entire trial thereby negating their right to a fair trial, are the provisions of the legislation and the Constitution and their application thereof, as well as legal instructions and culture. It was further revealed that this Act implied the elimination of the use of English and Afrikaans and creates opportunity to the accused's right to use his or her mother-tongue as one of the indigenous languages in the entire trial thereby affording the accused the right to a fair trial. The study found that the two theories as designed and implemented revealed problems on the ground and helped this research to conclude that these legally enforceable methods created the feeling of unfair treatment amongst the users of the indigenous languages in court. It suggested that the three identified indigenous languages be used as languages of court and of court record.

Keywords: *Indigenous languages, criminal courts, language of court, language of court record, the right to a fair trial, Vhembe District.*

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CHAPTER ONE

INTRODUCTION

1.1 HISTORICAL BACKGROUND

South Africa is a multilingual state with eleven official languages.¹ Presently, English and Afrikaans are the only languages used in criminal courts. This is despite the constitutional provisions on the use of eleven languages in the country. As such, during a criminal trial everyone is compelled to use these two official languages. In such circumstances it can be expected that discontent exists about language use in South African courts. Comments such as “we always talk about being a nation united in diversity, yet we cannot afford certain languages a right to be heard²” reverberate. In most instances debates that often get reported on, especially by the media and institutions on language usage revolve around exclusions, marginalisation, discrimination and many other prejudices. This includes speakers of indigenous languages who have been forced to use predominantly English and Afrikaans for communication. The languages of the courts – both written and oral still remain predominantly English and Afrikaans.³ Subsequently, the accused person’s right to a fair trial is found to have been infringed upon because other methods such as interpretation are used to ensure that the accused person follows court proceedings as will be seen in this study and as evidenced in some of the cases such as *S v Mbezi*.⁴

It is averred that the accused person does not get the full benefit of a trial if it is not conducted in his or her mother-tongue. This impacts negatively on his or her right to a fair trial as proceedings have to be interpreted to him or her. It has already been proven that some interpretations are not

¹ The Constitution of the Republic of South Africa 108 of 1996, section 6.

² Sennitt, A, “South Africa Seeks to Shore up Indigenous Languages”, *Media Network*, 13 March 2012, (accessed 27 March 2012).

³ Government Gazette, vol. 597 Pretoria, 30 March, 2015, No. 38646, Notice 282 of 2015.

⁴ See *S v Mbezi* (WS04/2004)ZAWCH , (26 March 2010), (accessed 21 April 2014), where the court *mero moto* indicated that he was of the view that accused number 1 did not understand or even hear the prosecution at the time when the prosecutor was having “feed” on the accused person.

up to standard⁵, hence the significance of this study⁶ on the use of mother-tongue for the purpose of affording the accused a fair hearing.

It is accepted that language is a critical feature of human identity and that indeed it creates us.⁷ Some commentators have established that service is best carried out in one's own mother-tongue.⁸ It has been further shown that language is the blood and soul into which thoughts run and out of which they grow.⁹

Language issues ranging from misinterpretation to suspicions of incorrect findings as a result of language use in the recent case of *S v Pistorius* case¹⁰ justify the use of mother-tongue. But as illustrated above, languages in South Africa are not treated equally, English is regarded as the dominant language in South African criminal courts.¹¹ Consequently, the same is also true in the District of Vhembe in Limpopo Province. It has been argued that linguistic diversity may be rejected as monolingual English speakers are able to create and enforce rules that favour themselves in these situations.¹² This assertion already creates an impression that one of the research questions on whether there are legally enforceable methods that are used to deny the accused the right to use his or her mother-tongue is proximate to the phenomenon in this study.

⁵ See findings on the inaccuracy of interpretation in Chapter Four of this study. Also the regulation of language practitioners aims to set the bar for the quality of interpreters in South Africa, which is pronounced to have a tarnished reputation, in terms of the South African Language Practitioners Act of 2013.

⁶ The significance as alluded to in this chapter is what prompted this project.

⁷ Landman, C, "Can Justice be Embodied in Sexist Language? A challenge to the confession of Belhar", *Ned Geref Teologiese Tydskrif*, 47, 283-290, www.christina-landman.co.za/belhar.htm, p. 3, (accessed 04 July 2011). See also Dorais, I.J, "Language, Culture and Identity: Some Inuit Examples", *International Journal of Law, Language & Discourse*, vol. 2. no. 4, 2012, p. 295, where he said Inuktitut is highly valued by most of its speakers, both as the easiest way to express their inner feelings and inner thoughts, as a symbol of who they really are.

⁸ See Lourens cited in Segar, S, "Parliament may Face Court Challenge if it Delays Language Bill" *Daily News*, www.iol.co.za, (accessed 19 January 2012).

⁹ Holmes, O.W, "Pan South African Language Board": *Annual Report, 2005-2006*, www.pansalb.org.za.

¹⁰ *SvPistorius*[2014]CC113/2013ZAGPPHC793, 12 September 2014, in *SowetanLIVE* (<http://sowetanlive.co.za/anger-over-pirtorius-trial-interpretter>, (accessed 21 April 2014).

¹¹ See the comments on the preference of English by the respondents "DJ&COND" in this study.

¹² Gibson, K, "The Myths of Language Use and the Homogenization of Bilingual workers", *Identities, Second Language Studies*, University of Hawai, 22(2), Spring 2004, p. 1-60. See also Hlophe, J.M, "Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society", *A Paper delivered at the University of Cape Town*, 17 September 2003, Forum, 2004, p. 43, where he said that the needs of the majority cannot be sacrificed to maintain the comfort of a few who prefer the *status quo*.

Section 6 of The Constitution of the Republic of South Africa provides that the official languages are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. While there are other spoken languages in the country, the Government is enjoined by the Constitution to take practical and positive steps to elevate the status and advance the use of indigenous languages and to ensure that all eleven official languages enjoy parity of esteem and are treated equitably in terms of section 6 of the Constitution of the Republic of South Africa 1996.¹³ Section 6 (2) of the Constitution recognises the historically-diminished use and status of the indigenous languages of our people, and urges the state to take practical and positive measures to elevate the status and advance the use of these languages. Municipalities are enjoined to conform to section 6 (3) (b) of the Constitution which provides that municipalities must take into account the language usage and preferences of their residences. The Vhembe District is bound by this section to develop a language policy that will conform with this section to address the injustice done to the residents of this district, particularly the accused, through language usage in court. Speaking Tshivenda, Xitsonga and Sepedi in criminal courts of this District will afford these languages their status and credibility.¹⁴

Equitable treatment of languages is provided in terms of section 6 (4) of the Constitution. These sections are read with section 30 of the Constitution which provides that everyone has the right to use the language and to participate in the cultural life of their choice. The principles of the right to a fair trial which are: (a) the right to a fair trial and the corresponding right to be heard form part of the cornerstone of our justice system and (b) justice is not only seen to be done when one uses his or her own language to make full answers and defend himself or herself, but is also complete are embedded in these provisions. The accused person has the right to use the language of his or her choice not only in terms of section 30 of the Constitution but also in terms of section 35 (3) (k) which provides that every accused has the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language. The

¹³ *The Constitution of the Republic of South Africa 108 of 1996.*

¹⁴ See Dowling, T, "Stop holding your tongue, seriyas!", available from *Media on African Languages, University of Cape Town, African Languages*, (accessed 12 February, 2014).

application of section 35 (3) (k) of the Constitution and section 6 (1) and (2) of the Magistrates' Court Act¹⁵ has caused enormous injustices to the accused persons as expounded in this study.¹⁶

For these reasons, there is a need to treat indigenous languages equally in court for the purposes of a fair trial. Most South Africans are concerned that little progress has been made in developing an enforceable language policy¹⁷ that would oblige the government to use all official languages equitably. It is in the light of these problems relating to language use in criminal courts that this study explores the possibility of having monolingual court rooms through the establishment of Indigenous Languages Courts in Vhembe District, Limpopo Province, South Africa, pursuant to the Use of Official Languages Act.¹⁸ Section 4 (1) of the Use of Official Languages Act of 2012 requires every national department, national public entity, and national public enterprise to adopt a language policy regarding its use of official languages for government purposes. This section provides that these departments should adopt a language policy within eighteen months of the commencement of this Act of 2012 or such further period as the Minister may prescribe, provided that such prescribed period may not exceed six months. In terms of section 4 (2) (a) of the Use of Official Languages Act of 2012 a language policy adopted as such must comply with the provisions of section 6 (3) (a) of the Constitution of the Republic of South Africa. National departments are enjoined by section 4 (3) of the Act to identify at least three official languages and must take into account its obligation to take practical and positive measures to elevate the status and advance the use of indigenous languages which were of historically-diminished use and status in accordance with section 6 (2) of the Constitution of the Republic of South Africa. In all fairness, the criminal justice system must afford the accused the right to a fair trial which includes the right to understand and to be understood in order to make complete answers. This can be achieved if the government complies fully with these legislative provisions.

¹⁵ *Magistrates' Court Act 32 of 1944.*

¹⁶ How the interpretation of these sections by courts affects the right of the accused to a fair trial is discussed in this study.

¹⁷ Berg, N, "Language Bill must Treat all Official Languages Equitably", 02 March 2012, www.politicsweb.co.za/politicsweb/view/page, (accessed 27 March 2012), De Lange, D, "Sparks Fly in Debate on Language Parity", www.iol.co.za/news/politics/sparks-fly-in-debate-on-language-parity-1.1215946, (accessed 19 January 2012).

¹⁸ *The Use of Official Languages Act 12 of 2012. Magistrates' Court Act 32 of 1944.*

A national language Act is regarded as one of the core legislative mechanisms to regulate the use of official languages. Such a language Act often comprises the pre-eminent legal mechanisms aimed at bringing about a form of official language equity. The implications of this Act were thereof explored to establish the feasibility of the Indigenous Language Courts to accord indigenous languages equitable treatment in criminal proceedings with the main aim of affording the accused the right to a fair trial.

In light of the above exposition, this study investigates the use of indigenous languages as languages of court in the Vhembe District criminal proceedings for the purpose of guaranteeing the accused the right to a fair trial in terms of this Act and constitutional rights to language.

Therefore, this study moves from the assumption that there are injustices perpetrated by the continued use of English and Afrikaans only in this District. It further moves from the premise that it is not impossible to establish Indigenous Language Courts throughout the district that will promote access to justice through the use of mother-tongue, an indigenous language of the majority of the accused persons during the entire trial.¹⁹ Lessons from other jurisdictions also inform the objectives of this study.

In support of these premises, one commentator stated that it was only fair to use an indigenous language in cases where all parties could understand and speak it fluently. He or she further mentioned that sometimes important information is lost in translation resulting in the magistrates ruling differently than they would have, had all the parties understood each other.²⁰

The research procedures and processes that follow, are more introductory. A more elaborative synthesis of these is presented and expounded in Chapter Three.

¹⁹ One of the reasons for this assumption is that most court officials speak the identified indigenous languages in this study.

²⁰ Mbatha, M, cited in Legalbrief Today, legalbrief@legalbrief.co.za, 12 December 2014, available from *The Mercury*.

1.2 STATEMENT OF THE PROBLEM

English and Afrikaans continue to be the only dominant languages in the Vhembe District criminal trials²¹ notwithstanding the letter and spirit of section 6 of the Constitution of South Africa and the object of the Use of Official Languages Act of 2012, thereby denying the accused person his or her right to a fair trial through the use of mother-tongue. In cases where an accused person does not understand the language of the court, interpretation is used to ensure that the accused follows court proceedings. This is the position despite the fact that some court interpretations are viewed by many scholars²² as well as some respondents who participated in this study through empirical research as inaccurate,²³ something which could lead to wrong conclusions being drawn and have dire consequences to the accused person. The accused person's right to a fair trial is subsequently nullified.²⁴ This state of affairs is concerning and is worth investigating so as to establish the gravity of the practice under the current political dispensation.

1.3 RESEARCH AIMS AND OBJECTIVES

The researcher believes that the legally-enforceable methods for the use of one's mother tongue as guaranteed by the Constitution and the Use of Official Languages Act of 2012 that will give

²¹ *Government Gazette*, vol. 597 Pretoria, 30 March, 2015, No. 38646, Notice 282 of 2015. This problem statement is also supported by the article on "Anger over Pistorius Trial Interpreters", *SowetanLIVE* (<http://www.sowetan.co.za/news/2014/03/14/anger-over-pistorius-trial-interpreters>), (accessed 21 April 2014).

²² See also Gutto, S.B.O, "Plain Language and the Law in the Context of Cultural and Legal Pluralism", *SAJHR*, vol.11, 1995, p. 311, where he referred to the undertaking by ANC that this government / organization identified the problem of complicated language in the administration of justice as a target for reform and transformation. See also comments on misinterpretation in *S v Pistorius* [2014] CC113/2013 ZAGPPHC 793, 12 September 2014, in *SowetanLIVE* (<http://sowetanlive.co.za/anger-over-pirtorius-trial-interpretrers.2014/03/14>), (accessed 21 April 2014).

²³ See "CONPI/1" respondent on cultural concepts she perceived she was misinterpreted and led to her incarceration in this study and many other respondents such as those in the category of "DJ&COND".

²⁴ This statement is correct in the analogy of the writer in *SowetanLive* (<http://www.sowetan.co.za/news/2014/03/14/anger-over-pitorius-trial/interters>, (accessed 21 April 2014) where defence lawyer Barry Roux has repeatedly pounced on inaccurate translation to poke holes in the state's argument. In which a witness was forced to stop to correct the struggling interpreter. An expert commented that if any of the findings were to hinge on some of these inaccuracies, this could have a serious effect in the final finding, said Blaauw.

effect to the right to a fair trial are developed through the achievement of the objectives of this study which are the following.

1. To determine whether the existing legally-recognised tools restrict the use of mother-tongue, particularly indigenous languages in criminal court proceedings.
2. To establish whether proceedings conducted in indigenous languages will minimise human errors that are sometimes created by interpretation.
3. To determine whether the Use of Official Languages Act of 2012 necessitates the establishment of Indigenous Language Courts for the purposes of giving effect to the right to a fair trial as opposed to the use of English and Afrikaans only as languages of court record in a multilingual Vhembe District.
4. To analyse and interpret the treated data so as to evaluate the findings on the use of indigenous languages as languages of court record and to further evaluate their impact on the right to a fair trial in the multilingual Vhembe District.

Indigenous Language Courts hear cases in indigenous languages in order to give effect to the right to a fair trial and to accomplish the objectives of the Use of official Languages Act of 2012. These cases are then compared with cases where English or Afrikaans only were used as the languages of court record, without giving statistics thereof. The aim of this study was to identify court proceedings which give effect to the right to a fair trial between cases heard in mother-tongue, indigenous language, and those heard in English or Afrikaans.

1.4 RESEARCH QUESTIONS

The following questions were investigated in this study:

1. Do present legally-recognised methods on the use of English and Afrikaans only in criminal court proceedings give effect to the right to a fair trial?
2. What is the impact of the problems created by interpretation on the right to a fair trial?

3. What are the implications of the Use of Official Languages Act on the use of English and Afrikaans only in the Vhembe District multilingual criminal courtrooms?
4. Will the establishment of the Indigenous Language Courts in terms of the Use of Official Languages Act of 2012 give effect to the right to a fair trial because all court users will be speaking the accused person's mother-tongue rather than the use of English and Afrikaans only?
5. Do existing and collected data say something about the research hypotheses?

This study hopes that adequate answers to these questions will give efficacy to our Constitutional values i.e. human dignity, the achievement of equality and the advancement of human rights and freedoms; supremacy of the Constitution and the rule of law, that would otherwise be perpetually undermined.

1.5. THE RESEARCH HYPOTHESES

This study tested the following hypotheses to help the reader have a good grounding of the research problem:

1. The use of mother-tongue, as one of the indigenous languages in this district, eliminates the negative impact that the inaccurate translation and interpretation has on the right to a fair trial.
2. Indigenous Language Courts guarantee the right to a fair trial.
3. The implementation of the Use of Official Languages Act 12 of 2012 is considered a powerful legal tool for the purposes of the right to a fair trial.
4. The implications of the right to a fair trial as guaranteed by the 2012 Act on other constitutional rights are more elementary to the right to a fair trial.
5. Culture and Language are instrumental to the right to a fair trial in terms of this Act.

1.6. DELIMITATIONS

- ✓ This study does not concern itself with other languages of the accused that might be used in court save to say in such instances the government should provide the accused with the facilities that would place him or her on the same par as those who are the speakers of the identified languages for the purpose of the right to a fair trial, including but not limited to deploying court officials who are the speakers of that language or transferring the accused to the court where all the parties are speaking his or her language bearing in mind the jurisdictional considerations in certain offences.
- ✓ This study does not determine and evaluate the training of interpreters for the purpose of perfect interpretation.
- ✓ This study does not attempt to determine the provision and accuracy of interpretation, but refers to this aspect with the aim of assisting the researcher to achieve the objectives of this study and because these phenomena still subsist.
- ✓ This study does not attempt to research on languages of the courts in written law that is difficult for the ordinary people to comprehend.

This study is therefore limited to:

- English and Afrikaans usage only in criminal proceedings as a tool to exclude the use of mother-tongue, i.e. indigenous languages and not affording the accused the right to a fair trial due to possible misinterpretation.
- The use of indigenous languages as the mother-tongue of the accused as provided in the Constitution and implied by the Act of 2012 in the geographical area of this study, i.e. the Vhembe District, where these languages are predominantly spoken.
- The Vhembe District, Limpopo Province, and thus excludes the possibility of findings relating to this phenomenon being generalizable to the whole of South Africa.

The reader now knows the extent of the research. It is clear what research questions were not studied or did not form part of this study.²⁵ Importantly, it is clear by now as to what the present study limits itself to. Next will be the definition of some concepts used in the study.

1.7 DEFINITIONS AND TERMS

1.6.1. Indigenous

Originating or living and occurring naturally in an area or environment.

1.6.2. Indigenous languages

An indigenous language is a language that is native to a region and spoken by indigenous peoples but has been reduced to the status of a minority language. This language would be from a linguistically distinct community that has been settled in the area for many generations. Indigenous languages are not necessarily national languages, and the reverse is also true.²⁶

1.6.3. Mother-Tongue

The language that the person learns to speak first/native language. The “use of mother-tongue or indigenous language of the accused” refers to the use of this language in the *entire trial* for the purpose of addressing the problem statement of this study.

1.6.4. The right to a fair trial

The right of an accused person to enjoy a just, objective and unbiased hearing after having been informed of the charges against him or her and after having enjoyed the right to make full answers and defence freely and in full. This right is terms of common law and the Constitution.

1.6.5. A fair trial

When fairness prevails in court proceedings. This includes the right to use the language of

²⁵ Leedy, P.D. & Ormrod, J.E., “Practical Research: Planning and Design”, 9th edn, 2010, p. 293.

²⁶ http://en.wikipedia.org/wiki/indigenous_language, (accessed 10 April 2013)

the accused in the entire trial where all participants speak the language of the accused.

1.6.6. Language of criminal court

The language of communication in the entire trial but courts records might be in another language.

1.6.7. Language of court record

The language that may not be used for communication but only for court records. This language may be used for communication in the entire trial as well as for court record. Based on the objective of this study these languages must be used as *languages of criminal court record* and any person who cannot speak that language so used and who would like to use the court records for any purpose would have to transcribe the records in the language of his or her choice, at his or her own expenses or at government expenses through the pursuit of section 6 (2) of the Constitution as narrated above. For the fact that the government is enjoined by this section “take practical and positive measures to elevate the status and advance the use of these languages”, the state must see to it that all languages are implemented particularly with regard to reported cases. One of the reasons for this preposition is that should the court proceedings be conducted in indigenous languages as the languages of the criminal court and be recorded in English as the language of court record, the consequences flowing from such practices will be the perpetuation of the promotion and preference of the use of English over other languages.

1.6.8. Interpretation

When criminal proceedings are converted into the language of the accused or witness for him or her to follow the proceedings. This is *viva-voce* transition of information from one language into another to benefit the hearer. Interpretation includes interpretation accorded to the constitutional and legislative provision during their application for the purpose of the right to a fair trial.

1.6.9. Translation

When the text of the criminal proceedings is converted into the language of the accused person or interested party to the proceedings for that person to follow what had transpired in court. For the

fact that interpretation and translation are used to mean one thing in certain contentions, when they are not, these concepts are used interchangeably in this study.

1.6.10. Inaccurate interpretation

Interpretations that may lead to “wrong conclusions” means those that are inaccurate or imperfect.

1.7.11 Monolingual courtrooms

Courts conducting proceedings in one language and no interpretation is needed. This one language refers to the language of the accused person.

1.7.12 Multilingual courtrooms

Courts conducting the proceedings in one language and interpretation into one or more languages is necessary.

1.7.13 Right to equality

When one is afforded equal treatment with others.

1.7.14 Language board

The Pan South African Language Board that promotes multilingualism in South Africa by Fostering the development of all 11 languages, while encouraging the use of many other languages spoken in the country.

1.7.15 Qualitative research

Exploratory research method which find out the perceptions, experience, opinion and attitude of participants with regard to the phenomenon under investigation.

1.7.16 Quantitative research

A research approach that quantify the perceptions and experience of the participants and put them in numbers, and not statistical, to generalize the findings of the study.

1.7.17 Suffix

A fictitious name given to participants to protect their identity.

1.7.18 The Constitution

The Constitution of the Republic of South Africa 108 of 1996.

1.7.19 The Act of 2012

The Use of Official Languages Act 12 of 2012.

1.7.20 Magistrates' Court Act

Magistrates' Court Act 32 of 1944.

1.8 ASSUMPTIONS

This study moved from the assumption that certain conditions which disadvantaged the accused exist and that these would be perpetuated if this study did not reveal them. The following are assumptions identified as the bedrock upon which this study rests²⁷:

1.8.12 *The first assumption:* English and Afrikaans continue to be the languages of court record in criminal court proceedings despite the existence of the predominantly spoken languages in the Vhembe district, i.e. Tshivenda or Xitsonga or Sepedi, which are mother-tongue and indigenous languages of most accused persons in this area. This situation may perpetuate the nullification of the right to a fair trial.

1.8.13 *The second assumption:* Most personnel working in the Vhembe District criminal courts and lawyers in this district are Tshivenda or Xitsonga or Sepedi speakers and they would therefore be able to conduct proceedings in these languages in the entire trial.

²⁷ See Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p.5.

- 1.8.14 *The third assumption:* Negation of the right to a fair trial through the use of language, also annuls other constitutional rights such as the right to life, which should otherwise be guaranteed if the right to a fair trial is maintained.
- 1.8.15 *The fourth assumption:* The development on the implementation of indigenous languages in court will eliminate the use of English and Afrikaans only as languages of court proceedings and consequently eliminate wrong conclusions resulting from interpretation as founded in this study.
- 1.8.16 *The fifth assumption:* Policymakers seem to be comfortable with the use of English as they consider it the language of sophistication amongst other reasons, and consequently this usage continues to infringe upon the right to a fair trial.
- 1.8.17 *The sixth assumption:* Policymakers are ignorant of the implications of the use of Official Languages Act 12 of 2012, the phenomenon under investigation, and constitutional provisions on the use of indigenous languages in a particular province or District.

1.9 SIGNIFICANCE OF THE STUDY

The dominance of English and Afrikaans has far-reaching prejudicial effects on many indigenous language speakers in terms of communication and their access to government services, justice, education and jobs.²⁸ In view of this fact, most South Africans are dissatisfied with the way in which their languages are used in the public sector.²⁹ Case law indicates that in many instances

²⁸ A case in point is the case of *S v Pistorius* [2014] CC113/2013 ZAGPPHC, 12 September 2014, p.793. National Language Policy Framework referred to PanSALB's finding on this aspect: "NLPF", 2003, pp.8- 9. The "NLPF" further recognised that the domination of English and Afrikaans had far-reaching prejudicial effects on many African language speakers in terms of their communication with the Government and their access to government services, justice, education and jobs.

²⁹ Examples of "South Africa Seeks to Shore up Indigenous Languages" as cited earlier show that South Africans are not satisfied on how their languages are used in public sectors including courts. In this article the Minister of Arts and Culture Paul Mashatile was refereed to have said that people take pride in their language and it is a very national subject and Titus, D. cited in de Lange, D, "Sparks fly in Debate on Language Parity" as having said "Let us keep this show on the road. We cannot go back", *IOL news.co.za*, (accessed 19 January 2012).

the accused requests the proceedings to be conducted in his or her mother-tongue but the presiding officer denies the accused this right as English is the language of court record³⁰ or that the presiding officer conducts the proceedings in the accused's mother-tongue but the court of review discourages the use of a mother-tongue because English is declared the language of court.³¹

The legal framework is in such a way that court practices do not promote the constitutional right to a fair trial through language rights³² and subsequently other constitutional rights³³ such as the right to life become affected.³⁴ It is submitted that should Indigenous Languages Courts be established in the Vhembe District, pursuant to the provisions of the Use of Official Languages Act of 2012, accused persons will enforce their rights in court proceedings with dignity because the proceedings will be conducted in their own mother-tongue. This is evident in the Khayelitsha Magistrate's Court, Western Cape, where a court currently conducts the entire proceedings in isiXhosa,³⁵ the language predominantly spoken by the residents of Khayelitsha. Wrong conclusions that arise as a result of the possible wrong interpretation of the proceedings into the language of the accused person will be minimised. In this manner, an accused person's liberty may be guaranteed if found not guilty, most probably as a result of the use of his or her mother-tongue.

In further justifying this study, the following scenarios are worth noting:

³⁰ See *Mthethwa v De Bruin N.O. and Another*, 1998 (3) BCLR 336 (N), at 338D.

³¹ *S v Damoyi*, 2003 JOL 12306 (C) 3 par. 4.

³² If language rights such as language and culture in terms of s30 of the Constitution of the Republic of South Africa are not respected and accorded to the accused, the right to a fair trial becomes obsolete. Policy Framework, "NLPF", which stipulated that successful implementation will require a change in the culture of use of official languages in government structures to ensure that the indigenous languages are actively used in a range of contexts, "NLPF", 2003, p. 7.

³³ Other constitutional rights that are affected by unfair trial are narrated in Chapter four of this study.

³⁴ An outcry about the unfairness of the proceedings will always dominate the criminal justice system, in the analogy of respondents such as CONPI/1 and Brock-Utne, B, "The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy", *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm, (accessed 08 August 2013), if language rights are not guaranteed through affording them to the accused.

³⁵ Magistrate's court conducts proceedings in isiXhosa: in Chapter three under research technique "OBS". See also a magistrate in Sekhukhune who insists on Sepedi for minor cases as exposed under "interviews" in Chapter Three. Further see "CTOPI/17" respondent who confirmed that minor cases are usually heard in indigenous languages.

- Internationally, “there is a growing interest from the academia and legal professionals in the study of the interface between language and law. Locally, language and law is one of the core postgraduate programmes, which can be traced back to the early 1990’s at the City University of Hong Kong”.³⁶
- “We are privileged, indeed, to practice this stimulating, constantly evolving noble Law profession”.³⁷
- The reviewing judge in the case of *S v Matomela*³⁸ anticipated the problem statement of this study perpetuating for he mentioned that instances like the one in this case, i.e. cases heard in indigenous language or mother-tongue of the accused as the official language in terms of the Constitution, will occur more frequently in the future. The case of *S v Damani*³⁹ is such an example. In this case the magistrate heard the entire trial in the language of the accused, i.e. isiZulu and reviewing judges considered it inappropriate as will unfold in this study.
- The Pilot Project of the Department of Justice and Constitutional Development was reinstated in the selected magisterial courts in 2014. In the Vhembe district, at Dzanani and Mutale pilot cases were heard once a month, all in Tshivenda. According to officials both at Dzanani and Mutale Magistrates’ Court, pilot project cases heard in Tshivenda had already started and are heard once a month. The Malamulele magistrate’s court, that was supposed to hear cases in Xitsonga, was one of the identified courts for this project but

³⁶ Le Cheng (ed.), “Multicultural Association of Law and Language (MALL), Forewords”, in *International Journal of Law, Language and Discourse*, vol. 2. no. 4, 2012, www.ijlld.com, Joseph-G-Turi, below, paraphrased Clausewitz when he said: is language becoming a new way to wage war? p. 17, in *International Journal of Law, Language and Discourse*, vol. 2, no.4,2012,p.17, www.ijlld.com.

³⁷ Beaudoin,L, Sherbrooke, L.L.L, “Systematic and Linguistic Specificities of Legal Language (s): A case in Point-Legal Translation in Canada”, in *Law, Language and Linguistic Diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law, Beijing, China*, September, 2004, p.18.

³⁸ *S v Matomela* 1998 (3) BCLR 336 (N) at 342H.

³⁹ *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014).

<http://www.saflii.org/za/cases/ZAKZPHC/2014/60.html>, (accessed 11 December 2015).

according to one respondent “CRTM”, as *per* schedule on “Other Participants”, this court was not conducting cases in Xitsonga.

1.10 RESEARCH DESIGN AND METHODOLOGY

When designing the research, the researcher considered the kinds of data that an investigation of this problem would require. She further developed processes and procedures for data collection. The research methodologies were also amongst the processes that the researcher included in her design.

Like in the above procedures and processes, a brief introduction of the design and methods adopted in this study follows, however, more information is provided in Chapter Three of the thesis:

1.10.1. Types of data

Two types of data were used in this study:

1.10.1.1 Literature and case law review

Literature and case law review with written sources reveal both secondary data and primary data. Secondary sources consist of books, journal articles and research reports, while primary sources consist of statutory enactments, constitutional provisions, law provisions and case law.

Literature and case law studies assisted the researcher to become acquainted with the thinking and ideas of previous researchers and authorities. Case law reports and cases being conducted in an indigenous language formed part of the information required in this study and assisted the researcher to evaluate the right to a fair trial through the use of language. Information was gathered from some of the district courts which already conducted cases in indigenous languages as indicated in the Pilot Project on indigenous languages in courts by the Department of Justice and

Constitutional Development.⁴⁰ These studies also helped the researcher to arrive at solutions or recommendations of the problem statement in this research.⁴¹

The following are the research methods for the literature and case law review:

❖ Data collection procedures and processes

- Library

During the design stage of the study the researcher developed processes on how she was going to collect and interpret data. In the quest to address the research problem the researcher visited the University of Venda Library to collect data using books and journals.

- Internet

Other journal articles were obtained through the internet. The researcher obtained statutory provisions using the internet, e.g. The Constitution of South Africa, Language Bill of 2011, and the Use of Official Languages Act 12 of 2012. The internet was one of the most important research technique as the researcher obtained the bulk of journal articles through this source.

- Promoters

The researcher obtained research reports and other current materials related to the research topic through her promoters, Professors R.R. Molapo, University of Venda and Nina Mollema, University of South Africa, Pretoria Campus and Nelson Musehane, University of Venda. The latter was the initial promoter, but retired before the project was finalized. However, he was also very resourceful as he provided the researcher with research books and reports and personal guidance.

⁴⁰ The implementation of this Pilot Project and its impact on the use of indigenous languages thereof is part of this study. It was first introduced in 2009 in four provinces,” Justice for All in Indigenous Language Courts”, South African Language Rights Bulletin, vol. 3, no. 7, March 2009, p.2.

⁴¹ Recommendations on the implementation of indigenous languages as languages of court record are advanced in Chapter Six of this study.

- Interviews

Further data was acquired as a result of empirical research because interviews of some of the participants such DJ&COND/2 culminated into the researcher having acquired further information on legislative provisions, i.e. South African Language Practitioners' Bill and Circular 50/2005, to gather more insight of the research problem.

- Newspaper articles

The researcher, in the quest to investigate the availability of the data also determined as to whether there were newspaper articles on the problem statement and indeed there was some information in this regard. Newspaper clips were therefore available to address the research problem.⁴²

1.10.1.2 *Empirical study*

The researcher then conducted empirical research as a research method of data collection. The researcher designed and planned her research study and developed methods for collecting data for the empirical study.

❖ **Research Approach**

In order to solve the research problem, the researcher chose the qualitative research method to collect data and quantitative research method to quantify the participants' perceptions and experiences with regard to the use of language in criminal proceedings.

⁴² Maake, N, "To Teach Your Children Well, Do so in Their Own Language": International Mother Language Day, *Sunday Times*, 16 February 2014, p. 21.

- Qualitative research approach

Qualitative research methods evolved over the course of the investigation as they are least prescriptive.⁴³ The nature of this study is more exploratory and therefore this approach was adopted to explore the implications of the Use of Official Languages Act 12 of 2012 on the use of English only as the language of the criminal proceedings. Research techniques used to collect data through this method, particularly interviews with participants in the category of the Department of Justice and Constitutional Development Directors and in all other categories on the ground sensitised and informed policy making processes in the district of Vhembe in relation to the above-mentioned Act. The participation of categories on the ground helped to shape the implementation process. This approach also helped the researcher to answer sub-problems that built up to the statement of the problem. Smit⁴⁴ supports this assertion in that qualitative research can inform policy as it deals with contextual issues that happen on the ground.

In this study, qualitative research design included the phenomenological approach, grounded theory and survey methods that address the problem statement. The study embedded these features.

- Quantitative research approach

This research design was adopted by the researcher for the purposes of counting and quantifying participants' perceptions and experiences in a court setting in relation to the problem statement. It is, however, not the aim of this study to statistically enumerate these perceptions and experiences. The aim is merely to quantify the results in order to ensure validity of the findings.

⁴³ Eisner E, 1998, cited in Cassard, A, "A Sherpa Leadership Model: A Leadership Model of Disempowerment": *Doctoral Thesis*, 2007, p.12.

⁴⁴ Smit, B, "Can Qualitative research Inform policy Implementation and Arguments from a Developing Country Context" in *Forum: Qualitative Social Research*, vol. no. 3. art.6, September 2003.

❖ Research processes and procedures to collect data

- Pilot study as a research design/strategy

A good research strategy requires careful planning and a pilot study will often be part of this strategy.⁴⁵ Therefore the researcher carried out a Pilot Study before she conducted the main research project. The Pilot Study also adopted the qualitative research approach. The nature of the phenomenon under investigation required this particular research approach.

The results of the Pilot Study were combined with the main study for the reasons advanced later in this study.

- Ethical issues

For the purpose of empirical study as a method of data collection, the researcher determined the type of data she would collect and the number of voluntary participants and find out whether participants would be able to give information, in most instances, through telephone calls and personal communication. Ethical issues were institutional requirements for research.

- The researcher as a source of information

The researcher played an important role in this study as she is the main role player in data collection. Her interaction with the participants and other research activities qualified her as the source of information.

⁴⁵ “Conducting a Pilot Study”, *National Centre for the Replacement, Refinement and Reduction of Animals in Research*, <https://www.nc.3rs.org.uk/conducting-pilot-study>, (accessed 21 October 2014).

- Credibility of the study

This study required the researcher to consider the trustworthiness of the data through recognized methods. Certain criteria were employed to judge the quality of this study. These are: verification, institutional research boards, evaluation, consistency, data collection methods and applicability.

❖ **Research methods**

The researcher used certain research techniques to collect the data. These are enumerated below.

- Survey methods

The purpose of the survey method was to survey a *sample* of participants to acquire representative responses for the population.

- *Sampling*

The researcher used *samples* in the process of selecting participants for this research project. Seven sub-groups were solicited for participation, i.e. The accused persons; The convicted persons; Court Officials: Magistrate, Prosecutors and Lawyers; Court Interpreters; Department of Justice and Constitutional Development Directors; University of Cape Town African Languages Centre and Pan South African Language Board Officials. Each category was sampled in terms of numbers and how data was collected from each of them. The accused persons were interviewed in court buildings and prison. The convicted persons were contacted in prison. Interviews for court officials, court interpreters and directors were conducted in their offices and chambers either personally or telephonically. Convicts were visited in prison. University of Cape Town African Languages Centre and Pan South African Language Board Officials were visited at their respective offices

Besides these categories of participants, there were other participants who were crucial for specific aspects of this study and they were selected to address them. They were scheduled under " *Other Participants*". The only technique used for these participants was telephone. This means that they did not form part of the *sampling*.

- Personal interviews

The researcher used oral interviews as one of the research techniques to gather information. The researcher had personal contact and conversed with the categories as shown in the *sampling* above.

- Questionnaires

Under this research methodology, the information was gathered in a written form. The researcher posed questions, not verbally, but through questions on paper: questionnaires. Respondents also answered the questions on the same paper in written format.

- Observations

Observations for the purpose of this study were embarked upon and led to deeper understanding than interviews alone. Personal observations were used to collect data during court proceedings.

- Other techniques

Other techniques such as documentary evidence, camera, audio tape, television, cellphone, telephone, emails and field notes were also used as additional data gathering techniques.

The research was conducted in 2013, 2014, late 2015 and in the early months of 2016.

1.10.2 Data analysis and interpretation

The researcher developed methods of data analysis and organization of the findings so that she could draw conclusions from these findings. She identified the information that assisted her to answer her problem statement, categorised perceptions gathered during the investigation and arrived at comprehensive conclusions. The researcher organized the data collected and identified statements that are related to the main theme and put them in more meaningful sub-themes.⁴⁶

The researcher was further assisted by the specific contexts in which people live and work. This led to her understanding of the historical and cultural settings of the participants. These settings prompted the researcher to acknowledge that the stories voiced represent an interpretation and presentation of the researcher as much as the subject of the study.⁴⁷ As already mentioned in this study, qualitative research methodologies were used to answer research questions. Case law was also used as a research design in order to collect extensive data on indigenous language courts with particular reference to the use of mother-tongue in court proceedings, the impact this process has on the convicted person and the lack of clear policy on language use in criminal courts. This research design assisted the researcher in the description, interpretation, verification and evaluation of the questions for the research in order to gain insight into the phenomenon under investigation.

Since the main reason for the pilot study was to determine the feasibility of the main research project, preliminary data to determine its success was crucial. Therefore, the data collected during this pilot phase was analogous to the main theme of this research.

In Hoepfl's⁴⁸ explanation to what constitutes data analysis, she referred to Glaser and Strauss who indicated that the primary goal of qualitative research is the generation of theory. This study built

⁴⁶ See Leedy, P.D., & Ormrod, J.E., "Practical Research: planning and design", 9th edn, 2010, p. 152.

⁴⁷ Creswell, J.W., "Qualitative Inquiry and research Design: *Choosing Among Five Approaches*", 3rd ed, 2007, p. 20.

⁴⁸ See Glaser and Strauss, 1967, cited in Hoepfl, M.C., "Choosing Qualitative research: A Primer for Technology Education Researchers", *Journal of Technology Education*, vol. 9. no. 1, 1997, <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, on this issue.

up theories that assisted the researcher to interpret the data as will be seen in the chapter on discussions.

1.11 SOCIAL CONSEQUENCES

The right to equality before the law, the right to dignity, the right to security of a person and the right to life build up the social life of the accused. Access to justice is also closely linked to poverty reduction since being marginalized means being deprived of choices, opportunities, access to basic resources and voice in decision making. When the accused is afforded these rights, he or she is protected socially when the court concludes that he or she is either guilty or not guilty of the crime for which s/he is charged after having heard the accused properly in his or her own mother-tongue.

Consequently, the social life of the people related to him or her is as well secured/protected. That is, the lives of other people that might have been affected by the accused's detention are secured. Rights such as the right of choice and freedom of movement, the right to integrity and personal security are fundamental to human dignity and security of a person, that is, the right of a person to legal and uninterrupted enjoyment of one's life, body health and reputation. The legal framework⁴⁹ regulating language in court should always operate in accordance with values of the Constitution.⁵⁰

1.12 STUDY AREA

The researcher was interested in finding out the importance of Indigenous Language Courts in the South African justice system, particularly in the Vhembe District, Limpopo Province, South Africa. The researcher in particular concentrated on the establishment and importance of Indigenous Language Courts with the aim of determining how these courts could effectively accord the right to a fair trial its efficacy and other rights that might have been affected by the use of English and Afrikaans only in courtrooms.

⁴⁹ In terms of this study, this includes the Constitution of the Republic of South Africa, Use of Official Languages Act of 2012 and Language Policy.

⁵⁰ The Republic of South Africa Constitutional values are human dignity, equality and freedom.

The demographics of this research is the Vhembe District.⁵¹ Vhembe is one of the five districts of Limpopo Province of South Africa. This District consists of all territories that were part of the former Venda Bantustan, however, the two large densely populated districts of the former Tsonga homeland of Gazankulu, in particular, Hlanganani and Malamulele were also incorporated into Vhembe after the 1994 constituted democratic Republic of South Africa. The district code is DC34. The Vhembe District is constituted by the Magistrate's courts of Thohoyandou, Musina, Makhado, Hlanganani, Malamulele, Dzanani, Mutale, and Vhuwani. There are satellite courts in each district court and some of them were sampled as this study unfolded. Responses from other courts that were investigated under the pilot study outside this demographics were incorporated into the main study for reasons advanced in Chapter Three of this study. These responses were for observational and informational purposes and not necessarily that they form part of the Vhembe District.

1.13 RESEARCH FUNDS

Resources were not affected by the pilot study.⁵² This pilot study was conducted almost over a period of seven months starting from the 25 September 2013 to April 2014. One disadvantage of this pilot study was that its funding was included in the funds for the main research though it did not affect the funds for the main research, particularly because the pilot study was not substantial and was not published before the main study was conducted. The only costly trip that the researcher undertook to take was the trip to the Western Cape between 25.09.2013 and 30.10.2013. The funds were sufficient for the whole project.

Another reason for not having exhausted the funds till the finality of this project was due to the fact that the geographical area of the main research was within the reach of the researcher. In addition, the University of Venda Research and Innovation Committee deemed it fit to increase

⁵¹ See the Vhembe District map.

⁵² Van Teijlingen, E.R, & Hundley, V, "The Importance of Pilot Studies" *Social research Update*, Issue 35 (2001), <http://sru.soc.survey.ac.uk/SRU35.html>, (accessed 21 October 2014).

the researcher's funds, without the researcher's prior request,⁵³ as it was every employee of the University's entitlement who was doing PhD studies to be given such funds.

1.14 DISSEMINATION OF STUDY FINDINGS

The study states how the solutions to the problem help researchers, educators, policy makers and other individuals.⁵⁴

The researcher will disseminate this study through its presentation to: institutions of higher learning libraries; journal articles; academic conferences and seminars; book publications; Vhembe District Courts; Vhembe District Municipality; and policy makers in the Department of Justice and Constitutional Development.

1.15 ORGANISATION OF THE STUDY

In her final report, the researcher put her thought in the form of six chapters. The researcher consistently provided the name of the chapter, what it entails and a brief conclusion on every Chapter. This was done to ensure the reader's better grounding of the subject matter of the topic under investigation. In doing so, the researcher was trying to put thoughts into perspective for the final report to assist the reader to understand the phenomenon in a much broader manner.

1.15.1 Chapter One: Introduction and background to the study

This chapter provides background of the study. It includes the problem statement, research questions, and objectives of the study, hypotheses, definition of the main concepts, critical assumptions by the researcher and the delimitations of this study. The study design and

⁵⁴ Fischler, A.S, "From Problem Statement to Research Questions", *NOVA Southeast University, Department of Education*.

methodology are stated and briefly discussed with the proviso that these will be expounded in Chapter Three.

1.15.2 Chapter Two: Literature and Case Law Reviews

The aim of this chapter was to assist the researcher to become acquainted with the thinking and ideas of previous researchers and authorities on the phenomenon under investigation: legally enforceable mechanisms that perpetuate the use of English and Afrikaans only thereby denying the accused the right to a fair trial through the use of his or her language during the entire trial. This chapter expands the view that the use of the accused's own language in indigenous courts as necessitated by the Use of Official Languages Act of 2012 will give effect to the right to a fair in the district of Vhembe. Court cases being conducted in indigenous languages formed part of the information required in this study and assisted the researcher to arrive at meaningful conclusions with regard to the phenomenon. The trend of case law was as well of paramount importance for the purposes of addressing the problem statement of this study. In a nutshell, Chapter 2 considered preexisting literature and case law studies related to the theme of the present study. This was done in line with conventional practice within the research community.

The literature and case law review included three areas: (a) legally recognized methods that negate the right to a fair trial through the use of language other than mother-tongue and theories developed thereof, (b) The discovery of inaccuracies created by interpretation and their impact on the outcome of a case, and (c) culture as an instrument to deny the use of one's language.

These lessons assisted the researcher to discover whether there are answers to the researcher's questions or not. In the case of the latter, this made a case for the relevance of the present study.

1.15.3 Chapter Three: Research Design and Methodology

This chapter presents the research design and methodology fused or data collection. These include how data were collected, analysed and interpreted in the quest to find out whether research questions were answered through the collected data. The research methodologies are aimed at the manner in which the empirical research was conducted for the purposes of validity of data collected.

1.15.4 Chapter Four: Research Findings

The researcher in this chapter presents the study findings which mark the study's contribution to knowledge. These findings were guided by the research approach the researcher adopted.

1.15.5 Chapter Five: Discussions

This chapter builds on Chapter Four. It discusses the findings presented in Chapter Four with the view to give such findings both meaning and context within which they should be interpreted and understood. Reference is made to the objectives of this study presented in Chapter One. This chapter is characterized by Summary, Inferences and Assumptions.⁵⁵ Two theories were integrated to benefit the reader to understand the right to a fair trial within the context of a language usage in criminal courts. The researcher focused on giving the reader a brief overview of the problem questions and whether they were answered in this study. Research questions were meant to address the main research problem statement. The researcher reconciled her findings with the problem and sub-problems and came to a meaningful conclusion. In the report, the researcher summarised her research by stating whether the problem statement was answered through reiterating the hypothesis and the data presented.

⁵⁵ Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p. 296.

1.15.6 Chapter Six: Conclusions and Recommendations

This concluding chapter focuses on the conclusions of this study. The researcher also made recommendations as solutions that will facilitate the use of these languages through the establishment of Indigenous Language Courts in terms of the Act. The recommendations made in this study are aimed at assisting policy-makers to make a paradigm shift in language use in criminal courts. The researcher also enumerated the weakness or limitations of the study as it was designed and carried out. The researcher identified the practical importance or implications of the findings. Finally, she made recommendations for further research as a follow-up to this research.

1.16. CONCLUSION

The researcher was motivated to undertake this study by the quest to understand and determine whether the operation of the legal framework regulates important aspects of justice system of which one of them is access to justice through the use of one's home language.

It is hoped that this research will contribute to the body of knowledge on this topic as there is a growing need to develop and exchange knowledge in the criminal justice system.

The next chapter presents the reader with an insight of the problem under investigation where other studies and authorities on the subject matter will be examined.

CHAPTER TWO

LITERATURE AND CASE LAW REVIEW

2.1 INTRODUCTION

The main purpose of this study is to explore the implications of the Use of Official Languages Act of 2012 in order to accord the accused his or her right to use his or her mother-tongue, particularly the use of indigenous languages in the quest to afford the accused his or her right to a fair trial through the establishment of indigenous language courts as opposed to the current position where English and Afrikaans are the only languages used in criminal courts. This study was prompted by the role language plays in human existence, development and dignity. It is through language that the accused would be able to formulate his or her defence, understand and follow the proceedings fully, in which his or her life and other rights might be at stake,⁵⁶ as a result of the use of the language (s) other than the mother-tongue.

There is a view that “The possibility to use one’s first language in criminal proceedings is connected to the possibility to defend oneself, and the wider range of acts which a party can perform in their mother-tongue or, alternatively, in a language they know better, the more the right of defence is guaranteed”.⁵⁷ Implicit in this submission is that mother-tongue is empowering.

It is the aim of this study to identify the legally enforceable methods that deny the accused the right to use his or her mother tongue. In order to contrast these methods, the goal of this study explored legal instruments that would accord the accused the right to a fair trial through the use of his or her own mother-tongue. Some authors⁵⁸ though hold a different view. They argue that the

⁵⁶ See Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm, (accessed 8 August 2013).

⁵⁷ Rasia, C, & Ervo,L, “Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy”, *International Journal of Law, Language & Discourse*, vol.2, no.4, 2012, p. 85, www.ijlld.com.

⁵⁸ An example is Joseph-G-Turi, “Language Law and Language Rights”, *International Journal of Law, Language & Discourse*, vol.2, no.4, 2012, p. 7, www.ijlld.com, who argues for the language of habitual use or the language the accused understands and not necessarily mother-tongue. According to him there is no reason to adopt a narrow

right to language does not necessarily mean the right to a mother-tongue, as was revealed earlier. This study argues that while it might be true that the right to language does not necessarily mean the right to mother-tongue, the right to access to justice is completely achieved when one expresses himself or herself only in the mother-tongue. These two conflicting arguments also justified this study.

In order to develop legally enforceable methods for the use of mother-tongue in criminal proceedings, it is necessary for the researcher to give an overview of current studies in South Africa and other jurisdictions on the problem statement. In particular, this chapter examines the views of other authors on whether the existing legally-recognized tools restrict the use of mother-tongue i.e. indigenous languages in criminal trials and whether the denial of the use of one's mother-tongue through these tools subsequently infringes on the accused's right to a fair trial. Furthermore, the chapter focuses on the role the indigenous languages as the mother-tongue of most inhabitants of the District of Vhembe may play in communication in criminal court proceedings within the context of the above mentioned Act of 2012. It is furthermore significant to find out whether there are legally enforceable means to use mother-tongue in criminal cases in terms of both the Constitution of South Africa and the Use of Official Languages Act of 2012 in order to eliminate problems experienced in courtrooms, specifically on the right to interpretation and the right to use the language the accused understands or the accused's language of choice. The trend of case law shall as well be of paramount importance for the purposes of addressing the problem statement of this study.

2.2 STUDIES IN OTHER COUNTRIES

Some scholars in countries outside South Africa have conducted a large amount of research projects in this field and published considerable reports and papers. Case studies in these countries will provide a broader perspective of the problem statement delineated in this study.

interpretation which does not take into account the possibility that the mother-tongue and language of use may differ.

These studies were necessary to address the problem statement and they were therefore consulted with reference to particular aspects of this study.

2.2.1 **How legally-enforceable mechanisms became instrumental to the use of English in exclusion of other languages.**

➤ FINLAND

In this country [Finland], there is a need to develop the concept of “fairness” in criminal matters for the purpose of a fair trial. However, this process has been lacking due to poor case law and ineffective control mechanisms in legislation. The resultant product of this lack of legal mechanisms is that there is no specific legislation covering the use of Romani languages in court proceedings.⁵⁹ Section 6 of the Constitution of Finland covers all linguistic groups but it does not imply any active protection or any linguistic rights in itself.

This section provides that “no one shall be treated differently...on the ground of... language”. This means that this section is an equity clause which prohibits discrimination on the basis of language. It is neutral with regard to language rights expect on the basis of the equal protection of the law. The wording on prevention of differentiation on the grounds of language does not necessarily provide for the right to use one’s own language. The application and/or the provision thereof may give way to the use of other languages than others, particularly in spheres such as courts.

➤ ITALY

In Italy, in Valle d’ Aosta region, in terms of Article 38 of the Statute of Valle d’ Aosta, the French is equal to Italian except for criminal cases, which must always be drafted in Italian. Therefore, protection of linguistic minorities such as the French does not seem to focus on the right of defence

⁵⁹ See Rasia, C, & Ervo, L, “Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy”, *International Journal of Law, Language & Discourse*, vol.2, no.4, 2012, p.71, www.ijlld.com.

in relation to language use. In countries such as Alto Adige, the languages of the historical minorities have received the same legislative protection as the German one”,⁶⁰ an official language which is equally recognized as Italian. In this region, despite the co-existence of these languages, every citizen has the right to use their own mother –tongue, even in court.

➤ CHINA

In China, according to Meizhen,⁶¹ “language power manifests itself in the daily legal activities in the lawyers’ office, police stations and courtrooms all over the country”. According to this writer, to many American scholars, the present legislation and legal instructions are in place, yet many people still feel the treatment of unfairness due to language use as a result of legislative provisions and/or their application. A question as to why people still have such a feeling was inevitable to this author because great progress has been made in terms of the legislation today. The use of language in a courtroom setting still results in unequal application thereof, hence this answer to the question:

Scholars believe that if the law does not fulfil the ideal it establishes, its failure and problem must lie in the details of the legal application. The detail of the legal application is composed of language, i.e. thousands of “plays” performed in courtrooms are conducted by the instrument of language. Courtroom trial is essentially a conflicting and antagonistic interaction.⁶²

⁶⁰ See Rasia, C, & Ervo, L, “Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy”, *International Journal of Law, Language & Discourse*, vol.2, no.4, 2012, p.83. www.ijlld.com.

⁶¹ Meissen, L, “Legal Language and Power: Research on the Phenomenon of Interactive Interruption in Court Session”, *Law, Language and Linguistic diversity, Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijin, September, 2004, pp.195-213.

⁶² Meizhen, L, “Legal Language and Power: Research on the Phenomenon of Interactive Interruption in Court Session”, *Law, Language and Linguistic diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijin, September, 2004, p.199. See also Gutto, S.B.O, “Plain Language and the Law in the Context of Cultural and Legal Pluralism”, *SAJHR* vol.11, 1995, p. 311, and K. Gibson “Gibson, K, “The Myths of Language Use and the Homogenization of Bilingual workers’, available from *Identities, Second Language Studies*, University of Hawaii, 22(2),Spring 2004, p. 1-60.

The unfair treatment of languages culminates into unfair trial in criminal trials. This unfairness emanates from the legislation.

➤ CANADA

In Canada, Section 16 of the Canadian Charter of Rights declared English and French as official languages of Canada. At a federal level, and in the Province of Quebec, the official languages of legislation are English and French. The Quebec Charter where French is spoken qualifies formally as “official” only French.

Beaudoin, and Sherbrooke,⁶³ conducted research in Canada and confirmed that language use could become extinct as a result of law. In this region, French civil law had narrowly escaped extinction because it endured the assault of the dominant language, English, for 150 years. There is an observation that “More often than not, the coexistence of the two languages and the legal systems has come at the expense of the quality of the French language”. The authors referred to Jean-Claude G mar as having so rightly remarked: “Language does not escape with impunity the clash of the legal language and systems”.⁶⁴

The equality of French and English is established by the Constitution. However, in reality, the equality of languages and the legal system was partial and territorial. The adoption of the Official Languages Act of 1969 made it possible for the Federal Court, the Supreme Court of Canada, the Federal Court of Canada and the Tax Court of Canada- to publish their legal decisions in both languages, i.e. English and French.

⁶³ Beaudoin, L, & Sherbrooke, L.L.L, “Systematic and Linguistic Specificities of Legal Language (s): A case in Point-Legal Translation in Canada”, *Law, Language and Linguistic Diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September, 2004, p.3.

⁶⁴ Jean-Claude,G, cited in Beaudoin, L, & Sherbrooke, L.L.L, “Systematic and Linguistic Specificities of Legal Language (s): A case in Point-Legal Translation in Canada”, *Law, Language and Linguistic Diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September, 2004, p.3.

In Canada, both French and English are developed languages with adequate linguistic and legal terms. The use of language in this jurisdiction depends on popularity- that is why French is at present threatened. However, there are minority languages as well, such as that of Inuit. Respondents in Canadian Eastern Arctic insist on the fact that the Inuit need their mother –tongue, because they feel more comfortable when they speak it.⁶⁵ Accordingly, English is not necessarily important to everybody. The view is that unilingual Inuit should be able to gain access to all of the opportunities offered in the North, without having to know English to do so.

➤ UNITED STATES OF AMERICA

The United States of America [USA] does not have any official language,⁶⁶ but English is used for legislation, federal court rulings and other official pronouncement. English is as well the most dominantly spoken language. At territorial level, other counties adopted English as well as local languages as official languages. Undoubtedly, the legal language used by lawyers and judges specifically for legal proceedings is usually too complicated for the lay person to comprehend. There are factors that are said to have affected comprehension adversely, such as the nature of a text.⁶⁷ In that sense, the USA presents a somewhat complicated case study occasioned by the country's complexity.

➤ TANZANIA

In Tanzania⁶⁸ the Constitution of 1962 made provision for Kiswahili and English to be national languages. After the 1999/2000 constitutional amendment, the issue of language disappeared. The

⁶⁵ Dorais, I. J, "Language, Culture and Identity: Some Inuit Examples", *International Journal of Law, Language & Discourse*, vol. 2, no.4,2012, p. 293, www.ijlld.com.

⁶⁶ <http://www.us.english.org/view/19>; <http://blogs.uj.ac.za/languagesmatter/2014/08/07/official-language-status-in-the-us/>, See also Joseph-G-Turi, "Language Law and Language Rights", *International Journal of Law, Language & Discourse*, vol.2, no.4, 2012, p. 5, www.ijlld.com.

⁶⁷ Choshi, M.K, "The Implications of Multi-Lingualism on the Right to a Fair Trial in South African Criminal Trials", Master's Mini-Dissertation, University of Pretoria, 1998, p. 14.

⁶⁸ Brock-Utne, B, "The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy", *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm (accessed 08 August 2013).

author quoted Kamanga,⁶⁹ according to whom there is a need for the Constitution of Tanzania to explicitly recognize a language as one of the grounds for discrimination. The author went on to mention that in the Tanzanian Constitution, language becomes obsolete because it no longer appears in the Constitution. The Constitution of South Africa has better protection for the African Languages than the Tanzanian one. According to the author, despite this protection in South Africa two languages, English and Afrikaans, have dominated the legal field since the early colonial and apartheid days. Victor Webb of the University of Pretoria stated that such languages can become substantial barriers to much of the population accessing their national rights and privileges.

In Tanzania, while there is no such protection as in South Africa, *Kiswahili is being used as the judicial language in the primary courts despite the presence of English as one of the official languages*. In lower courts, both English and Kiswahili are being used but the sentence is written in English. The author referred to two lawyers⁷⁰ who wrote: “there can be no doubt that the exclusive by-passing of indigenous languages in South Africa in enacting laws and conducting legal proceedings creates enormous obstacles for the native speakers of those languages”. Thus, Tanzania recognizes the fact that mother-tongue is critical on legal matters.

➤ IRELAND

In Ireland, there are areas where the Irish language is still predominantly spoken and maintained as a living language. This is because the Irish State has invested in the intervening years in efforts geared towards maintaining this language. The language was also revived in the rest of the country.

Between the years 1922 and 2003 the Irish legislature passed no less than 52 pieces of legislation, which contained a provision for the Irish language. But on a closer look, it is clear that the Irish

⁶⁹ Kamanga, 2001, cited in Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm, (accessed 08 August 2013).

⁷⁰ Ailola and Montsi, 1999:135, cited in Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm, (accessed 08 August 2013).

people appear to place real responsibility on a public body to act in a way that promotes the Irish Language. Invariably, the wording of the relevant provisions is such that in reality the provision is purely aspirational and symbolic for Irish and does not provide for the usefulness of the language. Ultimately, “the legislative development in Ireland culminated in major linguistic provisions being promulgated for the purpose of Irish language use in court”.⁷¹

This quote is evidence of one of the objectives of this study on legally enforceable provisions or pronouncements that perpetuate the use of other languages than languages predominately spoken by the inhabitants. These pieces of legislations were merely aspirational and disadvantaged the Irish language. Human resource management was considered as a legally recognized mechanism that negated the fulfilment on the use of this language for the purposes of fair trial as it has been lacking and adding up too many other factors that were the main absences in the Irish Language Planning. Fortunately, the development of legislation in Ireland reached a stage of linguistic legislation being promulgated for the purpose of use in court.

➤ PORTUGAL

All nationals living in mainland Portugal were speaking Portuguese as their mother-tongue by 1974. However, the history of language in this country has deep roots. Portuguese became the language of culture and administration, amongst other sectors. During the eighth century Portugal changed from high linguistic diversity to monolingualism.

⁷¹ Donnacha, J.M, “Language Legislation Mechanism of Language Planning”, *Law, Language and Linguistic Diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September, 2004, pp. 167-168. The Courts Justice Act 1924-1936 (s44) provides that judges appointed to courts serving Irish-speaking areas should have sufficient Irish to conduct their duties through the medium of Irish without the assistance of an interpreter and Legal Practitioners (Qualifications) Act, 1929 (s3) and as amended by the Solicitors Acts, 1954-1994 which provides that people being appointed as solicitors and barristers should have a “competent knowledge of the Irish language” and be able to perform their duties effectively in Ireland.

What is noticeable is that in the first period of language planning, with four main languages competing for supremacy, diversity was accepted. But, in the last decades, “speakers of non-European languages were segregated and their languages were forbidden in legal Acts”.⁷²

Language law was instrumental to the annulment of other languages except Portuguese. Hence monolingualism in Portugal seems to have long been cherished as a major value.

The Portuguese language was regarded as an element of national identity and subsequently, the few remaining minority languages were nearly extinct under pressure of assimilation with the exception of French and English which were allocated some very *restricted functions*.

2.2.2. Interpreting as a legal tool for English-use-only and the quest for fair criminal proceedings.

➤ FINLAND

Rasia⁷³ researched on the interpretation and translation in this country. The authors mentioned that interpretation and translation can be used as practical tools to fix the problem of multi-lingualisation and to make it possible to communicate in multi-lingualistic situations at the courts. However, according to them, the demands for a fair trial and the significance of authentic communication means big challenges for linguistic professionals.

While these authors recommend interpreting and translation as one response to the problem of multi-lingualisation, they argue for the other extreme on the solution to the communication problem because interpreting and translation mean that communication moves from the judge to parties towards interpreters and judges and parties. It therefore does not meet the demands of a fair

⁷² Pinto, P. F, “Law and Language Diversity in Portugal”, *Law, Language and Linguistic Diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September, 2004, p. 259.

⁷³ Rasia, C, & Ervo, L, “Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the Protection of Linguistic Minorities in Civil Proceedings between Finland and Italy”, *International Journal of Law, Language & Discourse*, vol.2, no.4, 2012, pp. 66-67, www.ijlld.com.

trial. They stated that an interpreter intercedes communication hence the language is no longer direct interaction between original actors and therefore no longer authentic.⁷⁴

Like other scholars,⁷⁵ Rasia confirmed that interpreted communication is always something other than what the original speech act was. Language and linguistic rights play significant roles in the current criminal court culture.

Accordingly, linguistic rights in proceedings, they argued,⁷⁶ are only guaranteed in criminal proceedings. However, the interpretation of the basic right to a “fair trial” can include different elements to make these rights concrete including interpretation and translation. In criminal cases, the necessary interpretation has to be always organized. In terms of the Nordic Convention on languages, Nordic citizens in Finland must be able to use their own language in dealing with a public authority including the courts.

This study aims to eliminate such tools and argues that the right to a fair trial will be made concrete only if the entire trial is conducted in the accused person’s own language.⁷⁷ The interpretation of the basic right to a “fair trial” is well elaborated in this study in terms of case law and other sources of law. The arguments and court pronouncements emanating from these resources are amongst the reasons that prompted this study.

➤ CANADA

The Canadian Charter of Rights, in terms of section 14 makes provision for the assistance of an interpreter where the accused or the witness does not understand the language of the proceedings. Despite the provisions of section 16 (3) which provides for the advance of equality of status of

⁷⁴ Rasia, C, & Ervo, L, “Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy”, *International Journal of Law, Language & Discourse*, vol.2, no.4, 2012, p. 67, www.ijlld.com.

⁷⁵ See Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol18_2/Brock.htm, (accessed 08 August 2013).

⁷⁶ Their findings or argument holds water within the context of this study.

⁷⁷ See the aims of this study.

English and French in Canada, section 14 of the Canadian Charter of Rights has the tendency of denying the accused his or her right to use his or her own language because it promotes interpretation where the accused is not conversant with the language of the proceedings.

The case of *R v Tran*⁷⁸ applied section 14 of the Charter and stated that at the same time the courts cannot permit a person charged with a criminal offence and facing deprivation of liberty who genuinely cannot speak or understand the language of the proceedings to dispense either wittingly or unwittingly with the services of an interpreter. The quality of interpretation was considered by the judge in this case where the court stated that the constitutionally guaranteed standard of interpretation as not one of perfection, but that of continuity, precision, impartiality, competency and contemporaneousness.

To establish a violation of section 14, the claimant of the right must prove that the interpretation received fell below the basic guaranteed standard and did so in the course of the case being advanced. Similarly, in the Canadian case of *Reference re use of French in Criminal Proceedings in Saskatchewan*,⁷⁹ the court indicated that the accused, regardless of his or her facility in English has the right to use French through the entire trial, because he or she had the right to use French as French is one of the official languages. The court in this case further stated that the accused had the right to use his or her own language but that did not have the right to be understood and all court officials had the right to use either English or French during the trial.

Challenges facing legal translation in Canada included translating common law concepts into French when they have evolved over the centuries in English. To produce a good translation, translators must, therefore, deploy their entire art, possess thorough knowledge of the source language, and, above all, a mastery of the target language, be familiar with its many resources, riches and subtleties and know where to find the clarification they need to render meaning of the text they are translating. These elements are the building blocks of translation in Canada.

⁷⁸ *R v Tran* (1994), 92 C.C.C. (3d) p. 218.

⁷⁹ *Reference re use of French in Criminal Proceedings in Saskatchewan*, (1987) 36 C.C.C. (3d) p.353.

Language is of paramount importance in law and, therefore, in legal translation, whatever the combination of languages in question, hence co-occurrence of phraseology was a solution in Canada.

The application of the court of the legislation by the court creates a feeling of discontent as alluded to, by Meizhen⁸⁰ for the court found that the non-provision of the interpreter as well did not constitute violation of the right to a fair trial according to the court. The provision or the application of legislation is definitely a cause for concern.

➤ UNITED STATES OF AMERICA

In the United States of America the fact that interpretation is not adequate is acknowledged and enunciated by Rainhof⁸¹ who maintains that “a person with this type of linguistic background will very probably manufacture words that do not exist in any dialect of Spanish, which means that every interpreter is bound to have problems interpreting that testimony.” Another author states the following:

Misunderstandings that occur in American courtrooms are caused by verbal and body language of non-English-speaking defendants and witnesses when are misread by judges and jurors.⁸²

In Rosa Lopez’s murder case, Rosa was the defence witness who was speaking the Spanish language and the interpreter was an English speaker. During the trial an interpreter who shared Lopez’s Salvadoran heritage was appointed to replace an English speaking interpreter. Court

⁸⁰ Meizhen, L, “Legal Language and Power: Research on the Phenomenon of Interactive Interruption in Court Session”, *Law, Language and Linguistic diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, September, 2004, pp.195-213.

⁸¹ Rainhof, A, “Rosa Lopez Testimony and Misdeeds of the Press”, 1997, www.electriciti.

⁸² Choshi, M.K, “The Implications of Multi-Lingualism on the Right to a Fair Trial in South African Criminal Trials”: *Masters Dissertation*, University of Pretoria, 1998, p.15.

watchers across the country were angry with the translation of the first interpreter saying “it missed the mark”.

Feldman⁸³ reported that the warning against self-incrimination was made in Toi-shan dialect yet the accused responded in Cantonese which is essentially a different language. As a result, the judge ruled inadmissible the accused’s confessional statement due to misunderstanding as a result of language.

It is acknowledged in the USA that misinterpretation and mistranslation can lead to wrong conclusions; mistrial may be granted, that is being vitiated by error, dismissal of confessions; a trial being unfair; thereby infringing the very purpose of interpretation which is intended to afford the accused the right to multi-lingual court hearing. The study argues for monolingual court proceedings in this district for the purpose of a fair hearing without extinction of other languages that are either currently being used or might have been used in the past.

➤ TANZANIA

In Tanzania it was found that “Interpretations do not always work well.” However, through a concrete example, Ailola and Montsi show that even when translation facilities are available fatal mistakes can occur because there are certain expressions which are, at best, incapable of an exact interpretation; others cannot be translated.⁸⁴ For example, these authors commented that while most African languages have a term for “killing”, they have no equivalent for “murder”. Thus, according to a story which was told to them by a Zambian legal practitioner there was a man who nearly incriminated himself in a crime of murder on account of an improper translation of the term. This critic is directed to the use interpretation as a legal method to ensure a fair trial while in reality it does not due to problems enunciated herein.

⁸³ Feldman, P, “Society Increasingly Multilingual: LA Courtrooms: Judges, Jury and Interpreter”, *LA Times*, 05 May 985, (accessed 06 June 2010).

⁸⁴ Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol18_2/Brock.htm, (accessed 08 August 2013).

3.2.3 The co-existence of language and culture as having manifested into the discrimination of other languages: A legal-method for English-use-only.

➤ FINLAND AND ITALY

According to Rasia, currently there are multicultural challenges that face both the law and the courts in that culture is intimately related to language and language is an instrument of communication in court. When law is formulated, cultural elements cannot be ignored. The question that needs to be answered in this given situation is whether culture becomes a genuine source of law.⁸⁵ In Finland, recalled Rasia, the public authorities shall provide for the cultural and societal needs of the Finnish-speaking and Swedish-speaking populations of the country on an equal basis to ensure that the other culture does not become assimilated into the other.

These authors discussed thus far specified that participatory society is now in the increase than before in court proceedings. The manner in which professions use legal language have, to very large extent, societal meaning because of parties' extensive interests in these proceedings in relation to language and their cultural belonging.

For these reasons, the language and the way of communication is an even more important factor in (fair) proceedings than before. All parties in the proceedings should subjectively feel that the procedure was fair. The most important function in the adjudication is that the contextual decisions, which the parties are satisfied with, are produced through fair procedure.⁸⁶

⁸⁵ Rasia, C, & Ervo, L, "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2, no.4, 2012, p. 64, www.ijlld.com.

⁸⁶ See also Rasia, C, & Ervo, L, "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2, no.4, 2012, p. 64, www.ijlld.com citing Svea court of appeal judgement which was criticised for having ignored cultural collision and its possible effects to national criminal law.

The most common challenge facing the multilingual states is whether bad English will be the court language in the future in the name of equality and in the name of factual resources, or whether there is still space for historical cultural needs and the special protection of some ethnical groups in some areas of the world.

While Sámi language, in the European region of Finland was aimed at helping a minority linguistic group to protect its culture and tradition, with language as part of it, the Sámi, as indigenous people, need special protection. In Italy, linguistic rights are more a question of cultural protection.

The authors found that language as an instrument comes just on the second level of its protection and also shows how a language can be discriminated against as a result of the culture people associate themselves with when they speak their own language.

➤ CANADA

English linguistic communities have equality of status and equal rights and privileges including cultural institutions necessary for the preservation and promotion of these communities.⁸⁷

Joseph-G-Turi⁸⁸ referring to the case of *Mahé v Alberta* quotes this specific court as saying that language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it.

The court in *Mahé v Alberta* decided on the findings of the Royal Commission on Bilingualism and Biculturalism for the purpose of entrenchment of language rights terms of section 23 of the Canadian Charter of Rights and freedoms, Constitution of 1867. This section preserves and promotes the two languages, English and French of Canada by ensuring that each language flourishes in provinces where it is not spoken by the majority of the population.

⁸⁷ Meehan, “Official Languages of Canada in Canadian Charter of Rights and Freedoms”, 1995, cited in Choshi, MK, “The Implications of Multi-Lingualism on the Right to a Fair Trial in South African Criminal Trials”: *Masters Mini-Dissertation*, University of Pretoria, 1998, at 11.

⁸⁸ Joseph-G-Turi, “Language Law and Language Rights”, *International Journal of Law, Language & Discourse*, vol.2, no.4, 2012, p. 17, citing *Mahé v Alberta*, [1990] 1 S.C.R. p. 342. at 362, on the decision of Royal Commission on Bilingualism and Biculturalism, 1990, Book II, p. 8. www.ijlld.com.

. The Commission stated inter alia that:

Language is also the key to cultural development. Language and culture are not synonymous, but the vitality of the language is a necessary condition for the complete preservation of a culture.

The basis of their application was the protection of the minority languages in terms of this section.

In Canadian Eastern Arctic,⁸⁹ the position in relation to language as cultural symbol is that the English language thus retains its dominant position within the Inuit society, even if most people attribute a high sentimental and cultural value to Inuktitut.

The Aboriginal language is intimately linked to their most basic- self-definition. For example, in Igloolik, Inuktitut is a significant element of identity. People pride themselves with Inuktitut rather than English because it is regarded as a privileged instrument for conveying traditional culture, communicating with the elders and thus helping preserve one's own deepest identity. This is the position even if one may be an Inuk without speaking the language. In a study done in this regard- 12 Quaqaq respondents even asserted that "one cannot be a real Inuit without speaking the language- while English and French draw their importance from their practicality and usefulness". Conversely, no respondent identifies with English because the importance of the language lies in the fact that it stands as a symbol for the collective rights of the Inuit, whether these be territorial, economic, political and cultural. For non-English speakers such as Inuit, English is rather seen as a tool, necessary to compete efficiently in the modern world, *but not good enough for the adequate expression of one's inner feelings.*

⁸⁹ Dorais, I. J, "Language, Culture and Identity: Some Inuit Examples", *International Journal of Law, Language & Discourse*, vol.2, no.4, 2012, p. 293-299, www.ijlld.com.

➤ TANZANIA

The forms of knowledge that could have empowered the underprivileged would have built on African culture and tradition and be delivered in African languages, enunciated Brock-Utne.⁹⁰ The non-English speakers who are disadvantaged by this language may not equally build their knowledge like English speakers whose knowledge is enriched through language, culture and tradition. With regard to African speakers, culture and tradition is the basis of their language and therefore one cannot build his or her knowledge when speaking a language foreign to his or her culture.

➤ IRELAND

There are extensive initiatives that have produced a large body of research on Irish language attitudes, ability and patterns usage that give us sophisticated insight into the relationship of the Irish people with the Irish language. As a result thereof, the Irish people currently see their language as an integral element of their own identity as Irish people in an Irish nation. Census returns for 1996 and 2002, suggest that only 9% of the population use Irish on a daily basis⁹¹. The reason for the decline is that the percentage of Irish speakers declines rapidly in the post school age cohorts. There is general consensus that learning language at school enhances the use of language.⁹²

⁹⁰ Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm (accessed 08 August 2013).

⁹¹ Donnacha, J.M, “Language Legislation Mechanism of Language Planning”, *Law, Language and Linguistic diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September, 2004, p. 165.

⁹² Read with a *sample* on African Language Centre at Cape Town University which enhances the use of indigenous languages for the purposes of court use.

➤ PORTUGAL

In Portugal, Portuguese is the language of national identity and culture.⁹³ As already specified above that Portugal is a monolingual state with Portuguese been spoken as the language of the nation, people identify this language with their culture. This means that language and culture are inseparable in this country.

2.3 THE SOUTH AFRICAN POSITION

2.3.1 Introduction

It is important to outline the position in South Africa as it presently stands. Firstly, this inclusion is important in order to be able to compare it with the positions in other countries for the purposes of the study's findings on the phenomenon. Secondly, an evaluation of the current South African position is necessary. Thirdly, a comparison and evaluation of the South African situation with other jurisdictions may lead to constructive suggestions for the country.

While it is not clear whether there is policy on languages in court in the South African justice system, the assumption is that there is a policy, whether written or unwritten.⁹⁴ This policy requires that proceedings be conducted in English or Afrikaans. The policy also confirms that legal documents be written in English and Afrikaans. Besides this sphere of government, communication in politics and business is in English.

Olivier narrated how South African dominant languages ascended to their use only:⁹⁵

⁹³ Pinto, P.F, "Law and Language Diversity in Portugal", *Law, Language and Linguistic Diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September, 2004, pp. 264-265.

⁹⁴ This study makes this assumption due to the fact throughout this research she could not find a policy on language use in court, even from policy makers.

⁹⁵ Olivier C.J, "South African Languages", 2009, [Http://salanguages.com/english/index.htm](http://salanguages.com/english/index.htm), (accessed 08 August 2013).

The history of English language in South Africa can be traced back to the first British occupation in 1795. English was considered to be a civilized language by the occupiers and the upper classes, and even those from Dutch stock were forced to use it in their everyday life. According to Act 8 of 1925 of South Africa, Afrikaans became the official language together with English. With the new Constitution of the Republic of South Africa it [Afrikaans] was again written into the Constitution as one of the official languages of South Africa. Not much is known about the ancient history of the Venda people. The language “Tshivenda” is also mainly regarded as a language isolated. Xitsonga has its origin from Zulu and is spoken by Tsonga and Shangaan people in South Africa. Sepedi is the language of the main clan in the Sesotho sa Leboa (Northern Sotho) language and is recorded as Sepedi in the Republic of South African Constitution.

These five languages are mentioned here for the purpose of this study in the Vhembe District. Xitsonga language is regarded as one of the officially diminished African languages in the Republic of South Africa. As already mentioned earlier in this study, Brock-Utne⁹⁶ put this development into perspective.

In South Africa around 1923, Buttler⁹⁷ confirmed that this English ascendancy was not the result of the English being a majority of the population. In the Vhembe District, about 860116 (67.16%) speak Tshivenda with Xitsonga 317850 (24.82%) being the second most commonly-spoken language, Sepedi 20498 (1.60) being the third spoken language, Afrikaans 16818 (1.31%) as the fourth spoken language followed by English 13615 (1.06) as the fifth commonly spoken language.⁹⁸

⁹⁶ Webb, V, University of Pretoria cited in Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*, [http://www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm.date_\(accessed 08 August 2013\)](http://www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm.date_(accessed_08_August_2013)) stated that “English and Afrikaans dominated the legal field since the early colonial and apartheid days and can become substantial barriers to much of the population accessing their national rights and privileges”. The author also referred to two lawyers i.e. Ailola and Montsi (1999:135) who wrote: “there can be no doubt that the exclusive by-passing of indigenous languages in South Africa in enacting laws and conducting legal proceedings creates enormous obstacles for the native speakers of those languages”.

⁹⁷ Buttler, J, “Afrikaner Woman and the Creation of Ethnicity in a Small South African Town, 1902-1950”, *The Creation of Tribalism in South Africa*, 1989, p. 59.

⁹⁸ According to the 2011 census, English was the mother-tongue of 1.06% in the Vhembe District, <http://census2011.adrianfrith.cm/place/934>, (accessed 23 February 2016).

2.3.2 Language legislation and legal instructions restricting the use of indigenous languages in criminal proceedings

The Magistrate's Court Act and the Constitution of South Africa are the most common language legislations in South Africa that, either in the form of application by courts or through their provisions, restrict the use of indigenous languages in criminal courts thereby impeding the accused's right to a fair trial.⁹⁹ This study is clearer on this aspect in chapter four.

These uncertainties in the implementation of these instruments result from the fact that there is no clear policy on the use of English and Afrikaans only in the criminal justice system. The assumption is that the dominant use of English results from a custom that has been perpetuated in the legal sphere from time immemorial – possibly from the colonial and apartheid systems. The change in this practice to ensure that indigenous languages are given equal and fair treatment was made difficult through the reasons shown in this study. The resultant feeling of unfair treatment is therefore inevitable amongst the indigenous language speakers. Problems that characterise language policies in African Countries are: avoidance, vagueness, arbitrariness, fluctuation and declaration without implementation.¹⁰⁰

⁹⁹ See de Vos, P, 'All languages Equal but English and (Afrikaans?) more Equal? *Constitutionally Speaking.co.za*, 30 April 2008, (accessed 08 August 2013), who confirmed this contention and said the problem is that our Constitution is as clear as mud on the issue of language rights. Trying to strike a compromise between what is practical and what is ethnically demanded, it contains a rather muddled provision that in effect allows for English to be treated as more equal than the other ten official languages. Hlophe, J.M, "Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society", *A Paper delivered at the University of Cape Town, 17 September 2003, Forum*, 2004, p. 42, as shown earlier, is of the view that it is clear that, at present in the courts, two languages continue to dominate. One of the reasons for this is lack of clear policy or commitment to the language issue. While Meizhen, L, "Legal Language and Power: Research on the Phenomenon of Interactive Interruption in Court Session", *Law, Language and Linguistic Diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, September 2004, p. 199, emphasised this contention and continued to say that the details of the legal application is composed of language, i.e. thousands of "plays" performed in the courtrooms everyday are conducted by the instrument of language. Gutto, S.B.O, "Plain Language and the Law in the Context of Cultural and Legal Pluralism", *SAJHR vol.11*, 1995, pp. 312-323, confirms this by saying that the domination of legal and constitutional discourse in South Africa by English and Afrikaans speaking institutions and personalities has led to narrow conceptualization and understanding of these constitutional provisions. All these explanations point to one aspect of inquiry: legally recognized instruments which perpetuate unfairness and inequalities.

¹⁰⁰ Bamgbose, 1991, cited in Rikhotso, A. M, "Language Policy and Language use in South African Social Security Agency (ASSA), Limpopo Province, *Master's Mini-Dissertation*, University of Limpopo, Turfloop Campus, 2014. p.17.

Section 6 (1) and 6 (2) of the Magistrate Court Act and sections 6 and 35 (3) (k) of the Constitution of South Africa are, for the purpose of this study, under scrutiny.

Section 6 (2) of the Magistrate Court Act provides that interpretation should be provided for if the accused is not conversant with the language in which evidence is given. It should be read with section 6(1) of the Magistrate's Act which provides that 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 used.

Section 35 (3) (k) of the Constitution provides that an accused person is entitled to the right to be tried in a language that the accused person understands or if that is not practical, to have the proceedings interpreted in that language. This section is read with section 25 (3) (i) of the Interim Constitution¹⁰¹ which provides that an accused person has the right to be tried in the language which he or she understands; failing this, to have the proceedings interpreted to him or her.

The purpose of enjoining these two sections is that, firstly, the former is the current Constitution while the latter is the Interim Constitution. Secondly, they carry the same provision. Thirdly, the breadth of these provisions have been tested extensively by courts in the South African justice system.¹⁰²

The constitutional provision on official languages, Section 6, is of paramount importance as it protects linguistic rights. The implications of this section on language legislation are also enormous and crucial to accomplish the goal of this study. Some authors confirm this supposition and assert that there are *deep lakes* even in the status of linguistic rights in the form of interpretation

¹⁰¹ *The Republic of South Africa Interim Constitution 200 of 1993* as replaced by the *Constitution of 1996*.

¹⁰² See the exposition of cases on these provisions in this Chapter.

and translation in many legal systems and national legislations. Brock-Utne had the following to say:

The actual achievement of justice is very often determined by the language conducted by the actors in the judicial theatre. Unfortunately, there is still a near monopoly of English and Afrikaans in the law and legal system of South Africa leading to the alienation of the legal system by the bulk of South African society.¹⁰³

The common law regarding the right to a fair hearing, including the right of an accused person to understand what is going on in court and to be understood, is a fundamental right profoundly embedded in the very fabric of the South African legal system. Non-English and Afrikaans speakers have to endure the use of these two languages. If they were not conversant with either language, translation services were provided for them.

Before the Constitution was adopted in 1996, South African courts based the duty to call an interpreter by the presiding officer on the opinion as to whether the accused was in need of such interpretation.¹⁰⁴ This duty raised the question whether there was irregularity in the conduct of the trial. Surprisingly, even post-constitutional decisions¹⁰⁵ still battle with the same dimension notwithstanding the letter and spirit of section 6 of the Constitution and the object of the Use of Official Languages Act of 2012.

Due to this legal position, the intervention of this study is imperative through the implications of this Act on the right to a fair trial as a result of the establishment of indigenous languages court, as will be seen later in this study.

¹⁰³ Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*,

http://www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm.date, (accessed 08 August 2013)

¹⁰⁴ See pre-constitutional decisions on the interpretation of these sections in this Chapter.

¹⁰⁵ These post-constitutional cases on this aspect in this chapter two.

The determination of the need of an interpreter as a dimension of the right to a fair trial is illustrated in the cases below which will be divided into pre-constitutional and post-constitutional decisions:

a. Pre-Constitutional decisions where Magistrate's Act 32 of 1944 was interpreted to afford the accused with interpretation for the purposes of the right to a fair trial

- In the case of *Ohannessian v Koen, N.O. and another*¹⁰⁶ the court concluded that a judicial officer is not required to call an interpreter if in his or her opinion, based on valid grounds, the accused is sufficiently conversant with the language in which the evidence is being given.
- In the case of *S v Mafu*¹⁰⁷ the court decided that one can be bilingual, but yet not sufficient enough to have the proceedings not being interpreted to him or her. Even if the accused is represented by bilingual legal representative, proceedings should be interpreted to him or her for the administration of justice. The court went further to pronounce that an interpreter may be bilingual, but not equipped enough to translate the language known to him.

b. Post- Constitutional decisions where sections 25 (3) (i) and 35 (3) (k) of the Interim Constitution and of the Final Constitution respectively, were interpreted to accord the accused with interpretation for the purposes of the right to a fair trial

- The court in *Naidenove v Minister of Home Affairs and Others*¹⁰⁸ indicated that section 25 (3) (i) of the Interim Constitution does not require that the accused should be informed in his or her native-language. It must be in the language which the accused understands. The court further stated that the accused had difficulties in communicating in English but yet concluded that section 25(3) (i) of the Interim Constitution is not violated by not conducting the proceedings in the language of the

¹⁰⁶ *Ohannessian v Koen, N.O and another* 1964 (1) SA 663 (TPD) at 664E.

¹⁰⁷ *S v Mafu* 1978 (1) SA 454 (CPD) at 459B-C.

¹⁰⁸ *Naidenove v Minister of Home Affairs and Others* 1995 (7) BCLR 891 (T) at 89811-J.

accused person. The court has independent responsibility to ensure that those who are not conversant with the language being used in court understand the proceedings and are understood.

- In the case of *S v Ngubane*¹⁰⁹ the accused indicated that he had not understood exactly what had transpired because the interpreter was not proficient in isiZulu and the trial was in Afrikaans. The court of review suggested that “in such an event, the magistrate can ascertain whether the accused understands the translation into Zulu.” The reviewing judge implemented the constitutional provision on language rights and stated that as the accused has been deprived of his or her fundamental right contained in section 25(3) (i) of the Interim Constitution, the proceedings ought now to be set aside and in all fairness to the accused, be tried before a different magistrate.
- In the case of *S v Matomela*¹¹⁰ the court interpreted section 35 (3) (k) to mean that the accused has a right to use his or her own language as long as that language is one of the official languages as entrenched under section 6 of the Constitution and the court conducted the entire case in that language. The court further stated that the Constitution as it presently stands, entitles people of the same language group to conduct the whole case in their language only provided it is one of the official languages.

The court completely adopted a different approach from other cases such as these:

- The court in *S v Ndala*¹¹¹ held that the right to a fair trial in section 25(3) (i) of the Constitution, included the right of an accused to be tried in a language which he or she understands or failing this, to have the proceedings interpreted by the court, to mean that there was a duty on the magistrate to use the services of an interpreter if the accused was not sufficiently conversant with the language in which evidence could be led.

¹⁰⁹ *S v Ngubane* 1995 (2) SA 811 (TPD) at 812A.

¹¹⁰ *S v Matomela* 1998 (3) BCLR 336 (N) at 341E-F.

¹¹¹ *S v Ndala* 1996 (3) ALL SA 65 (C) at 66C.

- *In the case of The State v Siseka Siyotula*¹¹²

The court in this case had to determine whether irregularity as a result of an interpreter who was not appointed officially and interpreted to the accused from English to isiXhosa amounted to unfairness of the trial. The court ruled that the accused was conversant with the language of the court, English and therefore the fact that the interpreter was not sworn in did not culminate in unfairness or a miscarriage of justice.

c. Post-Constitutional decisions where the right to use mother-tongue was demanded

- *In Mthethwa v De Bruin N.O. and Another's case*¹¹³ the court interpreted section 35(3) (k) to mean that it is clearly not practicable for the accused to demand to have proceedings conducted in any language other than English or Afrikaans. The proceedings in this case were entirely conducted in English despite the fact that the accused demanded that the proceedings be conducted in his own language, isiZulu, and despite the fact that all court officials were isiZulu-speakers.
- *In Lourens v The President of the Republic of South Africa and others' case*¹¹⁴ a Brits attorney, Lourens, brought an application in the High Court of Gauteng to force the government to treat all local languages equally. The court decided that the government ought to have been able to promulgate language policy legislation in the past 14 years but it failed to do so. The government was ordered to promulgate the legislation by March 16 2012 that would safeguard the language rights enshrined in the Constitution.

¹¹² *Siseka Siyotula v The State* (CA247/2001) [2002] ZAECHC 9 April 24, (2002).

¹¹³ *Mthethwa v De Bruin N.O. and Another* (1998) (3) BCLR 336 (N) at 338D.

¹¹⁴ *Lourens v Government of South Africa and others* 2013 (1) SA 499 (GNP).

In response to this order the government promulgated the Language Bill of 2000 in 2011 which became law in 2012 as the Use of Official Languages Act 12 of 2012. The implications of the latter Act on the right to a fair trial carries the theme of this study.

d. Post-Constitutional Court cases conducted in indigenous languages where no translation was necessary

- In the case of *S v Damoyi*¹¹⁵ there was no interpreter available to interpret the proceedings from either English or Afrikaans language to isiXhosa resulting in the postponement of the matter till the following day. The magistrate, the state prosecutor and the accused were all isiXhosa-speakers. The magistrate then resolved that the proceedings would continue without an interpreter. The proceedings did indeed continue and were recorded in isiXhosa.

When the matter was taken on review, the magistrate acknowledged that tremendous problems were experienced in having the portion of the record in which the evidence was recorded in isiXhosa transcribed, resulting in a delay in the transcription of the record hence the delay in submitting the record for review.

At first, the reviewing judge inquired whether the magistrate got permission from the Department of Justice to conduct the proceedings in isiXhosa as English is declared as the language of record in court.

The review judge found that the proceedings were in accordance with justice. However, the question of parity of official languages for the purpose of court proceedings needed to be addressed due to concerns raised by the magistrate. He further noted that the issue of use of indigenous African language in court proceedings has not yet been resolved, but is capable of and has the potential of costly implications in the administration of justice.

¹¹⁵ *S v Damoyi* 2003 JOL 12306 (C) 3 par. 4.

- The evidence in the proceedings of the case of *S v Matomela*¹¹⁶ was recorded in isiXhosa due to the shortage or unavailability of interpreters. In this matter, the magistrate, the prosecutor and the accused were all proficient in isiXhosa hence the conduct of the proceedings in isiXhosa. The trial magistrate based his decision also on the provisions of section 6(1) read with section 6 (2) and section 6 (4) of the Constitution, as well as the right of the accused to be tried in the language he or she understands.

The review court accepted the reasons why the proceedings were conducted in isiXhosa, but proceeded to say that one official language of record would solve the problem. In his view, such language should be one which could be understood by all court officials irrespective of mother-tongue.

- In the case of *The State v Tonic Ngoveni, at Tivani*¹¹⁷ Magoro Magistrate' Court, in the Vhembe District, Limpopo Province: the court used Xitsonga. This was in accordance with its language demographics where Tshivenda, Xitsonga and Sepedi are the dominant languages in this area. A transcribed matter heard in Xitsonga was obtained and the following is an extract from the trial proceedings in Xitsonga only:

HUVO : Ha khensa. Mi ta vitana MBHONI. Mi na MBHONI leyi mitsakelaka ku yi vitana?

MUHEHLIWA: Ee. Ndzi na yona MBHONI leyi ndzi nga ta yi vitana.

HUVO: I mani vito ra MBHONI?

MUHEHLIWA: Ndzo tiva ku i Silvia.

- The case of *S v Damani*¹¹⁸ was heard in isiZulu as this is one of the 11 official languages in terms of the Constitution. Court proceedings were recorded in this language but the

¹¹⁶ *S v Matomela* 1998 (3) BCLR 336 (N) at 342H.

¹¹⁷ *The State v Tonic Ngoveni* (HL223/2014, 03 July 2014) 31 pars. 10-20.

¹¹⁸ *S v Damani* (DR224/14) [2014] ZAKZPHC 60 (9 December 2014) pars. 20 and 4-5.

reviewing judge was skeptical about the use of isiZulu and not English. His reasons were based on practicality of the use of 11 official languages in court.

Critics on this judgment will be elaborated in Chapter Five of this study.

The bright side of this case is that the magistrate of the court of first instance defended his decision to conduct the proceedings in isiZulu which is one of the official languages in terms of section 6 (1) of the Constitution and on equal treatment of languages in terms of section 6 (4) of the Constitution. Over and above these two sections, the magistrate took into consideration the fact that the presiding magistrate, the prosecutor, the complainant and the accused were all isiZulu-speaking. Furthermore, it was stated that in Mahlabathini district, “99 per cent of the accused are Zulu-speaking.” As such, the requirements of section 6 (3) (b) of the Constitution on language usage and preferences of the residents of a particular Municipality had to apply.

In all the above mentioned cases communication moved from the prosecutor to the witness and from the accused to the Prosecutor. There was no intercepted communication by the interpreter. The entire proceedings were conducted and recorded in indigenous languages.

e. The Department of Justice and Constitutional Development Pilot Project on Indigenous Language Courts¹¹⁹

The Department of Justice and Constitutional Development intended to promote access to justice through the use of indigenous languages in South Africa as the languages of record in court. In 2009 the Indigenous Language Pilot Project was implemented at 27 district courts countrywide. A total of 890 cases were heard by these courts in indigenous languages. The lessons learned during the Pilot Project were meant to inform the policy framework for language use in criminal courts. The aim of the project was to promote access to justice through the use of indigenous languages as languages of record in court as opposed to the use of English-only criminal cases. It

¹¹⁹ Shabalala, B, “ KZN promotes use of indigenous languages in courts”, available from *DOJ & CD :Newsroom*, www.justice.gov.za/m_statements/2009/20090203_indlang.html , (accessed 20 March 2012), Pilot Project initiated by the Department of Justice and Constitutional Development for the implementation of indigenous languages.

was hoped that it would have made court processes more accessible and understandable to ordinary citizens focusing particularly on the poor and vulnerable. As will be seen later in this study, the indigenous language courts indeed accorded ordinary citizens the right to access to justice through the use of their own languages. Unfortunately, most courts did not continue with this process for reasons advanced in this study. Khayelitsha Magistrate's Court was conducting the entire criminal trials in isiXhosa. Other regions around the country might have continued but were not covered by this study.

The following are *sample* Magistrate's Courts where the researcher obtained information about the success or failure of this project. Districts outside the geographical area of this study were contacted as part of the Pilot Study to strengthen this study's assertion on the practicality of using indigenous languages in court, for the Vhembe District which is the main area of this research:

- Malamulele Magistrate's Court, the District of Vhembe, Limpopo Province: in Xitsonga.¹²⁰ This court did not continue using Xitsonga as language of record due to reasons provided to the researcher during personal and questionnaire interviews as will be seen later in this study.
- Dzanani and Mutale Magistrate's Courts, the Vhembe District, Limpopo Province: in Tshivenda.¹²¹ These courts as well did not continue conducting proceedings in Tshivenda for reasons extracted during empirical research, but later reinstated pursuant to the Department of Justice and Constitutional Development's reinstatement of this project in 2015. Announced in Chapter three of this study.
- Hlanganani Magistrate's Court, the Vhembe District, Limpopo Province: the court conducted criminal cases in Xitsonga, ceased to do so for reasons advanced later in this study.

¹²⁰ "CTOPI" respondents informed the researcher during the interview, exposed in Chapter Three.

¹²¹ "CTOPI" respondent confirmed during the interview with the researcher. See Chapter Three.

- Sekhukhune District Court, Limpopo Province: in Sepedi.¹²²This court also did not continue conducting proceedings in Sepedi except in minor cases in which one presiding officer insisted on Sepedi for the entire trial. Reasons for not continuing in Sepedi are advanced later in this study. Court records which were supposed to be studied for the purpose of this project are said not to be transcribed due to the reason already alluded to. Oral interviews on this project showed that criminal proceedings conducted in the accused indigenous language eliminated language errors as will be seen later in this study.
- Mitchel's Plain Magistrate's Court, Western Cape Province: in Afrikaans.¹²³ During the Pilot Study in the Western Cape by the researcher it was found that Mitchel's Plain court did not continue to hear cases in Afrikaans after the Pilot Project was completed. While the officials conceded that Afrikaans was used at that court during the existence of the Pilot Project, there were no cases transcribed for perusal by the researcher. Court records are only transcribed where one of the parties takes the matter for review.
- Khayelitsha Magistrate's Court, Western Cape Province: in isiXhosa.¹²⁴ This court was envisaged to enhance service and accelerate access to justice.¹²⁵ During Pilot Study, this court was conducting criminal proceedings in isiXhosa and an observational exercise thereof was embarked upon by the researcher who visited this court. Findings on the pilot study will be explored in Chapter Three of this study.
- Msinga Magistrate's Court in KwaZulu-Natal Province: in isiZulu. According to the information gathered by the researcher, the first indigenous language court at Msinga

¹²² Kriel, M, "Justice for All in Indigenous Language Courts", *South African Language Rights Bulletin*, vol.3.issue 7, March 2009.

¹²³ den Hartigh, W, "African Languages in SA Courts", 12 March 2009, www.medioclubsouthafrica.com (accessed 15 December 2011).

¹²⁴ Kriel, M, "Justice for All in Indigenous Language Courts", *South African Language Rights Bulletin*, vol.3.issue 7, March, 2009.

¹²⁵ Staff Reporter, "Regional Court Breaks Language Barrier", available from *Cape Argus*, March, 2009, www.africanvoice.co.za, (accessed 16 March 2012).

in KwaZulu-Natal has been operating since the beginning of March 2011.¹²⁶ The Msinga Magistrate's Court was one of the Pilot Project samples as indicated earlier. While the Head of the Court, Krugel admitted that where cases conducted in isiZulu no problems were experienced except that court personnel, accused and public experienced the proceedings on isiZulu only as something strange.¹²⁷ This court did not continue to hear cases in isiZulu after the completion of the Pilot Project. Reasons advanced for not continuing with this language were explored during Pilot Study which was done through telephone interviews as will be seen later in this study.

Lessons from these districts as well as from the Vhembe District informed the objective of this study on the establishment of Indigenous Language Courts in the Vhembe District, because using a language in court is one of the most important and effective ways to keep a language restore its status, as required by section 6 (2) of the Constitution.¹²⁸

Halala¹²⁹ reinforces *language and planning* through the policy by stating that Tsonga was the official language of all people who were referred to as Shangane-Tsonga within the republic of South Africa at the height of Bantustan government. It was the Tsonga language committee of the then department of education and Culture that came with this new concept, Tsonga.

It is against this background that this study investigated the use of indigenous languages as languages of court and/or record, where interpretation would not be necessary and analyse the findings thereof on how they impact on the right to language and fair trial. In the process of this data analysis, the researcher indicated how the use of English impacted on other constitutional rights as well.

¹²⁶ den Hartigh, W, "African Languages in SA Courts", 19 March 2009, www.mediaclubsouthafrica.com, (accessed 15 December 2011).

¹²⁷ Shabalala, B, "KZN Promotes Use of Indigenous Languages in Courts", available from *DOJ&CD: Newsroom-Media Statement*, February 2009, www.justice.gov.za, (accessed 20 March 2012).

¹²⁸ See also Van Coller, H, cited in den Hartigh, W, "African Languages in SA Courts", 12 March 2009, www.mediaclubsouthafrica.com, (accessed 15 December 2012).

¹²⁹ Halala, P, "A Critical Historical Study of the Response of the Vatsonga to Swiss Christian Missionary Activities: The Example of Valdezia, Elim, Kurulen and the Surrounding Areas, 1873-1994", *PhD Thesis*, University of Limpopo, Turfloop Campus, 2011, p.70.

2.3.3 Interpreting as a mechanism for English-use-only in criminal trials.

It is apparent from the above scenario that interpreting is one of the tools that restrict the use of indigenous languages in criminal proceedings, while its accuracy may in certain instances be questionable. It is accepted both nationally and internationally that translation is not one of perfection,¹³⁰ but the right of an accused to interpretation is perpetuated in order to give the accused the right to multilingual court proceedings.

In South Africa, Parliament passed the Bill which was intended to set standards for interpreters and repair the tarnished reputation of the country's interpreter and translation industry¹³¹ for the purpose of perpetuating the use of interpretation in criminal matters.

In principle, due process of law is satisfied when the accused person is given a fair hearing by an unbiased tribunal or presiding officer. The constitutional right to a fair trial includes the right to understand and be understood in order to make full answers. Fairness and oneness are fundamental values in our criminal justice system. Therefore, the renunciation of the opportunity to acquire firsthand information through language communication may well leave the accused with justifiable sense of justice. Du Plessis made the following observation:

As a multilingual country, we in South Africa are forced to allow non-English-speakers to interpret into English. This practice leaves much to be desired for the quality of the English produced is not always of acceptable standards.¹³²

¹³⁰ Choshi, M.K, 'The Implications of Multi-Lingualism on the Right to a Fair Trial in South African Criminal Trials': *Master's Mini-Dissertation*, University of Pretoria, 1998, p. 46. In this research project the author concentrated on the use and accuracy of interpretation in court. The fact that interpretation is poor is acknowledged by courts as well as authors: See *S v Mpopo's case* and comments by DJ&COND, Cape Town, on this issue. S.B.O. Gutto, "Plain Language and the Law in the Context of Cultural and Legal Pluralism", *SAJHR* vol.11, 1995. p. 314, also affirmed this aspect.

¹³¹ *The South African Language Practitioners' Council Bill of 2013*.

¹³² du Plessis, T, "Language Facilitation and Development in South Africa": *Papers read at an International Forum for Language Workers on 6-7 June, 1997* "Interpreting at the Hearing of the Truth and Reconciliation Commission: April 1996 to February 1997.

This is also confirmed by the case of *S v Ndala*¹³³ where there were doubts about the linguistic competence of the interpreter. Most language related comments on the landmark case of Oscar Pistorius¹³⁴ amounted to poor quality of translation.

To further confirm this statement extracts such as the one below are worth noting:¹³⁵

Magistrate : *What is the basis of your defense?*
Interpreter : *Why do you say you are not guilty? [in Tshivenda]*
Magistrate : *Do you admit the allegations in terms of section 220 of the Criminal Procedure Act 1977?*
Interpreter : *Do you understand these allegations that have been levelled against you? [in Tshivenda].*

Most interpreters are not English–speakers but they are all expected to interpret into English in addition to interpreting into Afrikaans and the different African languages.

Brock-Utne shares the same sentiments thus:¹³⁶ “*in cases where the rest of the court does not understand the language of the accused the interpreter plays a semi-autonomous role*”. The author referred to Ailola and Montsi, who conducted their research in SA. They found out that in a courtroom set-up, the relationship is one of master-servant in that the interpreters frequently internalise the values and attitudes of their court superiors. *There is no effective means for checking the veracity of the actual interpretation*,¹³⁷ given that English and Afrikaans languages are recorded.

¹³³ *S v Ndala* 1996 (2) SACR 218 (C), at 224A-E.

¹³⁴ Schafer, D, “Poor Quality of Translation in Oscar Pistorius Trial a Concern”, 04 March 2014, www.politicsweb.co.za, (accessed 21 April 2014).

¹³⁵ Choshi, M.K, ‘The Implications of Multi-Lingualism on the Right to a Fair Trial in South African Criminal Trials’, *Master’s Mini-Dissertation*, University of Pretoria, 1998, p. 24. Also Moeketsi, R.H, “Redefining the Role of the South African Court Interpreters”, *National Association of Judiciary Interpreters and Translators Newsletter*, vol.8 Nos. 3-4, www.najit.org/membrsonly, (accessed 23 February 2016), produced the same results.

¹³⁶ Ailola and Montsi, cited in Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*, http://www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm.date (accessed 08 August 2013)..

¹³⁷ See also *S v Mpopo* 1978 (2) SA 424 (A) at 426G.

Brock went further to wonder if we can achieve a fair trial by means of translation and interpretation only because.¹³⁸

the communication and the right to participate and advocate in an actual, factual, active and equal way are the main components of a fair trial, the level of this standard becomes centrally poorer if the actors cannot communicate directly but only via third parties. This is the problem of interceded communication in general because the communication differs more and more from the original and authentic speech acts. The communication should therefore not focus on interpreters and translators.¹³⁹

The whole trial stands or falls with the help of the interpreter in the cases where all actors cannot speak the same language. However, the interpretation should continuously attempt to interpret spoken information as correctly as possible and to communicate the original text in the most correct language, if this is not done, *quality communication cannot take place*.¹⁴⁰

Musehane was also of the view that “during the process of transmitting ideas and messages from the speaker or the writer to the audience or readers, sometimes the language or expression used in the discussions raises emotions”.¹⁴¹

The true position of language issues in the South African legal system were said to have been well exposed in the “TRC” hearings.¹⁴² Interpreting was a daunting experience to ordinary South

¹³⁸ Ailola and Montsi ,1999, cited in Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*, http://www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm.date (accessed 08 August 2013).

¹³⁹ See also Vijoer, F, “Look who is talking in the courtroom *too!* ”, *SALJ*, vol.109, 1992, p. 64.

¹⁴⁰ Gryling, L, “On Relevance in Interpreting: Practical Guidelines”, *Interpreting at the Hearing of the Truth and Reconciliation Commission: April 1996 to February 1997, Papers read at an International Forum for Language Workers on 6-7 June, 1997*”.

¹⁴¹ Musehane, N.M, “The Tshivenda Language and the Law of Defamation” *Law, Language and Linguistic Diversity, Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September 2004, p. 218.

¹⁴² du Plessis, T, “Language Facilitation and Development in South Africa”: *Papers read at an International Forum for Language Workers on 6-7 June, 1997*”.

Africans. At the “TRC” proceedings in instances where the commissioner was conversant with the language of the victim he or she would try to communicate in the victim’s own language. Commissioners did not always appreciate the demanding nature of the skills interpreters have to have.

As indicated in the introduction, the development of the language front in South Africa has attracted attention of media and linguistics. Monnakgotla¹⁴³ lamented the fact that there is a dire need for foreign language interpreters to deal with the issues of language expeditiously. This is closely connected to access to justice because justice delayed is justice denied.¹⁴⁴ Unanimous respondent to de Vos’s article said the best solution would be to upgrade our interpretation services, where proper interpreters are hired, and not given peanuts, and that they should not, as is currently the case, only be utilized to interpret to the benefit of the presiding officers, but for all the parties and public involved.¹⁴⁵

Some of these comments concern regional differences within the languages themselves, not that interpreters earn peanuts. For example, between Sepedi spoken in Bolobedu, Ga- Modjadjie, Limpopo Province and Moletjie Village, Limpopo Province, the importance of court officials being employed to preside in cases in which these languages are spoken becomes more imperative.

The continuous use of interpreting will culminate in more and more loss of meaning in any courtroom communication.

¹⁴³ Monnakgotla, M, “Johannesburg Courts Face Foreign Languages Problems”, *Sowetan*, March 27 2012, p.7.

¹⁴⁴ See also comments on Pistorius’ case in Smith, D, “Oscar Pistorius: a runaway interpreter, then the trial of the century begins”, available from *The Guardian*, Monday 3 2012, 21.37 GMT, <http://www.theguardian.com/world/2014/mar/03/oscar-pistorius.reeva.steenkamp>, (accessed 21 April 2014), about an interpreter who run away from interpreting in this high profile case. This contention was also confirmed by “DJ&COD/2” who affirmed that usually interpreters are reluctant to interpret in high profile cases.

¹⁴⁵ de Vos, P, ‘All languages Equal but English and (Afrikaans?) more Equal? *Constitutionally Speaking.co.za*, 30 April 2008, (accessed 08 August 2013).

2.3.4. Historical development of languages as cultural symbols

The provisions of the Bill of Rights relating to language and culture, and to education, requires that every person shall have the right to use the language and to participate in the cultural life of his or her own choice. The use of English at South African Schools deprived other languages their cultural origin. Linguistic communities are preserved and thrive through their basic language rights and culture.¹⁴⁶ Everyone's right to a fair trial through language is concomitant with these rights.

Can we regard culture as a source of law for the establishment of indigenous language courts in the Vhembe District with the aim empowering the indigenous people in this district to exercise their language and cultural rights, in the analogy of Rasia?¹⁴⁷ If it is regarded as a source of law, it could therefore be enjoined as a legal instrument to restrict or affect language rights, as done in the past, or, in contrast, to accord these rights their legal existence.

Gutto¹⁴⁸ contented that:

If it is acknowledged that language is a repository of social, cultural and ideological values, language usage must be ensured in all government's spheres of operation. Although it has been acknowledged that the new official languages will not necessarily change present law and court practices, an individual's free use of a language without the interference of the state is the basis through which culture finds expression and through which participation takes place.

¹⁴⁶ Supreme Court of Canada in <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/580/index.do>, (accessed 10 August 2013)

¹⁴⁷ Rasia, C, & Ervo,L, "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2, no.4, 2012, p. 64, www.ijlld.com.

¹⁴⁸ Gutto, S.B.O, "Plain Language and the Law in the Context of Cultural and Legal Pluralism", *SAJHR* vol.11, 1995, p. 312.

Instead of using culture as a repository of language rights, the colonial system used it to discriminate against indigenous languages.

The sentiment is also shared by Harries¹⁴⁹ who asserted that a Bantustan policy was formulated in the 1950's -60's by whites to form a homeland of Tsonga-related dialects. As a result, a Tsonga identity has thus emerged. Their language was thus discriminated against based on their identity with the language "Tsonga", instead of allowing this community with common interest to exercise their right to language and culture in court and elsewhere.

Language use in criminal proceedings encroaches on the right of the accused to use his or her own language and participate in his or her cultural activities through language as entrenched in section 30 of the Constitution of South Africa. This section provides that everyone has the right to use the language and participate in the cultural life of their choice, but no one exercising these rights may do so in a manner that is inconsistent with any provision of the Bill of Rights. The varieties of languages and dialects and cultures encountered in a day in one urban South African criminal courtroom depict the linguistic and cultural diversity of this country.¹⁵⁰

¹⁴⁹ Harries, P, Exclusion, Classification and Internal Colonialism: The Emergence of Ethnicity Among the Tsonga-speaking of South Africa", in Vail, L, (ed), *The Creation of Tribalism in South Africa*, 1989, p. 82.

¹⁵⁰ Moeketsi, RH "Redefining the Role of the South African Court Interpreters", *National Association of Judiciary Interpreters and Translators Newsletter*, vol.8 Nos. 3-4, www.najit.org/memembrsonly, (accessed.08 August 2013).

2.4. CONCLUSION

It is hoped that the literature and case law review assisted researcher to achieve her goal, i.e. implementing indigenous languages for the purpose of the right to a fair trial through the Indigenous Language Courts. Findings on the collected data in accordance with this method are believed to have informed the researcher's objectives. The chapter that follows this one is on the research design and methodology of this study. The researcher outlines how she conducted the empirical research for the present study.

CHAPTER THREE

RESEARCH DESIGN AND METHODOLOGY

3.1 INTRODUCTION

This Chapter outlines the design and methodology the researcher followed to conduct the empirical research. The main aim of this empirical research was to produce scientific information that would be used to solve the problem statement. The researcher intended to explore, through field work, the implications of the Use of Official Languages Act 12 of 2012 on the establishment of Indigenous Language Courts for the purpose of giving effect to the right to a fair trial through the use of own mother-tongue in the entire criminal proceedings in Vhembe District. In this chapter the researcher mainly provides the overall structure for the procedures and processes she followed to collect the data, tools she adopted for data collection, the type of data the researcher collected and the data analysis mechanisms the researcher employed.¹⁵¹ In this chapter, the researcher also identifies resources and data collection methods that were used.

In order to arrive at the aims of this study, an investigatory process was embarked upon by the researcher between 2013 and 2016. Personal communication with various informants and institutions was also instrumental in data collection during this period.

3.2 RESEARCH DESIGN

The researcher initially chose a research problem and questions to address the research problem as a research strategy. The researcher's research design included the kind of data that an investigation of the problem required, identified possible participants and did an investigation to establish as to whether consent would be given by the participants or by someone else.¹⁵²

¹⁵¹ See Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p.85.

¹⁵² See Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p.105.

3.2.1 Exploration of the problem statement/phenomenon

The researcher identified the problem statement as a research strategy. She also designed her study through exploring the issues relating to the research statement at the beginning of the study to introduce the reader to the aspects to be investigated. This process included the development of research questions, the identification and articulation of sub-questions/different phenomena that built up to a research problem,¹⁵³ the development of research hypotheses, discovery of the assumptions and the articulation of the focal center of the study through the delimitations of the study.

3.2.2 Research approach

In her research design, the researcher adopted two research approaches. The first one was the qualitative research method at the initial stages. This was done in order to solve the research problem and to answer the research questions. This means that the researcher used the qualitative method to do fieldwork. The nature of the problem dictated this approach. Secondly, a quantitative research approach was also used but featured at the end of the research. This approach was not used for the purpose of statistical analysis, but merely for counting and quantifying participants' perceptions and experience in court. Both quantitative and qualitative research methods may enhance research studies, though researchers may not have the time, resources, or experience to effectively combine these two approaches for their initial research attempts".¹⁵⁴

3.2.2.1 Qualitative research approach

In order to answer the research question, the researcher expanded her horizons to get an understanding of the phenomenon under investigation. The researcher accomplished this by doing qualitative research.

¹⁵³ Fischler, A.S, "From Problem Statement of Research Questions", *NOVA SouthEastern University, School of Education*,

¹⁵⁴ See Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p.106.

❖ The nature of this method

In qualitative research, reality is not divided into discrete, measurable variables because the researcher is the source of her own data collection, personal involvement through observations and interviews. Qualitative research designs tend to be more evolutionary in nature.¹⁵⁵ Phenomenological inquiry, or qualitative research, uses a naturalistic approach that seeks to understand phenomena in context-specific settings.¹⁵⁶ There is no magic formula for conducting qualitative research.

In human and social sciences studies¹⁵⁷ such as this one, qualitative methods are used to explore the nature of the phenomenon.

This method attempts to understand participants' perceptions, perspectives and understanding of the court usage of language other than the accused person's language. People's experiences are the source of information in this phenomenon. The researcher studied the experience of the people who find themselves in this situation and looked at how the system could change for the better through the Use of the Official Languages Act of 2012.

In its nature, this method is focused on exploring the provisions of the Use of Official Languages Act 12 of 2012 on languages and its implications on the use of mother-tongue for the purpose of a fair trial and one of the indigenous languages required to be developed in terms of the Constitution of the Republic of South Africa.

¹⁵⁵ Laerd: Masters Dissertation, "Research strategy and research ethics"/Laerd Dissertation, <http://dissertation.laerd.com/research-strategy-and-research-ethics>, (accessed 12 October 2014).

¹⁵⁶ Hoepfl, M.C, "Choosing Qualitative research: A Primer for Technology education researchers", *Journal of Technology Education*, vol. 9, no. 1, 1997, <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014).

¹⁵⁷ Van Teijlingen, E.R. & Hundley, V, "The Importance of Pilot Studies" in *Social research Update*, Issue 35, 2001, <http://sru.soc.survey.ac.uk/SRU35>, html, (accessed 21 October 2014).

It was due to this aspect that the researcher identified other categories of participants such as magistrates, prosecutors, lawyers, and interpreters rather than the accused and the convicted persons only to look at multiple perspectives on the same phenomenon/situation.¹⁵⁸

Qualitative research design includes the phenomenological study approach, grounded theory study approach and survey methods.¹⁵⁹ These approaches were adopted by the present researcher and are embedded in the study.

- Phenomenological study

A phenomenological study is defined as a study that attempts to understand people's perceptions, perspectives, and understandings of a particular situation.¹⁶⁰ A phenomenology is subjective in nature but adds to the knowledge base more traditional forms of inquiry by painting a meaningful picture of complex human situation. The researcher preferred this method in order to answer the research question through these tools. The researcher began with the description of the problem/phenomenon which reveals the nature of the present criminal court processes and its relationship with the ordinary people in terms of language usage.

- Grounded theory approach

According to Glaser and Strauss as referred to by Hoepfl,¹⁶¹ a theory is not a "perfected product" but an "ever-developing entity" or process. It represents a somewhat extreme form of naturalistic inquiry which is a characteristic of qualitative research. Qualitative methods build theory from observations/ interviews¹⁶² and literature review. In terms of this approach, the researcher developed two competing theories to solve the problem/phenomenon in this study, i.e. *the*

¹⁵⁸Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p.141.

¹⁵⁹Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p.141.

¹⁶⁰ Valle, R.S., "Phenomenological Research Methods", <http://link.springer.com/chapter>, available from *Existential-Phenomenological Perspectives in Psychology*, 1989, p. 41-60,). (accessed 12 October 2014)

¹⁶¹ Glaser and Strauss, 1967, cited in Hoepfl, M.C., "Choosing Qualitative Research: A Primer for Technology education researchers", *Journal of Technology Education*, vol. 9. no.1, 1997. <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014).

¹⁶²Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p.142-143.

language the accused understands. If that is not practicable, to have the proceedings interpreted into that language and use of mother-tongue theory in the entire trial.

A theory is offered to examine the phenomenon in question. Theories depict the evolving nature of the phenomenon and describe how certain conditions lead to certain actions, how those actions or interactions lead to other actions. These theories were used to interpret the data and assisted the researcher to come to certain conclusions as will be seen later in this study.

- Survey methods

Survey methods are commonly used in quantitative research studies.¹⁶³ As this study used qualitative research method, the goal of the survey method is therefore to survey a *sample* of participants to acquire representative responses for these categories.

The researcher surveyed a *sample* Magistrate’s Courts, as well as other participants in the Pilot Study as per the table below:

PARTICIPANT	LANGUAGE USED IN THE ENTIRE TRIAL
Malamulele Magistrate’s Court, Vhembe District, Limpopo Province	Xitsonga
Dzanani and Mutale Magistrate’s Courts, Vhembe District, Limpopo Province	Tshivenda
Sekhukhune District Court, Limpopo Province, Sekhukhune District, Limpopo Province	Sepedi
Mitchell’s Plain Magistrate’s Court, Wynberg District, Western Cape Province, 1 st Avenue, East Ridge	English
Khayelitsha Magistrate’s Court, Wynberg District, Western Cape Province	isiXhosa
Msinga Magistrate’s Court, Umzinyathi District, KwaZulu-Natal Province	isiZulu
University of Cape Town Language Centre	Short courses in isiXhosa for court purposes

¹⁶³Leedy, P.D. & Ormrod, J.E., “Practical Research: Planning and Design”, 9th edn, 2010, p.187.

DJ&COND/2	For language policy
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In some areas, categories of the accused persons were identified to participate in the interviews. Lessons from these districts informed the objective of this study on the establishment of Indigenous Language Courts in the Vhembe District, because using a language in court is one of the most important and effective ways to develop and maintain the status of a language, as required by section 6 (2) of the Constitution.¹⁶⁴

The Magistrate's Courts that formed part of this survey in the main study are stated below. Some pilot study courts are also included because they participated in the main study:

MAGISTRATE'S COURT	LANGUAGE/S OF THE COURT
Malamulele Magistrate's Court, Vhembe District, Limpopo Province	<ul style="list-style-type: none"> English
Dzanani Magistrate's Courts, Vhembe District, Limpopo Province	<ul style="list-style-type: none"> English
Mutale Magistrate's Courts, Vhembe District, Limpopo Province	<ul style="list-style-type: none"> English
Makhado Magistrate's Court, Vhembe District, Limpopo Province	<ul style="list-style-type: none"> English Afrikaans
Hlanganani Magistrate's Court, Vhembe District, Limpopo Province	<ul style="list-style-type: none"> English
Tivani Magoro Magistrate's Court, Vhembe District, Limpopo Province	<ul style="list-style-type: none"> English and three indigenous languages: Tshivenda, Xitsonga and Sepedi
Thohoyandou Magistrate's Court, Vhembe District Limpopo Province	<ul style="list-style-type: none"> English

¹⁶⁴ See also Van Coller, H, University of Free State, cited in den Hartigh, W, "African Languages in SA Courts", 12 March 2009, www.medioclubsouthafrica.com, (accessed 15 December 2011).

The magistrate's courts in the Vhembe District that were not covered in the survey are: Musina, Tshitale, Vhuwani and Tshilwavhusiku hence this survey was representative of most of the participants in this district.

Inclusive of the pilot study sampling, the researcher totaled different viewpoints and perceptions in order to assist her to arrive at a meaningful conclusion on the problem under investigation.

❖ **The purpose of the qualitative method**

The purpose of qualitative data was to fully describe a phenomenon and to ensure better understanding of any phenomenon about which little is yet known or to gain new perspectives on things which are already known.¹⁶⁵ In this study, the purpose of this method was to explore the use of indigenous languages which is most probably the mother-tongue of the accused as court languages in terms of the Use of Official Languages Act of 2012. This method enriched the research and informed the reader about new perspectives on the language front which is already known. The fact that the language of choice of the accused person or the language he or she understands most probably excludes the mother-tongue, makes this study very viable. This method also helped the researcher to further analyse and interpret the data collected within the context of the settings of the phenomenon. The researcher's horizons were limited to a certain extent.¹⁶⁶ However, the abovementioned theories assisted the researcher in interpreting the data and coming to meaningful conclusions. This method also allows flexibility in terms of guidelines and personal views. Hence, the researcher was able to explore personal views (though cautious about biases) and built assumptions about the phenomenon rather than relying principally on the information afforded by the participants.

3.2.2.3. *Quantitative research approach*

¹⁶⁵ Hoepfl, M.C, "Choosing Qualitative research: A Primer for Technology education researchers", *Journal of Technology Education*, vol. 9. no.1, 1997.<http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014).

¹⁶⁶ See this study's limitations/weaknesses in Chapter six.

The researcher also chose this method in order to quantify the participants' perceptions and experiences with regard to this phenomenon based on the guidance provided by one author who maintained that "researchers often combine elements of both approaches in what is sometimes called a *mixed-method design*".¹⁶⁷

The researcher may start with qualitative data collection in a pilot study on a relatively unexplored topic, using the results to design a subsequent quantitative phase of the study.

The researcher, after gathering data from different participants, grouped the participants' experiences into segments as they have had different experiences with the phenomenon, i.e. the use of language in criminal proceedings. She quantified their perceptions and experiences thereof. This point is expounded in chapter four of this study. By so doing, the researcher put into perspective the issues that led to her conclusions.

3.2.3. Processes and procedures to collect the data

After having explored the research problem, and after having adopted the research approaches as part of the research design, the researcher outlines the third planning strategy of her research which is processes and procedures that she complied with for the purpose of data collection.

3.2.3.1. Pilot study as a research design/strategy

The researcher carried out a Pilot Study before she conducted her qualitative research as a design strategy that fulfils a range of important functions which include increasing the likelihood of the success of the main study, as suggested by one of the authors¹⁶⁸ who advocates for this plan. It is a good research strategy that emanated from careful planning.

¹⁶⁷Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p.97.

¹⁶⁸ See Van Teijlingen, E.R, & Hundley, V, "The Importance of Pilot Studies", *Social research Update, University of Surrey*, Issue 35, Winter, 2001, (accessed 21 October 2014).

❖ **What is a pilot study?**

According to Hulley¹⁶⁹ a pilot project is defined as a small-scale preliminary study conducted in order to evaluate the feasibility, time, cost, adverse events and effect size in an attempt to predict an appropriate sample size and improve upon the study design prior to the performance of a full-scale research project. In general, sample size calculation may not be required for some pilot studies such as this one. The sample was based on the same inclusion/exclusion criteria as the main study.

❖ **A study on the viability of using Indigenous Languages in Criminal Court Proceedings: A Pilot Study.**

The researcher embarked on a pilot study in order to determine whether it is feasible to use indigenous languages and/or mother-tongue in criminal courts in the Vhembe District. This sub-topic merely provides the name of the pilot study.¹⁷⁰

❖ **Pilot study emanated from literature review**

This pilot study was embarked upon as a result of the literature review.¹⁷¹ The researcher learned through the literature review that the Department of Justice and Constitutional Development intended to promote access to justice through the use of indigenous languages in South Africa as languages of court as narrated in Chapter two of this study.

¹⁶⁹ Hulley, Stephen B, “*Designing Clinical Research*”, available from *Williams, L. & Wilkins, 2007*, pp. 168-169, in Wikipedia, the free encyclopedia, <http://en.wikipedia.org/wiki/pilot-experimtn>, (accessed 23 October 2014).

¹⁷⁰ See Cook, D.J, et al., “Prophylaxis of Thromboemlisna in Critical Care (PROTECT) Trail: a Pilot Study’, available from *J Crit care*, 2005, pp.20:364-372, where the author suggested that a pilot study must have name, hence this name is assigned to this pilot study,

¹⁷¹ Kriel, M, “Justice for All in Indigenous Language Courts”, *South African Language Rights Bulletin*, vol.3.issue 7, March, 2009; den Hartigh, W, “African Languages in SA Courts”, 12 March, 2009, www.mediaclubsouthafrica.com, (accessed 15 December 2011). See in-depth study of this aspect in Chapter two of this study.

It was in the light of these developments that Khayelitsha and Mitchell's Plain were visited and Sekhukhune and Msinga magistrates' court were contacted for the purpose of this pilot.

❖ Rationale of this pilot study¹⁷²

Although pilot experiments have a well – established tradition in public action and their usefulness as a strategy for change has been questioned,¹⁷³ this pilot study provided vital information on the severity of the proposed procedures and treatment.¹⁷⁴ Another feasibility objective was whether it is possible to use indigenous languages in criminal proceedings. It was found to be possible. Frankland argues that a pilot study helps the qualitative researcher to narrow issues of the search study¹⁷⁵ of which the researcher managed to accomplish through this small study as will be seen later in this chapter when the research methods of the study are elaborated upon.

This pilot study also trained the researcher on the approach she used to identify participants; how to phrase interview questions to make the participants more comfortable to interact with the researcher; and developed the overall research skills. The researcher was also able to manage different situations that might have had adverse effects on her project such as the attitude of the participants towards offering information to a complete stranger in some instances.

Most aspects assessed for feasibility¹⁷⁶ are embedded in this study.

¹⁷² Van Teijlingen, E.R. & Hundley, V., "The Importance of Pilot Studies", *Social Research Update*, Issue 35, 2001, http://sru.soc.survey.ac.uk/SRU_35, (accessed 21 October 2014).

¹⁷³ Billé, R., "Action without change? On the Use and Usefulness of Pilot Experiments in Environmental Management," *S.A.P.I.E.N.S.*, vol.3.no.1, 2010, <https://sapiens.revues.org/979.html>, (accessed 22 March 2016).

¹⁷⁴ See "Conducting a Pilot Study". *National Centre for the Replacement Refinement and Reduction of Animals in Research*, <https://www.nc3rs.org.uk/conducting-pilot-study>, (accessed 23 October 2014).

¹⁷⁵ Frankland, J. et al., "Some Issues Arising in the Systematic Analysis of Focus Group Material", available from *Barbour, R and Kitzinger, J (eds) Developing Focus Group Research*, 1999, p.154.

¹⁷⁶ Van Teijlingen, E.R. & Hundley, V., "The Importance of Pilot Studies", *Social Research Update*, Issue 35, 2001, http://sru.soc.survey.ac.uk/SRU_35, (accessed 21 October 2014).

❖ Combining the pilot study with the main study

The researcher combined data from the pilot study with data from the main study with the advice of Cook¹⁷⁷ who maintained that the researcher can combine the two data provided the sampling frame and methodologies are the same. It was simply not possible to exclude the pilot study participants in the main study because to do so would have resulted in too small a sample in the main study.

The purpose of combining the data from the pilot study and data from the main study was also to increase the efficiency of the main study.

Therefore, below are reasons advanced by the researcher for incorporating the pilot study data into the main study for the purpose of interpreting the data and making suggestions and recommendations:

- ✓ The fact that the *sample* frame and methodologies in the pilot study were the same as that of the main study.
- ✓ The *sampling* strategy used to select participants and the possibility of changes over time of the phenomenon under investigation were carefully considered before incorporating the pilot data.
- ✓ The phenomenon under investigation has not changed so the pilot data was still very valid. Court processes are still conducted in isiXhosa in Khayelitsha magistrate's court. Similarly, court processes are still conducted in English and Afrikaans in the Vhembe District. Language issues ranging from misinterpretation to suspicions of incorrect findings as a result of language use in the recent case of *S v Pistorius*¹⁷⁸ and also conclusions of the court of review in *Damani's case*¹⁷⁹ are outrageous and need to be addressed through

¹⁷⁷ Cook, D.J, et al., "Prophylaxis of Thrombolisna in Critical Care (PROTECT) Trail: a Pilot Study', available from *J Crit care*, 2005,pp. 20:364-372.

¹⁷⁸ S v Pistorius [2014] CC113/2013 ZAGPPHC 793, (12 September 2014), in *SowetanLIVE*(<http://.sowetanlive.co.za/anger-over-pistorius-trial-interpreters,2014/03/14>), (accessed 14 March 2014).

¹⁷⁹ *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014).

mechanisms such as this study and subsequently prompted incorporation of the pilot study in the main study.

- ✓ The reinstatement of the pilot project of the Department of Justice and Constitutional Development as enunciated in Chapter one.
- ✓ The existing Act of Parliament which is under investigation in the main study, the Use of Official Languages Act 12 of 2012, was not implemented yet.

The incorporation of the pilot study data into the main study was in accordance with the principles of this qualitative research.

3.2.3.2. *Ethical issues*

Research ethics is not a one size fits all approach. It has been suggested that the research strategy that one chooses to guide a thesis determines the approach that one should take towards research ethics¹⁸⁰. The researcher determined the type of data, i.e. the empirical study, that would be collected and the number of willing participants and to find out whether participants would be able to give information.

In this process, “Ethical Clearance Certificate” was important. Ethical considerations included the following steps:

❖ **Internal review board: University of Venda Ethics Committee**

Ethical issues are important for empirical study. The researcher underwent certain processes to obtain “Ethical Clearance Certificate”. The University of Venda Ethics Committee was the first forum to be approached before the researcher could conduct the research project in order to obtain this certificate. Due to unforeseen circumstances, this certificate was not forthcoming and therefore the researcher was compelled to use a letter written by the promoter to access information in the meantime. The requirements for the issuing of this certificate included, (a). written consent

¹⁸⁰ Laerd, “*Research strategy and research ethics*”/Laerd Dissertation, <http://dissertation.laerd.com/research-strategy-and-research-ethics>, *Masters Dissertation*, (accessed 12 October 2014).

form and, (b). letters written to participants. The latter requirement was improved as a result of the pilot project as well, because questionnaires were accompanied by letters in the main study, something that was not done in the case of the pilot study. Through this letter, participants and those in authority such as Head of Prison allowed the researcher access to the prison for the purpose of data collection.

During the pilot study ethical issues were considered despite the fact that the researcher had not obtained the actual “Ethical Clearance Certificate” yet. The researcher succeeded in obtaining information by assuring participants of ethical issues such as confidentiality of their names though in some instances lack of this certificate was not crucial to some of the participants such as in the Department of Justice and Constitutional Development Directorate.

❖ **Protection against harm**

The researcher took precautions to protect the identity of participants in order to preserve their dignity and protect them against any kind of reprisal. In the quest to achieve this goal the researcher developed a method of identifying the participants. “*Suffix*” was used for a particular group of respondents¹⁸¹ to keep personal data confidential. The researcher used this identifying method during data analysis and interpretation.

❖ **Informed consent**

It has been maintained that when research involves public documents or records that human beings have previously created i.e. court records and newspaper articles, such documents and records are generally considered to be fair game for investigation by researcher¹⁸². The researcher informed participants about the nature of the study and the purpose of the information. In oral interviews the researcher explained fully the nature of the research while in written interviews each questionnaire was accompanied by a letter containing a brief description of the nature and the purpose of the

¹⁸¹ Abbreviations include “suffixes” which were created for the purpose of identifying participants in this study.

¹⁸²Leedy, P.D. & Ormrod, J.E., “Practical Research: Planning and Design”, 9th edn, 2010, p.101.

research, including “Ethical Clearance Certificate” and consent form. Some participants were comfortable to give information without any consent while others were comfortable when their supervisors gave them permission to give such information.

For the purpose of the court observations, the nature of the court proceedings is such that they are conducted in an open court and therefore individual consent was not required for the researcher to access information. This is confirmed by Laerd that sometimes it is simply impossible to get an informed consent from each participant, especially if you are accessing a group through a gatekeeper or are observing people on the move¹⁸³. Where the researcher was accessing a group of participants such as in prison, each individual consent was not necessary.

In other instances, the researcher did not have difficulties in obtaining information based on informed consent due to the fact that she was a lecturer for twenty years and most of the court officials were her former students. In this district under investigation there was no court she visited where she was not known by one or more court officials. At Makhado Magistrate’s court, for example, the first office the researcher approached was the office of prosecutors and was received by a former student who is now a prosecutor at that court. Also at Dzanani Magistrate Court the researcher was received by two court officials, a magistrate and a control prosecutor all of whom were former law students at the University of Venda. In addition, the fact that the researcher is a practicing advocate opened doors to gather information, to a large extent, without restrictions. This is acknowledged by one writer who pronounced that researchers in qualitative research are more likely to gain successfully access to situations if they make use of contacts that can help remove barriers to entrance.¹⁸⁴ The researcher also treated participants with respect. Consequently, in most cases the researcher did not have a problem in accessing the respondents.

❖ Right to privacy

¹⁸³ Laerd, “*Research strategy and research ethics*”/ Laerd Dissertation, <http://dissertation.laerd.com/research-strategy-and-research-ethics>, *Masters Dissertation*, (accessed 12 October 2014).

¹⁸⁴ Hoepfl, M.C, “Choosing Qualitative research: A Primer for Technology education researchers”, *Journal of Technology Education*, vol. 9. no. 1, 1997.<http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014).

In terms of section 14 of the Constitution of the Republic of South Africa everyone has the right to privacy. Similarly research ethics require that researchers should respect participants' right to privacy.¹⁸⁵

The nature of this study does not require the names of the participants but for the purpose of ethical considerations participants were assured that their identity would not be disclosed in any way. The right to privacy in this study was mostly important where participants had to give information in their official capacity and their names were treated with utmost confidentiality because the researcher observed the principle of *uberrima fides* i.e. utmost good faith. Confidentiality is regarded as basic element of research ethics.¹⁸⁶

❖ **Honesty with Professional Colleagues**

Leedy¹⁸⁷ argues that the researcher should strive to report his or her findings as accurate as possible without misrepresentation or intentionally misleading professional colleagues about the nature of the findings.

It was due to this principle of conventional academic practice that the researcher acknowledged her sources of data, outlined her research design and methodology as precise as possible. She interpreted the collected data and drew her conclusions based on the collected data as opposed to simply making ungrounded and unauthenticated speculations. This study will be assimilated as stated in Chapter one of this study hence the researcher was careful to report the well founded information.

¹⁸⁵ Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p.102.

¹⁸⁶ See Laerd: "*Research strategy and research ethics*" / Laerd Dissertation, <http://dissertation.laerd.com/research-strategy-and-research-ethics>, *Masters Dissertation*, (accessed 12 October 2014).

¹⁸⁷ Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p.103.

❖ Professional Codes of Ethics

Although the institution does not have a policy on professional codes of ethics and the fact that there is no code of ethics in the School of Human and Social Sciences, University of Venda, the researcher as an Advocate of the High Court of South Africa is bound by legal ethics that govern the conduct of everyone engaged in the practice of law.

In light of this *status quo* the researcher is bound to treat her research findings within the ambit of these ethics. She was therefore professional when conducting this study and when reporting its findings.

3.2.4 The researcher as a tool of research

3.2.4.1 *Qualifications*

The researcher obtained her B. Juris at the University of Venda in 1989, LLB degree at the University of Witwatersrand in 1992 and Master's degree at the University of Pretoria, in 1998. The researcher wrote mini-dissertation as part of the Master's Degree on the right to a fair trial but that was based only on the interpretation in court. The mini-dissertation was therefore resourceful for the purpose of this doctoral research in terms of accuracy of interpretation and other research skills.

3.2.4.2 *Personal engagement*

The researcher designed and planned the research. She moved from one place to another collecting different data sets. In some instances, she was taken from pillar to post during the data collection phase. In other words, the researcher is the source of the data because of her involvement through direct observations, conducting oral interviews, and using other research methods mentioned above.

The researcher was successful in obtaining information from the respondents though under very compelling circumstances in some interactions with participants. One of the examples is when she tried to speak to “DJ & COND/ 2” respondent several times during and after her visit in the Western Cape in October 2013 without success until 11.03.2014 when she managed to talk to him. The tireless efforts she underwent to get information from participants are worth noting. Another example is that of telephone calls to “COTPI/9”. Several phone calls had to be made before accessing the information the researcher needed for her study. These are but some of the challenges the researcher had to contend with during the data collection phase.

3.2.4.3 Time issues, revision exercises and further fieldwork

As mentioned earlier, this study started at the end of 2012 with the proposal being approved in February 2013. Immediately after the proposal was approved the researcher started her study with literature review and then proceeded to the empirical study in the last term of 2013 until she left the field as shown in this study. The research plan is provided as an appendix.

The first draft of the dissertation was submitted at the beginning of 2014 and the researcher completed revision of her chapters during the summer of 2016. In the process of revising her chapters, she was required to conduct further field study to gather more data. This exercise assisted the researcher in getting more insight on the issues related to this study as language is a developing topic.

3.2.4.4 Language

The researcher lived in Venda for twenty years, from 1994 to-date and was therefore proficient in Tshivenda save for cultural or Tshivenda first language concepts. She fairly understands Xitsonga as she lived with Xitsonga-speaking people in Phalaborwa, Limpopo Province, where she is domiciled. For this reason, she was able to communicate efficiently with the respondents who are Tshivenda speakers. The researcher is in fact a Sepedi

speaker and could therefore not be able to understand some of the Tshivenda or Xitsonga cultural concepts, thanks to the research assistant, she was able to understand what the informants were saying. The value of knowing these languages was evident during this study because human enlightenment has spread across the world because of research and new discoveries.¹⁸⁸

The researcher requested a Tshivenda-speaking assistant who was also proficient in Xitsonga language to help her in the interviews for both the ‘Convicted Persons’ and the ‘Accused Persons’ categories at Matatshe Prison.

3.2.4.5 Values

Having obtained advice from certain authors¹⁸⁹ on research issues. The researcher was wary of the fact that her personal experience as a practicing Advocate of the High Court does not cloud the participants’ stories. She was trying to be as professional as possible though her experience as a lawyer almost attracted other issues such as defending categories of the Convicted Persons and the Accused Persons in their legal battle with the justice system. The researcher had explained at the beginning of the interview, the purpose of the interview.¹⁹⁰ She also shared her values with participants at the beginning of the conversations and attempted to avoid interference with her assumptions as she continued with her inquiry and analysis. The researcher noted her values and biases, that is, she positioned herself in the study.

The researcher further contained her bias particularly with reference to the rights of the convicts and the accused persons during the interview. Similarly, with the conversation between herself and “DJ&COND/1” respondent when the latter showed high regard for English language, she was actually aware of the source of her bias which is related to human rights violations as she is a human rights defender. The pilot study befitted the researcher in many aspects including where

¹⁸⁸ Leedy, P.D. & Ormrod, J.E., “Practical Research: Planning and Design”, 9th edn, 2010, p.37.

¹⁸⁹ Creswell, J.W., “Qualitative Inquiry and research Design: *Choosing Among Five Approaches*”, 3rd ed, 2007, p. 20, maintained that a researcher brings values to a study, but qualitative researchers make their values known in a study.

¹⁹⁰ Leedy, P.D. & Ormrod, J.E., “Practical Research: Planning and Design”, 9th edn, 2010. p.149.

her questions were blended with biasness. She was able to manage certain tempting situations. This study benefited the researcher in these aspects to a very large extent including her interaction with the vulnerable participants. With the help of the assistant researcher, at times, who explained clearly in Tshivenda the reason for our visit, the researcher managed to maintain the interaction throughout the interviews.

3.2.4.6 Assumptions, inferences and conclusions by the researcher

After gathering information, particularly from the category of “DJ&COND” respondents, and literature review ¹⁹¹ where they confirmed English as the preferred language in court; where they indicated the reluctance in the use of indigenous languages; when they indicated their passion for the use of English as the language of sophistication; the researcher discovered certain assumptions and these are well exposed in Chapter five of this study.

The researcher was privy to the fact that certain information may have been distorted by the respondents. She was also wary of the fact that some respondents might not have been aware at the time of the trial that language barriers affected the findings of their cases. Hence she drew inferences and conclusions on how the use of the language other than their mother-tongue resulted in their trials being unfair. This point is further explicated in Chapter five of this study. It is within the realm of the research that the researcher relies on the respondents’ information and draws inferences and conclusions because this constitutes their experiences, something that this phenomenon was investigating.

The researcher attached certain meanings to the experiences of the participants and/or the researcher herself and developed an overall description of the phenomenon/problems.

¹⁹¹ See remarks by a judge in the case of *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014), cited in legalbrief@legalbrief.co.za (accessed 12 November 2014), where a judge in a review case heard in isiZulu said that giving indigenous courts the status of English and Afrikaans in court proceedings may be a distant dream.

3.2.4.7 Views

This study acknowledged that the researcher's views formed the basis of knowledge. Therefore, subjective evidence is assembled based on individual views. This is how knowledge is known-through the subjective experiences of people. It is important, then, to conduct studies in the field where participants live and work. These are important contexts for understanding what participants are saying.¹⁹²

The views of the participants in this study also played an important part in the knowledge of the phenomenon.

3.2.4.8 Experience

The researcher's experience on language issues through her experience as an academic and an advocate of the High Court was that English and Afrikaans languages are used in court in exclusion of indigenous languages. Language is a topical issue around the globe¹⁹³ and she is one of the researchers who are interested in this sphere of academic life. It has been acknowledged that researchers recognise that their own background shapes their interpretation, and thus "position themselves" in the research to acknowledge how their flows form their own personal, cultural and historical experiences. Thus, the researchers make an interpretation of what they find, an interpretation shaped by their own experiences and background like in this study.¹⁹⁴

Having been the victim of English and Afrikaans as a lawyer, the researcher's experience is vital for the purposes of this study. In this case she appeared before an Afrikaans-speaking judge and

¹⁹² Creswell, J.W., "Qualitative Inquiry and Research Design: *Choosing Among Five Approaches*", 3rd edn, 2007, p. 20.

¹⁹³ Said Le Cheng (ed), "Multicultural Association of Law and Language (MALL), Forewords" in *International Journal of Law, Language and Discourse*, vol. 2. no. 4, 2012. See also Joseph-G-Turi, "Language Law and Language Rights", *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p 17, paraphrased Clausewitz when he said: is language becoming a new way to wage war?

¹⁹⁴ Creswell, J.W., "Qualitative Inquiry and research Design: *Choosing Among Five Approaches*", 3rd edn, 2007, p. 25.

Setswana-speaking judge at the Gauteng High Court. Her experience through literature and case law review and conferences on language issues prompted the research problem.

The experience, views and opinion of the participants also played an important role in understanding this phenomenon.

3.2.5 Credibility of the Study

In qualitative research such as the current one, researchers do not receive the concept “validity” with warm hands.¹⁹⁵ Credibility is an inquiry to test the trustworthiness of the study. In conventional inquiry, internal validity refers to the extent to which the findings accurately describe legality while external validity refers to the ability to generalise findings across different settings.¹⁹⁶ In this study, the researcher therefore used the concept “credibility” rather than “validity”. The researcher chose this concept because most modern researchers prefer this concept to test the trustworthiness in their studies. The researcher’s law background also prompted her to come to this conclusion. In litigation, lawyers frequently use the concept “credibility” when they test the trustworthiness of a witness. It is against this background that the researcher found the concept more appropriate to confirm her findings.

Considering the nature of this study the researcher complied with both internal and external validity in that she managed to describe the rationale for establishing Indigenous Language Courts for the purpose of the right to a fair trial in terms of language use and also managed to interpret her findings in such a way that her study could be transferable to different settings respectively. In the former validity, her study is worth noting and in the latter, her study can be applied elsewhere other than the Vhembe District which was used as the research site.

¹⁹⁵ See Leedy, P.D. & Ormrod, J.E., “Practical Research: Planning and Design”, 9th edn, 2010, p. 100.

¹⁹⁶ Hoepfl, M.C., “Choosing Qualitative research: A Primer for Technology education researchers”, *Journal of Technology Education*, vol. 9. no 1, 1997.<http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014).

In this study the researcher compared multiple data sources in search of common themes to support the credibility of her findings. Different categories of participants also supported the credibility of her findings.

Credibility depended less on the sample size (as noted in Chapter six) than on the richness of the information gathered and on the analytical abilities of the researcher. The researcher developed criteria for judging the quality of this study.

3.2.5.1 Verification

The researcher verified her research assumptions through their comparison with the phenomenon under investigation. Theoretical perspectives built during the study confirmed her statement of the problem.¹⁹⁷

3.2.5.2 Institutional research boards

The researcher's instruments were evaluated by the Department of African Languages, School of Social and Human Sciences Research and Publication Committee and subsequently by the University of Venda Research and Publication Committee. They were finally considered and approved by the University Research Ethics Committee and were found to be appropriate for this research approach.

3.2.5.3 Evaluation

The data was evaluated to test the use of English and Afrikaans only through research instruments, at the expense of the accused's mother-tongue. The fact that there is a policy i.e. The Use of Official Languages Act and the Constitution in place but is not implemented was revealed through interviews of the participants and the researcher's experience with language issues. The current Act supersedes any practice (the use of English and Afrikaans only) that might have existed before

¹⁹⁷Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010. p. 137.

its promulgation. The evaluation was also done through the exposition of her views, assumptions, values and biasness somewhere in the study. Interpretation of the data, recommendations to change the lives of the society affected by the phenomenon, are evidence of the trustworthiness of this study.

3.2.5.4 Consistency

The other criterion on credibility is the consistency of the data i.e. the extent to which all of the items within an instrument yield similar results.¹⁹⁸ The criterion requires an inquiry as to whether the findings would be consistent if the enquiry were replicated with the same subjects in a similar context. In qualitative research, instruments required for consistency are the researcher and the informants for the research results to be the focus of the study and not the biases of the researcher. In this study, this criterion for credibility is met in that the same interview schedule was used in all categories of participants yielding the same results. The technique used to attain dependability in qualitative research is called checklist. The researcher conducted in-depth unstructured individual interviews, which were jotted down and audio taped to ensure an audit trail. The literature review was consistent in the data analysis and interpretation.

3.2.5.5 Interpretation

The researcher scrutinised the data collected and put them in meaningful segments with direct emphasis on the research questions. The researcher was able to organise the data collected and draw inferences thereof. The researcher admits that the stories voiced represent an interpretation and presentation of the researcher as much as the subject of the study.¹⁹⁹

¹⁹⁸Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p. 93.

¹⁹⁹ Creswell, J.W., "Qualitative Inquiry and research Design: *Choosing Among Five Approaches*", p. 20, 3rd edn, 2007.

3.2.5.6 Data collection methods

The methods used to obtain data and which rendered this study credible are oral interviews, direct observations, documentary evidence, and questionnaires. In each of these methods, the researcher used samples of participants who have direct experience with the issues under investigation. Therefore, the informants were purposively selected based on their knowledge on the subject matter or theme of the study. The method was described with utmost precision and the reader knows exactly what was done, to the point where the reader could replicate the study and, where possible, get similar results as explained under *applicability*.²⁰⁰ The researcher precisely stated that the *mixed-method design* was going to be used in her study. This criterion was met because these research methods produced the true status of the court settings with regard to language use.

3.2.5.7 Applicability

Applicability in qualitative research refers to whether it is fitting or transferable.²⁰¹ It refers to the degree to which the findings of the present study can be applied to other contexts and settings or with other groups. It implies that the researcher should be able to generalise qualitative findings to other population groups. Should another researcher conduct similar studies in dissimilar contexts and, again, draw the same conclusions as this study that would be evidence that the conclusions of this study have validity and applicability across diverse contexts and situations. This study was further validated based on the fact that the same conclusion could be reached by another researcher in a different context. Similarly, the pilot study proved the applicability of this study in that similar conclusions were drawn by the researcher in other districts investigated under the pilot study. Thus, the pilot study rendered this research valid as it yielded the same results as in the Vhembe District i.e. predominantly spoken languages may enable the use of these languages in the entire trial. *Samples* in the Vhembe District that were used in the pilot study were as well used in the main research and were effective.²⁰²

²⁰⁰Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p. 293.

²⁰¹ Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p. 100.

²⁰² Thabane L, et la., "A Tutorial on Pilot Studies: the what, why, how?". *Medical Research Methodology*, 2010. <http://www.biomedcentral.com/1471-2288/10/1>, (accessed 23 October 2014)

3.3 THE RESEARCH METHODS

The researcher has, in Chapter one, briefly explained her research methods. In this Chapter she discusses these methods in detail in order to embed other methodological issues. The researcher, through the pilot study, managed to test the adequacy of these methods for the purposes of the trustworthiness of this study. The criteria for testing the adequacy of the research instruments was based on primary feasibility objectives which determine whether to continue or not to continue. Research instruments employed to determine the feasibility objective²⁰³ are questionnaires, interviews, observations and documentary evidence. The outcome of these criteria was that the research should continue using the same research instruments as they were found to be successful and have accomplished the objectives of this pilot.

The review of literature and case law on the use of indigenous languages particularly during the Department of Justice and Constitutional Development Pilot Project as stated in Chapter two of this study provided appropriate source of information on variability.

3.3.1 Research techniques

The researcher developed techniques as part of methodology to collect data. One of the aims of the pilot study was to establish whether the techniques were effective or not. Techniques employed in the pilot study proved to be the most effective methods during the pilot study as well as the main study.

The research techniques used in this study are hereunder discussed:

²⁰³ Cook, D.J, et al, “Prophylaxis of Thromboembolism in Critical Care (PROTECT) Trial: a Pilot Study”, available from *J. Crit Care*, 2005, 20: 364-372.

3.3.1.1 Sampling

Hoepfl²⁰⁴ referred to Lincoln and Guba who recommend the maximum variation *sampling* as the most useful strategy in qualitative research because it aims at capturing and describing the central themes or principal outcomes or deviation across a great deal of participant or program variation. The researcher was aware of the deficiencies in this strategy and tried as much as possible to avoid distortions as a result of the large *sampling* or addressed these deficiencies, if any, in each *sample*. The effectiveness of the sample established for the main research was tested during the pilot in that all categories, except the category of Pan South African Language Board, were identified to be the most vital participants. Though the category of the Convicted persons were not represented in the pilot study, the aim was to include them in this feasibility study. Due to their locality: Prisons or Home, they could not be reached except in the main study. The categories which participated in the study proved viable.

The researcher used *samples* in the process of selecting participants for the main study. All seven sub-groups participated in this study. Initially five groups were solicited for samples but as the researcher collected the data she identified further samples of participants. This process assisted the researcher to be selective about the data she was looking for.²⁰⁵ The researcher was guided by the research questions she wanted to answer when she identified her sample. These samples are believed to *represent* the Vhembe District criminal courts and other population groups identified under sub-groups Universities' African Language Centres and PanSALB.

The following samples were identified in this study and the criteria for their choice are provided:

❖ The Accused Persons

²⁰⁴ Lincoln and Guba, 1985, cited in Hoepfl, M.C, "Choosing Qualitative research: A Primer for Technology education researchers", *Journal of Technology Education*, vol. 9. no. 1, 1997. <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014).

²⁰⁵ See Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p. 147.

A *sample* of the accused persons was used to investigate issues related to the problem statement. Two (2) accused persons participated in the oral interview process while fifty one (51) questionnaires were used to gather information as *sample* to represent this category. A total of fifty three (53) participants represented this group. This group was selected as a result of its importance with regard to (1) problems created by translation and interpreting and their impact on their right to a fair trial: their experience to this effect is vital; (2) the importance of their indigenous languages in criminal proceedings and how would this facilitate their right to a fair trial; (3) their participation in the pilot study for the purpose of the use of the accused's language in the entire trial; (4) their experience with regard to the elimination of problems created by interpretation; (5) the fact that most accused persons (approximately 98%) and that almost all court officials speak these languages in the analogy of CTOPI/17 supported by the Vhembe District language demographics as enunciated in Chapter Two of this study.

Suffix "APPI" indicates oral interviews for the accused persons while suffix "APQI" indicates the use of questionnaires for this category of participants.

❖ **The Convicted Persons**

Nine (9) personal interviews were conducted in this category. One prison warder who offered to give information in accordance with her experience as court orderly, is amongst the nine (9) participants but will not be counted when quantifying representativeness of this group. Forty (40) questionnaires were used and they were found to have represented this category identified by this study to have been affected by the use of language in criminal hearings in the Vhembe District. A total of forty-nine (49) respondents were used to represent this group.

The proximity of this sub-group for the purpose of this investigation is twofold: (1) how the use of language other than the respondent's mother-tongue might have affected their constitutional right to a fair trial which culminated into their incarceration and infringement

upon their rights to language²⁰⁶, freedom and security of a person, life, etc.; (2) having gone through the whole trial process and their perception on the use of languages other than their mother-tongue their participation was crucial.

Suffixes or pseudonyms “CONPI” and “CONQI” represent oral interviews and interviews through questionnaires respectively, for this sub-group.

❖ **Court Officials: Magistrate, Prosecutors and Lawyers**

Another category that the researcher identified to gather information from, is the one that represents court officials. These included the magistrate, prosecutors and lawyers. Interviews were conducted on this group. A total of twenty-three (23) persons were orally interviewed and thirty (30) questionnaires were filled in by the participants and yielded good results. A total of fifty-three (53) was ultimately used to gather information.

The information gathered from this sub-group was directed to their experience with regard to (1) the use of English and Afrikaans and if subsequent use of tools such as interpretation fulfil the very same purpose they were intended to achieve, i.e. the right to a fair trial; (2) their perceptions on the right to language, particularly indigenous languages in terms of the Use of Official Languages Act of 2012 and the Constitution, and how these language instruments would ensure access to justice: this group deal with matters related to access to justice on a daily basis; their responses on the existence and implications of the Use of Official Languages Act of 2012, particularly on the use of indigenous languages in the entire trial; (3) their overall views on the use of indigenous languages in the entire trial as per pilot project of the DJ&COND..

²⁰⁶ To confirm their importance in this study see the comments by a convicted defendant who claimed there were inaccuracies in the interpretation of his case in Louw, P, “Court Interpreters lost in translation”, in *Interpreters undermining justice system-study*, available from *The Herald*, June 08, 2015.

The suffixes or pseudonyms “CTOPI” and “CTOQI” indicate oral interviews and interviews through questionnaires for this category, respectively.

❖ **Court Interpreters**

This category participated in this study. Overall, four (4) interpreters were orally interviewed while twelve (12) questionnaires were filled in. A total of sixteen (16) respondents represented this group.

Their participation in this study was sought for the following reasons: (1) their experience on the accuracy of interpretation and how this may affect the right to a fair trial;²⁰⁷ (2) Their knowledge of the phenomenon and how it can be addressed through the use of mother-tongue/indigenous languages in the entire trial; and (3) their experience with interpretation of cultural concepts and dealing with witnesses who are entrapped in their culture. This group has been very useful in the establishment of Indigenous language courts because of their experience with the use of English and Afrikaans only related problems.

Responses from the category of court interpreters are identified through the use of suffix “CIPI” for personal interviews and suffix “CIPQ” which indicates interviews through questionnaires.

❖ **Department of Justice and Constitutional Development Directors**

The next category that was represented is the Directorate of the Department of Justice and Constitutional Development which is responsible for languages in court and interpretation and language policy in court and court interpreting. This was the most difficult group to contact and the researcher had to abandon the questionnaire survey method and embarked on oral interviews only. Initially ten (10) participants were anticipated to partake in this

²⁰⁷ Schafer, D, “Poor quality of translation in Oscar Pistorius trial a Concern”, 04 March 2014, www.politicsweb.co.za, (accessed 21 April 2014) where the writer said ...one can only imagine what people experience everyday when they attend court.

project.²⁰⁸ A total of three (3) respondents was ultimately interviewed and their views were found to have yielded great success as will be seen later in this study. The nature of this sample is such that representativity is not important for the purpose of this study as they are policy-making category. Information from these two participants is sufficient to interpret the data and arrive at conclusions.

Their proximity in the study is related to (1) the information on policy development on the implementation of indigenous languages that are predominantly spoken mother-tongues of most accused persons in a particular areas; (2) their knowledge and consciousness of the existence of the Use of Official Languages Act of 2012 and its implications on the right to use ones language in criminal proceedings, more especially on its implications on the right to a fair trial; (3) their experience on interpretation in criminal cases; and (4) their awareness of the Constitutional provisions on languages; and (5) their perception on the establishment of indigenous Language Courts that might eliminate extensively established interpretation problems.²⁰⁹

The suffix “DJ&COND” is used to identify this group.

❖ University of Cape Town Centre for African Languages Diversity

In the process of gathering information the researcher discovered another category which she felt would contribute, to a very large extent, to the goal of this study. The University of Cape Town African Languages Centre is known to be developing African Languages. The researcher learned about this center through the internet.²¹⁰ The researcher visited the Centre and conducted an oral

²⁰⁸ See Leedy, P.D. & Ormrod, J.E., “Practical Research: Planning and Design”, 9th edn, 2010, p. 147, who stated that you develop certain perspectives by engaging in some activities or talking to certain people than the other - you build assertions towards the never-quite-attainable goal of “getting it right,” approximating reality but not establishing absolute.

²⁰⁹“ DJ&COND/2” respondent made reference to Oscar Pistorius case as an example of high profile cases where interpreters usually ran away. His experience is confirmed by information on the interpretation in this case. See Smith, D, “Oscar Pistorius: a runaway interpreter, then the trial of the century begins”, available from *The Guardian*, Monday 3 2012, 21.37 GMT, <http://www.theguardian.com/world/2014/mar/03/oscar-pistorius.reeva.steenkamp>, (accessed 21 April 2014).

²¹⁰ <http://www.afri-lang.uct.ac.za/news.html>, (accessed 09 March 2011).

interview with one (1) official of the Centre. Information gathered was vital for the investigation in the following instances: (1) development of African Languages for their use in criminal proceeding (2) The proximity of this center to this study emanated from the findings on the discontinuity of the use of indigenous languages due to lack of legal terminology by courts during the Pilot Project on indigenous languages in court initiated by the Department of Justice and Constitutional Development in 2009 as explained in Chapter two of this study.

Whether this Centre is representative of African Language Centers is not crucial for the purpose of this study as the information required by the researcher was to find out whether African Languages are being developed for court purposes. Some institutions of higher learning may be offering such courses but could not all be consulted in this study. If such commitment is made, the research questions will be addressed effectively.

A “suffix” was not developed for this group and therefore its participation in this study is identified by reference to the name of the center.

❖ **Pan South African Language Board Officials²¹¹**

The PanSALB was also sampled for the purpose of this investigation. One (1) official from Pan South African Language Board at the University of Venda, Limpopo Province, was interviewed. The reasons for the information gathered from this Board include but are not limited to: (1) the Board has the Constitutional obligation in terms of Section 6 (5) of the Constitution to develop and ensure that all official languages in South Africa are used and promoted to ensure multilingualism in criminal courts²¹² [for the purpose of this study]; (2) its programme of auditing the country’s readiness to comply with the Use of Official Languages Act of 2012; (3) its

²¹¹ This Board was dissolved in 2016 by the Minister of Arts and Culture, Nathi Mthethwa due to the fact that the board was not expeditious in fulfilling its mandate of developing the country’s languages and promotion of multilingualism. Available from *News24*. Its contribution to this research was enormous as evident from this study.

²¹² “Multilingualism in South Africa with Focus on Language Usage”, <http://www.pansalb.org.za/news.html>, (accessed 09 August 2013) this media release the board announced its programme of auditing the country’s readiness to comply with the Use of Official Languages Act of 2012.

commitment to mother-tongue²¹³ conforms with this study's grounded theory on the use of mother-tongue in criminal courts to address the problem statement. Representativity is not important for this group as it is acknowledged that the information obtained from the literature review was supportive of this category. The researcher's intention was to obtain information that might be useful for the implementation of this Act which is proximate to her research problem. Indeed, the informant played a vital role in this study as will be seen in the findings and data interpretation.

A "suffix" was not developed for this group and therefore its participation in this study is identified by reference to its statutory abbreviation i.e. PanSALB.

3.3.1.2 Interviews: Oral

Interviews constituted one of the research techniques that the researcher embarked upon to gather information. The researcher had personal contact and conversed with the samples identified in this study. The pilot study was instrumental in the development of research questions and research plan. After the pilot study, the researcher revisited her research questions and amended two of them. For an example, instead of "accused's language" or just an "indigenous language", this question was amended to read "the accused's mother-tongue".

Audio tape and hand notebook were instruments used to collect this data. The researcher principally relied on field notes than any other instrument. The researcher noted days, time, date, research technique, length of every interview though in some instances it was not possible to record all this information due to various factors.

Having gone through the pilot study under very compelling circumstances including but not limited to lack of prior arrangements, the researcher designed a research protocol which included making prior appointments for the visits in the main research. These arrangements were through

²¹³ PanSALB Media Release, "PanSALB celebrates International Mother Language Day", <http://www.pansalb.org.za/news.html>, (accessed 17 April 2014). Also available from Maake, N, "To Teach Your Children Well, Do so in Their Own Language": International Mother Language Day, *Sunday Times*, February 16, 2014, p. 21.

personal communication. These measures assisted the researcher during data collection. People in authority were contacted before the visit in the main study. Ethical issues came into the picture as well. In some instances, informants required permission from their superiors before giving information. An example was CTOP/7 (a female prosecutor) at Khayelitsha Magistrate's court who was willing to give information in her own personal capacity and not any official capacity without permission from the superior. In the main study the researcher improved on these aspects.

The researcher recorded the conversation using her writing skills in a memo book. She was also able to use electronic devices i.e. audio tapes where possible and where permission was sought from the informants.

Whether one relies on written notes or a tape recorder appears to be largely a matter of person preference. Some authors view tape recorders as intrusive.²¹⁴ Accordingly, the researcher holds the same view as a result of her experience with this device - some participants were not comfortable with their voices being recorded. In addition, the researcher was cautious about making contacts that could help remove barriers to entrance or obtaining information, she therefore preferred field notes than video tape. Field researchers rely most heavily on the use of field notes, which are running descriptions of setting, people and activities. Some authors acknowledge the difficulty of writing extensive field notes during an observation [and during interviews] and thus recommend jotting down notes that will serve as a memory aid when full field notes are construed.²¹⁵ The researcher in this study employed this strategy as well, mostly in interviews that took more than thirty minutes such as in the category of the DJ & COND.

The researcher unpacked this information as she continued with her data collection processes and procedures. The nature of the data collected dictated that the researcher asked the questions related to (1) facts i.e. what were currently the language issues in court; the respondents' beliefs and

²¹⁴ Hoepfl, M.C, "Choosing Qualitative research: A Primer for Technology Education Researchers", *Journal of Technology Education* vol. 9. no. 1, 1997, <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014).

²¹⁵ Hoepfl, M.C, "Choosing Qualitative research: A Primer for Technology Education Researchers", *Journal of Technology Education*, vol. 9. no. 1, 1997, <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014).

perceptions about language use in court, particularly the influence of language on the right to a fair trial and other constitutional rights affected by language; (2) participants' feelings i.e. how intensive are the participants affected by the use of language; (3) motives i.e. when participants who are responsible for ensuring the rights of the accused persons think that it is not necessary, what is actually their motive; (4) issues related to what happened yesterday when human rights were violated through law and today in a constitutional dispensation; (5) questions that intensively went into the roots of the solution of the phenomenon, e.g. (5.1) whether it is desirable to change the present position through legal instruments such as Indigenous Language Courts; (5.2) how to remove undesirable situations i.e. the experience of the community whose language is indigenous languages but cannot be used in the entire trial; and (5.3) questions that built up grounded theories in this study.

An interview “guide” or “schedule” is a list of questions or general topics that the interviewer wanted to explore during each interview. Although it is prepared to ensure that basically the same information is obtained from each person, there are no predetermined responses, and in unstructured interviews such as this one, the interviewer is free to probe and explore within these predetermined inquiry areas.²¹⁶ The researcher acknowledges that her interviews went through this processes. The first interview was not the same as the other previous interviews since the latter had been somewhat improved. The researcher would articulate the responses and choose those that were deemed approximate to her research questions. Where necessary, interviews were used in conjunction with documentary evidence and questionnaires.

The following categories participated in the data processes on different levels of their experiences and perceptions with the phenomenon as explained earlier. However, their semi-structured interviews are similar to the ones for the accused persons.

²¹⁶ Hoepfl, M.C.,” Choosing Qualitative research: A Primer for Technology Education Researchers”, *Journal of Technology Education*, vol. 9. no. 1, 1997, <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>. (accessed 12 October 2014).

❖ Interviews for the convicted persons and the accused persons

The researcher visited the head of prison at Matatshe Prison, “Mr Luvhengo”,²¹⁷ situated at Sibasa, in the Vhembe District, Limpopo Province, in order to make arrangements to conduct interviews of these two abovementioned categories, as per the telephonic arrangement on 27. 01. 2014 @:10H: 30.

The intention of the researcher was to interview several participants simultaneously in a focus group due to the nature of their experience and perceptions with criminal justice system as well as due to the nature of their residence i.e. prison, which she did. The number of personal interviews is already spelt out under the *sampling* section of this dissertation.

Security measures were amongst the issues to be taken into consideration for these groups. The procedure was very user-friendly to the researcher and her assistant²¹⁸ as they managed to interview the expected number of participants.

The interaction with the convicted persons was more comfortable as this was a female ward than with regard to the accused persons which was a male prisoner.

✓ **The Convicted Persons: (Interviews: 04. 02. 2014, between 9H00-15H00), Matatshe Prison in the District of Vhembe.**

This category was consulted and the language impact on the welfare of this category unfolded. Electronic devices were not allowed in prison and the researcher therefore relied on field notes. Written interviews were the first to be administered and oral interviews were conducted afterwards on the same day. The time lapse between the two interviews was not noted.

²¹⁷ Fictitious name.

²¹⁸ Creswel, 1998 and Neuman, 1994, cited in Leedy, P.D, et al., “Practical Research: Planning and Design”, 9th Ed, (2010), p. 148.

The following interview schedule indicates the respondents who participated in oral interviews. Unfortunately, the researcher did not take note of time spent on each interviewee. Events were recorded in a notebook from the participants:

CONPI/1 (interview: 04. 02. 2014), Tshivenda speaker	Respondent on cultural concept “o ndzhena mabaini anga” and sentenced to life imprisonment for murder.
CONPI/2 (interview: 04. 02. 2014), a Xitsonga speaker	Respondent who said that she was sentenced to five (5) years imprisonment because the interpreter was very fast to an extent that she could not hear anything.
CONPI/3 (interview: 04. 02. 2014), Tshivenda speaker	Respondent who stated that she was told things by the presiding officer that she did not say during her evidence.
CONPI/4 (interview: 04. 02. 2014), Xitsonga speaker	Respondent who was speaking in Xitsonga and the police officer in Sepedi, but the statement was recorded in English, during warning statement. She was sentenced to six (6) years imprisonment because the presiding officer called her a liar, based on the contradictions between the warning statement and <i>viva-voce</i> evidence.
CONPI/5 (Interview: 04. 02. 2014), a Zimbabwean and a Tshivenda speaker	Respondent who did not follow the proceedings properly because of language usage and did not even know the offences she committed until sentencing.

CONPI/6 (Interview: 04. 02. 2014) is an old woman, a Tshivenda speaker,	Respondent who was arrested with other five (5) men, including the deceased's husband. She overheard the husband during the trial asking for forgiveness, but due to language barrier, she did not hear the reasons why the husband was asking for forgiveness. Was sentenced to life imprisonment.
CONPI/7 (Interview: 04. 02. 2014)	Respondent who was arrested for shoplifting and beaten by three security guards. The transmission of evidence from her to the magistrate was in English and could not hear anything that the interpreter was saying to and from the Magistrate by the interpreter. She was sentenced to fifteen (15) years imprisonment.
CONPI/8 (Interview: 04. 02. 2014) was a Tshivenda speaker	Respondent whose legal representative was talking to the magistrate and other court officials in English and therefore could not hear anything said about her case. She was sentenced to life imprisonment in 1994.
Volunteered Prison Warder (interview: 04. 02. 2014) was regarded as CONPI/9 for the purpose of findings	Respondent who afforded her experience in which the presiding officer, in a maintenance case ordered the respondent to pay one third of his salary every month. The interpreter misinterpreted the order to mean that the respondent was ordered to pay R20, 000, 00 of

	his salary. <i>This respondent will not be included in the quantification of the results in Chapter four.</i>
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The assistant researcher, Connie Nelufule at that time, informed the participants about the purpose of our visit which was to gather information for the purpose of the research project. The respondents CONPI were willing to tell their stories. The first respondent who volunteered to tell her story with regard to her encounter with the criminal justice system is “CONPI/1”. The interviews were conducted in Tshivenda, Xitsonga and Sepedi and reduced to writing in English.

The researcher was wary of the fact that the interviewees’ memories might not be accurate or that they might have distorted information, which is possible in any given circumstances.²¹⁹ The researcher could not also verify the *truthfulness* of this information, for the intention was to gather information on the respondents’ opinions, experiences, behaviour, feelings, beliefs and in some cases facts and in some instances, not necessarily facts but what interviewees thought might or should have happened. In a phenomenological research such as this one the researcher relied on the respondents’ information and drew inferences and conclusions because it is exploratory in nature.

The research assistant was able to maintain the purpose during the interviews whenever the respondents wanted to deviate from the main reason for our visit. Questions such as “*my appeal is not attended to*” and “*my lawyer is not facilitating my case expeditiously*”, arose on several occasions during interviews. The research assistant was able to contain the participants by consistently reminding them about the purpose of the conversation while

²¹⁹ See Leedy, P.D. & Ormrod, J.E., “Practical Research: Planning and Design”, 9th edn, 2010, p. 148. See also “Anger over Pistorius Trial Interpreters”, *Sowetanlive* (<http://www.sowetan.co.za/news/2014/03/14/anger-over-pistorius-trial-interpreters>, accessed 21 April 2014), in which the writer commented that witnesses had to give precise description of events over a year ago with poor vocabulary and fearsome cross-examination, though the latter process is not applicable to interviews for the purpose of this study

the researcher would be tempted to listen to such questions as already shown in this Chapter.

During interviews the researcher was listening attentively when the participants in all categories of participants narrated their everyday experiences or experience with the criminal justice system and produced good information that would be used in the study.

✓ **The Accused Persons**

The researcher interviewed two APPI's at Khayelitsha Magistrate's Court, Western Cape Province, Wynberg District, Walter Sisulu RD & Steve Biko RD, Cape Town, @ 26.09.2014

The interviewer did not note the time frame for each respondent. On the same date the researcher was observing²²⁰ proceedings in isiXhosa only, the interviews were conducted during court adjournments.

The semi-structured interviews with the convicted persons and the accused person categories included the following questions:

1. Which language was used in your entire trial?
2. Was the language used your mother-tongue?
3. Were you able to follow the proceedings?
4. Do you think the entire trial should be conducted in your mother-tongue where every party to your trial use your language and why?
5. Was there interpretation in your trial?
6. Do you think interpretation was perfect?

²²⁰ See Hoepfl, M.C., "Choosing Qualitative research: A Primer for Technology Education Researchers", *Journal of Technology Education*, vol. 9. No. 1, 1997, <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014), where she mentioned that interviews may be used in conjunction with observation or other techniques.

7. Should you be convicted, (and/or now that you are convicted, in the case of convicts, were you satisfied) will you be satisfied that the decision of the court is not affected by the use of language in any way?
8. What were the implications of interpretation on your other constitutional rights, e.g. the right to dignity?

Depending on whether the respondent was the convicted person or the accused person, the question was phrased to suit his or her position. For example, question seven (7) was phrased to suit either category. The reader is reminded that one rationale for conducting the pilot study was to develop questions. This was one of the questions that were rephrased: “*was the language used your mother-tongue or the language of your choice?*” to read thus: “*was the language used your mother-tongue?*” The reason for this alteration was that as the researcher collected information she started to narrow her research. For this reason, the second leg of this question would not have accomplished the objectives of this study.

❖ **Category of Court Officials: Magistrates, Prosecutors and Lawyers**

Semi-structured interviews for this category were as follows:

1. Which language is used in this Magistrate’s Court?
2. Which language is predominantly spoken in this District?
3. Why are you not using the predominantly spoken language of the District?
4. What is your opinion on the right to a fair hearing? Do you think the use of English accords the accused the right to a fair trial?
5. Do you think interpretation is accurate?
6. If not, does it afford the accused the right to a fair trial?
7. What are the challenges of using indigenous languages as languages of court record, if any?
8. Are you aware of the constitutional provisions on the use of official languages?
9. Are you aware of the existence of the Use of Official Languages Act 12 of 2012?

The following interview schedule indicates times for appointments as well as the duration of successful interviews for each respondent. The first eight respondents were interviewed during the pilot study and their times of interviews were not noted but they were interviewed at different times:

Respondent	Status	Magistrate's Court	Technique	Date and Time
CTOPI/1	Magistrate	Mitchel's Magistrate's Court, Wynberg District, Western Cape Province, 1 st Avenue, East Ridge, Mitchel's Plain. Tel: 021 370 4200	Interview: Personal	25. 09. 2013
CTOPI/2	Control Prosecutor	Mitchel's Magistrate's Court, Western Cape Province, 1 st Avenue, East Ridge, Mitchell's Plain. Tel: 021 370 4200	Interview: Personal	25. 09. 2013
CTOPI/3	Prosecutor	Mitchel's Magistrate's Court, Western Cape Province, 1 st Avenue, East Ridge, Mitchell's	Interview: Personal	25. 09.2013

		Plain. Tel: 021 370 4200		
CTOPI/4	Court Manager	Mitchel's Magistrate's Court, Western Cape Province, 1 st Avenue, East Ridge, Mitchel's Plain. Tel: 021 370 4200	Interview: Personal	25. 09.2013
CTOPI/5	Magistrate	Mitchel's Magistrate's Court, Western Cape Province, 1 st Avenue, East Ridge, Mitchell's Plain. Tel: 021 370 4200	Interview: Personal	25. 09.2013
CTOPI/6	Prosecutor	Mitchel's Magistrate's Court, Western Cape Province, 1 st Avenue, East Ridge, Mitchel's Plain. Tel: 021 370 4200	Interview: Personal	25. 09.2013
CTOPI/7	Senior Prosecutor	Khayelitsha Magistrate's Court, Western Cape Province, Wynberg District, Walter Sisulu RD & Steve Biko RD,	Interview: Personal	26. 09.2013

		Cape Town, 021 360 1400		
CTOPI/8	Defence attorney,	Khayelitsha Magistrate's Court, Western Cape Province, Wynberg District, Walter Sisulu & Steve Biko RD, Cape Town, 021 360 1400	Interview: Personal	26. 09.2013
CTOPI/9	Prosecutor	Sekhukhune Magistrate's Court, Limpopo Province, Sekhukhune District, 013 260 1001	Interview: Teleph:015 962 8248	25. 11. 2013 @ 13:41
CTOPI/10	Prosecutor	Sekhukhune Magistrate's Court, Limpopo Province, Sekhukhune District, 013 260 1001	Interviews: Telephone:0 15 962 8248	25. 11. 2013 @ 13:44)
CTOPI/11	Chief Magistrate	Msinga Magistrate's Court, KwaZulu-Natal Province, Umzinyathi District, 033 493 0001	Interview: Telephone 015 962 8248	26.02.2014 @10:30
CTOPI/12	Magistrate	Malamulele Magistrate's Court, Limpopo Province, Vhembe District, CRN Police station and	Interviews: Telephone 015 962 8248	11.03.2014 @12:44; 12.03.2014 @15:42

		Hospital Street, 015 851 0022		
CTOPI/13	Prosecutor	Malamulele Magistrate's Court, Limpopo Province, Vhembe District, CRN Police station and Hospital Street, 015 851 0022	Interviews: Telephone 015 962 8248	11.03.2014 @12:47; 12.03.2014 @15:43
CTOPI/14	Magistrate	Msinga Magistrate's Court, KwaZulu-Natal Province, Umzinyathi District, 033 493 0001	Interviews: Telephone 015 962 8248	20. 03. 2014 @14: 37; 20. 03. 2014 @15: 37; 21. 03. 2014 @11:04
CTOPI/15	Control Prosecutor	Dzanani Magistrate' Court, Limpopo Province, Vhembe District, Makhado Location, Louis Trichardt, 015 970 4005	Interview: Telephone 015 962 8248	26.03.2014 @12:50
CTOPI/16 ²²¹	Court manager	Thohoyandou Magistrate's court, Limpopo province,	Interview: personal	22. 04. 2014 @10:30-11:20

²²¹ The interviewee was willing to offer information and be recorded but unfortunately, the tape recorder was not well operated and the researcher lost the opportunity of having this conversation on video recorder. Hoepfl, M.C, "Choosing Qualitative research: A Primer for Technology Education Researchers", *Journal of Technology Education*, vol. 9. No. 1, 1997, <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014) said the audio tapes are not recommended by other authors and one of the reason advanced was their failure during the interview or warding off informants.

		Vhembe District,952 Thohoyandou Complex, 015 962 5550		
CTOPI/17	Chief Magistrate	Thohoyandou Magistrate's court, Limpopo province, Vhembe District, 952 Thohoyandou Complex, 015 962 5550	Interview: personal	22.04.2014 @ 11:30 – 12:00
CTOPI/18	Magistrate	Tivani Magoro Magistrate's Court, Hlanganani satellite Magistrate's Court, Limpopo Province, Vhembe District, Tivani Village.	Interview: Telephone 015 962 8248 Interview: Personal: Audio taped	20.10.2014 @11:26; 20.10.2014 @15:34 23.10.2014 @ 09:50-10:25
CTOPI/19	Attorney	Mukhodobwane Attorneys, 015 962 0384	Interview: Telephone 015 962 8248	18.11.2015 @13:12 18.11.2015 @14:47
CTOPI/20	Attorney	Nengwekhulu Attorneys 076 038 8094	Interview: Telephone 015 962 8248	18.11. 2015 @13:15

CTOPI/21	Attorney	Baloyi Attorneys, Dr Muremele Offices, Opposite Mvusuluso Taxi rank, 060 806 4302	Interview: Telephone 015 962 8248	18.11.2015 @14:57
CTOPI/22	Advocate of the High Court of South Africa	High Court Bldg. Mphephu Street, Thohoyandou,1950.01 5 960 9900	Interview: Telephone,0 79 674 2935	04.02.2016 @12Hh:00
CTOPI/23	Attorney	Francis Mvundlela Attorneys, Limdev, room no. 87?93, Thohoyandou, 0950,	Interview: Personal	02.02.2016 @16H:35- 17H-08

Their comments on the indigenous languages in court was crucial for the purpose of this phenomenon. For this category, the researcher attempted to gather as much information as possible within limited time because interviews were done during the respondents' working hours. In some instances, the respondents were relaxed. Such examples happened at Mitchel's Plain Magistrate's Court, Western Cape Province, where one respondent, a prosecutor created time for the researcher. Also, the Chief Magistrate of the same court was very helpful in providing information on the phenomenon. Similarly, at Thohoyandou Magistrate's court, the researcher was received by the Chief Magistrate who created time for the interviewer and the interview subsisted for thirty (30) minutes. A magistrate at the Tivani Magoro Magistrate's court was comfortable with the interview being audio taped. In most instances the researcher was under pressure when conducting her interviews because she thought she was taking the officers' time even in instances where she had prior arrangements with the informants.

The most problematic situation of gathering the data in all Magistrate Courts visited is that Magistrates, Prosecutors and Interpreters are controlled under different departments. It was maintained that qualitative research places a premium on the strength of the researcher rather than

on standardization.²²² For the researcher to have interviewed a magistrate officer she would have consulted and sought authorization from the Chief Magistrate. When the researcher wanted to interview a prosecutor she would approach the control prosecutor who would speak to prosecutors under his/her supervision. Similarly, interpreters were authorised to give information under the control of a Principal Interpreter. The most difficult category to get hold of was lawyers. At the Khayelitsha Magistrate's Court, the researcher had to use the opportunity to interview one during a brief court adjournment.

Interviews by telephone were jotted down on the note book by the researcher. In most cases the researcher struggled to secure time for such interviews as indicated in some of the interviews such as CTOPI/9.

Some respondents were honest with the researcher on their time schedule either that they didn't have time, or that they would be available at certain times, etcetera, while others would agree to a particular time arrangement but would not avail themselves due to unforeseen developments in their professional lives.

Interviews for each Court Official were recorded as such, either in the filed notebook or audio equipment.

❖ **Category of court interpreters**

Court Interpreters represented the category of people who come across language issues in their workplace on a daily basis. Their vast experiences and perceptions about the phenomenon is crucial to answer the research question.

Semi-unstructured interviews for this category included the following questions:

1. Which language is used in your court?

²²² Eisner, E.W, 1991, cited in Hoepfl, M.C, "Choosing Qualitative research: A Primer for Technology Education Researchers", *Journal of Technology Education*, vol. 9. no. 1, 1997, <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014).

2. What is your role as interpreter?
3. Do you view interpretation as accurate?
4. What is your view on the use of indigenous languages as languages of court record?
5. Will you support the establishment of indigenous language courts?
6. What is the role of culture in relation to language use in criminal court proceedings?

The interview schedule for this group of participants is outlined in the table below. Similar to the court officials, in the first two respondents' time for their interview was not noted:

Respondent	Magistrate Court	Reach technique	Date and time
CIPI/1	Mitchel's Magistrate's Court, Western Cape Province. 1 st Avenue, East Ridge, Mitchel's n. Tel: 021 370 4200	Interview: Personal	25. 09. 2014
CIPI/2	Khayelitsha Magistrate's Court, Western Cape Province, Wynberg District, Walter Sisulu RD & Steve Biko RD, Cape Town, 021 360 1400	Interview: Personal	26. 09. 2013
CIPI/3	Thohoyandou Magistrate's Court, Limpopo Province, Vhembe District, 952 Thohoyandou	Interview: Personal and audio tape	22. 04. 2014 @ 12H:11-12:30

	Complex, 015 962 5550		
CIPI/4	Tivani Magoro Magistrate Court, Limpopo Province, Vhembe District, Tivani Village.	Interview: Personal and audio taped	23.10.2014 @12H:20-12H:35

This category was mostly comfortable to give information. CIPI/3 was reluctant to be placed on audio tape and had to seek second authorisation from her supervisor as to whether she should be audio taped. The supervisor approved and she was audio taped. She was already allowed to give information before the tape was introduced as a method of note taking. Hence some authors do not recommend this device because they feel that it creates barriers to access information.²²³

This respondent's information was very crucial to the phenomenon in that she related much on "cultural concepts" and also how the witness who was violated would behave during testimony.

The most crucial part of her interview is when she narrated a story of a woman older than court officials. This incident is noted and elaborated upon under the findings chapter.

²²³ See Lincoln, Y.S, & Guba, E.G, 1985, cited in Hoepfl, M.C, "Choosing Qualitative research: A Primer for Technology Education Researchers", *Journal of Technology Education*, vol. 9. no. 1,1997, on this aspect, <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014). The experience of the researcher is that she would share the same sentiments as these authors.

❖ **Directors in the Department of Justice and Constitutional Development**

The researcher conducted almost the same interviews as those of the Court Officials with the Department of Justice and Constitutional Development Directors whose sampling was proximate to the research question.

Other questions were mainly meant for either of the respondent. For example, question eight on the list was directed to DJ & COND/2.

The unstructured interview questions were as follows:

1. What is your portfolio in the Department?
2. What is your own experience of language use in court and interpretation?
3. Do you regard interpretation as perfect?
4. Due to these problems created by interpretation, don't you think the Department should introduce the use of indigenous languages in entire trial for the purpose of eliminating these misinterpretation?
5. At Khayelitsha, a court conducts proceedings in isiXhosa only. What is your view on this?
6. Do you find the use of isiXhosa in the entire trial beneficial to the accused person?
7. How did you manage to get it practical to use isiXhosa only in court?
8. Do you have any arrangements in place to extend the court in isiXhosa at Khayelitsha to two or three courts because at the moment there is only one in fourteen courts?
9. What is the difference between courts in Limpopo Province with this court because they are regulated by the same policy?
10. Is there a policy on the use of English and Afrikaans only in criminal court proceedings?
11. Do we anticipate a solution to interpretation problem in the near future taking into account the fact that these problems are perpetuating as evident in the recent case of Pistorius?

12. Are you aware of the Use of Official Languages Act 12 of 2012?
13. What do you think it is its implications on the use of English only in criminal court proceedings?
14. Do you have any policy in place on the use of indigenous languages in court for the purpose of the right to a fair trial in terms of the Constitution?
15. Are you aware of other constitutional right that might be affected by the use of language?

Three respondents were interviewed and hereunder are their interview schedules:

Respondent :DJ&COND/1
Designation : Provincial Language Manager for Court Services
Address : Limpopo Province including Vhembe District, Polokwane
 DJ&COND Head Office, 92 Bok Street, Polokwane.

Research Technique : Oral Interview: Personal interaction

Date and Time : 13. 02. 2014 @ 10:30-11:30

Respondent : DJ&COND/2
Designation : Director of regional courts and responsible for languages
Address : Western Cape DJ&COND Head Office, 90 Street
 Parliamentary, Cape Town, Western Cape Province,

Research Technique : Telephonic conversation: Telephone number 015 962
 8248

Date and Time : 20. 03. 2014 @ 15:22 - 16:02

Respondent : DJ&COND/3
Designation : National Language Manager for Court Services
Place : Pretoria, Tel 012 357 8096

Research technique :Telephonic interview: Office telephone number
 015 962 8248

Date and Time :19.11.2015 @ 15:46. There was list of locating calls before
 the researcher could speak to this respondent.

The first respondent was very fast and accomplished the expectations of this study. The researcher was taking notes with her note book and had to listen only at some point so that she could not miss information. Such information was evaluated as soon as the conversation was completed. This informant was regarded by the researcher as the key participant because he is one of the people who are responsible for the policy framework in the whole of Limpopo Province for transferability into the Vhembe district.

The second respondent is responsible for court language in court in the entire Province. What was interesting about this respondent was that he was available to offer further information at the end of the interview, should the need arise in future. Like the first respondent, he was regarded by the researcher as the key participant due to his vast experience on language issues in court. This tended to enable him to offer his own perceptions on these issues.

These two participants were asked almost similar questions as those of the other categories save to say that the information gathered from these respondents was extended to policy development on the implementation of indigenous languages as predominantly spoken mother-tongue of most accused persons in a particular area as well as how language is managed in court including the Vhembe District.

Respondent DJ&COND/1 was interviewed again in terms of the schedule on “Other Participants” for clarification on other related issues to the statement of the problem. Note must be taken to the fact that DJ&COND/3 was not asked the same questions as the first two respondents. The researcher interviewed this respondent with regard to only relevant issues concerning this research, with: (a). whether the Department of Justice had a policy at national level on language as required by section 4 (1) of the Use of Official languages Act 12 of 2012; (b). inquiry on whether the Department had adhered to the due date of May 02, 2015 for language policy in terms of section 4 (1) of Act 12 of 2012; and (c). whether there is legislation in place on the right to a fair trial in relation to language usage as

promised by the then Minister of Justice and Constitutional Development, Envy Surty, who vowed to pass several legislations including the right to a fair trial.²²⁴

The main aim of these questions was to determine the efforts taken by the department on language issues as required by this Act at national government level for transmission to provincial and subsequently municipal levels.

❖ **University of Cape Town Centre for African Languages Diversity**

This Centre was visited by the researcher during the pilot study and one respondent officer of the Center was interviewed as: Respondent secretary, personal interview, 30. 10. 2013: @ 11H15-12H05. Respondent Head of the Centre: University of Cape Town Centre for African Languages, personal communication: 17.04. 2014 @15:54, University of Cape Town Upper Campus, Beattie B23, Rondebosch, Cape Town.

The first respondent was in the office on the day of the visit and informed the researcher that there are isiXhosa courses for the purpose of court language that are offered at the University of Cape Town, but referred the researcher to the Head of the Centre, the second respondent, who was not available that day for further information.

The development of these courses would be interpreted to make recommendations to the District of Vhembe to propose such courses at their local University for the purpose of court proceedings.

❖ **The Pan South African Language Board**

The Pan South African Language Board was also very helpful in achieving the goal of this study. One (1) official from Pan South African Language Board at the, Limpopo Province, was as well interviewed as follows: PanSALB official, University of Venda, University Street, Thohoyandou, 11.03. 2014 @ 11H00-11:45.

²²⁴ Ndawonde, "Government Continue Bringing Justice Facilities Closer to the Poor", DOJ&CD: Newsroom, <http://www.justice.gov.za>, available from *Cape Argus*, March 23, 2009, (accessed 15 March 2011).

Information gathered was, to a very large extent, instrumental to the solutions identified in this study, particularly the development of “Multilingual Legal Terminology Booklet” for the purpose of implementing indigenous languages in criminal courts by this board.

❖ **Other Participants**

Designation of Participant	Suffix	Place of work	Date and time of interaction: 015 962 8248	Purpose of interaction
Court Manager	CRTM/OP	Malamulele Magistrate’s Court, Limpopo Province, Vhembe District, CRN Police station and Hospital Street, Tel: 015 851 0022	09.11.2015 @ 14:59	To find out whether cases heard in indigenous languages have started as per reinstatement of Pilot Project for the purpose of Observation for this study
Clerk of the Court	CofC/1	Mutale Magistrate’s Court, Vhembe District. Tshilamba Location	09.10.2014 @11:51; @11:59	1. Inquiry on cases heard in indigenous as per reinstated Pilot

		015 967 6209 <hr/> 071 301 6209 0722023395	20.10.2014 @15:00;@16:02; & 20.10.2014 @14:00:Site visit 12.11.2015 @14:10 19.11.2015 @14:35; 14:18;15:18	Project/2014: court roll on these cases 2. Court records for cases heard in indigenous languages as per Pilot Project/2009.
Hlanganani Chief Magistrate's Court	CTOPI/OP	Hlanganani Magistrate's Court, Vhembe District. Vhembe District, Next to Water Vaal Police Station , 015 873 1529 Tel:015 873 0061 Tel: 015 873 1529	<u>20.10.2014 @15:50</u> 12.11.2015 @15:55 24.11.2015 @ 14:53	1. Inquiry about questionnaires distributed in terms of questionnaire schedule of this study. 2. Pilot Project court records heard in indigenous languages in 2009.
Clerk of the Court	CofC/2	Dzanani Magistrate's Court, Vhembe District, Tel:015970 4005	09.10.2014 @11:50 23.11.2015 @15:31 24.11.2015 @01:39	Finding out court roll on indigenous languages, Tshivenda.

		Email Makhado Location, Louis Trichardt, 015 970 4005		
Magistrate	CTOPI/18	Tivani Magoro Magistrate's Court, Vhembe District, Tivani Village.. 082 579 3527	12.11.2015 @14:26	Inquiry about reinstatement of cases heard in indigenous languages in terms of Pilot Project/2014.
Provincial Language Manager: Court Services, Limpopo	DJ&COND/1	Department of Justice and Constitutional Development, Limpopo Province, Polokwane	12.11.2015 @15:11 for locating & @15:45 for interview	Finding out whether there is a language policy in terms of section 4 (1) of the Act 12 of 2012, as per due date of the May 02,2015
Official at the Limpopo Sports, Arts and Culture	OSAC/1	Department of Sports, Arts and Culture, Limpopo, Polokwane, 015 284 4320	18.11.2015 @15:20	Inquiry about Vhembe District language policy in terms of Act 12 of 2012

Official at Vhembe District	OVD	Vhembe District, Thohoyandou, 015 962 4625	18.11.2015 @15:30	Inquiry on language policy in place for Vhembe district in terms of Act 12 of 2012 & section 6 (3) (b) of the Constitution.
Official in the office of Chief Justice	O CJ	Office of the Chief Justice, Johannesburg Tel: 011 838 2010	Email communication. 19:11.2015 @15:09; 14:57 Email response appended <i>Locating calls:</i> 012 406 4719 12.11.2015 @15:27 021 467 1700 12.11.2015 @12:53	On the number of black judges for purposes of appeals and reviews
Official in the Department of Sport, Arts and Culture	OSAC/2	Department of Sports, Arts and Culture, Pretoria, Tel:012 441 3255	19.11.2015 @14:37; 15:00	Determining whether the due date for language policies for national

				departments was extended from May 02, 2015 to another date
Phalaphala FM	PhalaFM	Phalaphala FM, Polokwane, Tel: 015 297 1709 Tel: 015 290 0260 Thohoyandou, 015 962 5102	19.11.2015 @15:54 19.11.2015 @15:57	Obtaining a speech at 16:20 on DJ&COND/1 on indigenous languages in court as at
Court Interpreter	CI/1/OP	Thohoyandou Magistrate's Court, Vhembe District, 952 Thohoyandou Complex, 015 962 5550	23.11.2015 @13:12;14:53; 14:59	Inquiry about the functionality of Languge units
Court Interpreter	CI/2/OP	Malamulele Magistrate's Court; Vhembe District.	23.11.2015 @15:08	Finding out whether language units are established

Finally, the researcher managed to obtain as much information as possible to address the research questions. She attempted to record information as quick as possible in order not to miss out,

particularly where the respondents were reluctant to give information or when they did not have enough time.

3.3.1.3 Questionnaires

The information gathered under this research instrument was as a result of questions imposed in written form: questionnaires. The design of the questions was also a guiding principle and open-ended questions were asked to encourage the participants to provide accurate, unbiased and complete information. The researcher was also guided by the statement of the problem and sound analysis and interpretation of the data. She was able to organise the answers though it was not easy in each question. The main aim of the questionnaires was to meet the research objectives though at the initial stage of the research important aspects were omitted, but were included as a result of the pilot study.

The researcher did sample a large number of Magistrates' Courts; the Accused Persons; the Convicted persons and the interpreters with the aim of generalizing their perceptions.

In total, two hundred and thirteen (213) questionnaires were passed out to the participants in their respective categories, except in the last three categories²²⁵ during autumn of 2013; autumn, winter and spring 2014; summer and autumn 2015.

The following table represents the number of questionnaires passed out to each category and those returned.

²²⁵ "Marketing research and Information system" <http://www.fao.org/docrep/w3241e05.htm>, (accessed 12 February 2015), the author indicated that if the data to be collected is qualitative or is not to be statistically evaluated, it may be that no formal questionnaire is needed. The last three groups where questionnaires were not administered include Directors in the Department of Justice and Constitutional Development, PanSALB and University of Cape Town Centre for African Languages.

Category	No. of questionnaires passed out	No. of questionnaires returned
The Accused person	Fifty (51)	Fifty (51)
Convicted Persons	Forty (40)	Forty (40)
Court Officials	Forty two (42) for Magistrates Forty two (42) for Prosecutors, fifteen (15) for lawyers. One fax to Sekhukhune One fax to Msinga	Thirty (30)
Court interpreters	Twenty three (23)	Twelve (12)
		Total : 133

The pilot study tested the research process e.g. the different ways of distributing and collecting the questionnaires. In the pilot study the researcher identified participants by approaching their superiors. During this procedure the researcher approached informants and distributed questionnaires any time during working hours. This turned to cause inconvenience to participants, especially categories of Court Officials and interpreters. In the main study the researcher approached participants in the categories of Court Officials and Court Interpreters in the afternoons after having realised that they were more comfortable during those hours as a result of the pilot study. In some cases, officials would indicate their preferences on time to be contacted and the researcher would abide by their time. The researcher was forced to deviate from this method in some instances where it was convenient for her to cover a number of areas, particularly those that are close to each other and distributed them in the morning.

In other courts such as Tivani Magoro Hlanganani Magistrate's Court, Sate Lite Court and Khayelitsha Magistrate's court questionnaires were collected the same day because of the distance and time constraints. The researcher would spend the whole day at these Magisterial Courts to give

the respondents more time to fill out the questionnaires and collected them in the afternoon. In the intervals, the researcher would be making observations in court and orally interviewing the available court officials and interpreters.

Identifying logistical problems which might occur during the main study using the proposed methods was one of the feasibility aspects of the pilot study.²²⁶ The researcher did not encounter problems of identifying participants during this process in all the Magisterial Districts. The only experience the researcher had during this process is that some of the questionnaires sent either personally or through fax such as at the Sekhukhune Magistrate's Court, were never filled in and returned despite the researcher's efforts to receive them back either through the researcher's visit to the site for collection or telephone reminders. Several calls were made to CTOPI/9 in an attempt to persuade the participant to return the questionnaires but to no avail between the 21. 02. 2014 and 11. 03.2014.

Another example is when the researcher submitted questionnaires on the 16 October 2014 @ 08:30 at the Dzanani, Makhado and Hlanganani Magistrate's Courts, and kept reminding the respondents about filling them telephonically. When the research assistant subsequently visited the Dzanani Magistrate's Court to collect them, it was found that they were not filled in yet. Collections were made at a later date. The response from the Makhado Magistrate office's interpreters was good while with other officials such as magistrates and prosecutors it was very minimal. Response from Hlanganani Magistrate's court was zero hence the researcher could not leave the field until the last report. The researcher went back to the field towards the end of 2015 and extra efforts were made to receive responses from this court. Schedule on data collection during autumn 2015 is illustrated earlier in this chapter under "other participants" where such information is captured.

In the Western Cape the researcher and her assistant first visited Mitchel's Plain Magistrate's Court and distributed questionnaires there; that was on the 25 September 2013. Some of the respondents could not fill them on the same day and the researcher was compelled to go back the following

²²⁶ See Van Teijlingen, E.R, & Hundley, V, "The Importance of Pilot Studies", *Social research Update, University of Surrey*, Issue 35, Winter, 2001, (accessed 21 October 2014).

day: 26th September 2013 on her way back from Khayelitsha Magistrate Court and that was approximately at 16H00. She collected few completed questionnaires. At Khayelitsha the researcher spent the whole morning of the 26th September 2013 and half afternoon to allow the respondents enough time to fill in the questionnaires. Despite this strategy, it was still not possible to get all the questionnaires filled out. At Thohoyandou Magistrate's Court the researcher left the questionnaires for two days and collected them on the third day. The researcher recorded the time frame for completion of questionnaires by participants and found that they wanted more time to complete the questionnaires while the completion of the questionnaire itself would take 20-30 minutes. In the main study, the researcher would leave the questionnaire in some instances for a week under the care of an official she knew and collected them when they were ready.

Telephonic and personal interviews were the best methods that yielded good results better than questionnaires in this study. This was due mainly to the instant response to questions.

In the category of accused persons, prison authorities were consulted and participants were identified randomly. Every accused person would be approached for an interview. The category of the convicted persons was identified through the same instruments i.e. telephone calls to the authorities and personal visit to the site for permission to interview them.

Questionnaires that were passed to participants were as follows:²²⁷

Category of participants	Magistrate's court and area of interview	Date and time for appointment	Date Distributed (site visits)	Follow up date and time	Method of communication
Court Officials, i.e. magistrates and prosecutors, Court Interpreters	Mitchel's Plain Magistrate's Court, Wynberg District, Western Cape Province, 1 st Avenue, East Ridge, Mitchel's Plain. Tel: 021 370 4200	N/A	25.09.2013 @9:00	26.09.2013 @16:00 & collection	Site visit collection
Court Officials, i.e. magistrates and prosecutors, Court Interpreters	Khayelitsha Magistrate's Court, Western Cape Province, Wynberg District, Walter Sisulu RD & Steve Biko RD, Cape Town, 021 360 1400	N/A	26.09.2013 @09:00-15:h00 Collected same day	N/A	Site visit collection

²²⁷ See a copy of field note book where the researcher recorded telephone interviews and arrangements despite the schedule on this aspect.

Court Officials, i.e. magistrates and prosecutors	Sekhukhune and Msinga Magistrates' Court	See schedule for CTOP/9 in this Chapter	See personal communication above	See COTPI/9 schedule for Sekhukhune.	Telephone But no returns
Court Officials, i.e. magistrates and prosecutors, Court Interpreters	Thohoyandou Magistrate's Court, Thohoyandou, Vhembe District, 952 Thohoyandou Complex, 015 962 5550	N/A	22.04.2014 @ 12:10	25.04.2014 @08:30 Collected	Site visit Collection
Court Officials, i.e. magistrates and prosecutors, Court Interpreters	Mutale, Mutale Village, Vhembe District Tshilamba Location 015 967 6209 &0177023395	09/10/2014 @ 11:51 @ 11:57 Telephone: 015 962 8248	22.10.2014 @14H00	20.10.2014 @15:00 @16:02, 12.11.2015 @14:10, 19.11.2015 @14:35, @15:18	Site visit & Telephone 015 962 8248 collections
Court Officials, i.e. magistrates and prosecutors, Court Interpreters	Dzanani, Vhembe District Makhado Location, Louis Trichardt, 015 970 4005	09/10/2014 @ 11:50	16.10.2014 @8:15	Not noted _____ 23.11.2015. @15:31,	Site visit and telephone 015 962 8248 Collection

				@14:02, @14:54,	
Court Officials, i.e. magistrates and prosecutors, Court interpreters	Malamulele, Malamulele Township, Vhembe District, CRN Police station and Hospital Street, 015 851 0022	09/10/2014 @ 11:56 @12:-02	14.10.2014 @14:45	21/10/2014 Telephone: 015 962 8248 @15:55 @16:05	Telephone 015 962 8248 Site visit 19.12.2014 @ 14:10 & Collection
Court Officials, i.e. magistrates and prosecutors, Court interpreters	Makhado, Makhado Town, Vhembe District, 103 Munnik street, Makhado.	N/A	16.10.2014 @ 13:30	20/10/2014 @14:52 @15:15 @15:37	Telephone :015 962 8248 Site visit 21.10.2014 & collection
Court Officials, i.e. magistrates and prosecutors, Court Interpreters	Hlanganani, Vhembe District, Next to Water Vaal Police Station , 015 873 1529	N/A	15/10/2014 @`15H00	20/10/2014 @15:50 05/11/2015 @15:55	Telephone 015 962 8248 No returns
Court Officials, i.e. magistrates and prosecutors, Court	Tivani, at Tivani Village, Vhembe District Tivani Village.	20.10.2014 @15:34 21/10/2014 @11:26 Telephone	23/10/2014 @ 8:30	Collected same day of site visit	Site visit collections

Interpreters					
The Accused Persons	Matatshe, Male Prison, Sibasa, Limpopo Province, Vhembe District	27/01/2014 @10:30	05.02.2014 @ 09:30-12H00	Collected same day of site visit	Site visit collections
The Convicted Persons	Matatshe Prison, Male Prison, Sibasa, Limpopo Province, Vhembe District	27/01/2014 @10:30	04/02/2014 @ 09H-15H00	Collected same day of site visit	Site visit collections
Court officials, Lawyers, ten (10), four (4) returned	In their respective chambers, Thohoyandou	Different times. E.g. Attorney/1, 072 974 8400 18.11.2015 @13:08, 14:48,	19.11.2015	Collected same day	Site visit collations
		Attorney /2, 015 962 5446 18.11.2015 @14:52	20.11. 2015	Collected same day	Site visit collections

Certain questions did not receive adequate answers but due to their vitality for the purpose of answering certain research questions they could not be ostracized during the analysis phase. Ambiguous questions were rephrased after the pilot study for the purpose of the main project while some were discarded as unnecessary. The revised part three questionnaire is evident to this end. Some answers to the questionnaires were clear enough to answer the research questions and were aptitude to the interpretation of the information required while others were vague and doggy.

Others were not answered. Thorough consideration was made to such answers to give them their efficacy. This is clearly postulated in Chapter four on quantitative research findings.

Gender was not a criterion for identification of participants. The researcher found herself with participants who represented both genders as she proceeded with her study; a factor that worked well in a democratic dispensation.

In categories of “convicted persons” and “accused persons” at Matatshe Prison, the researcher did not insert the time frame for the filling of the questioners because it was in a focus group. With the category of “convicted persons” (female participants) the researcher spent almost the whole day. With regard to the category “the Accused Person” (male participants) the researcher spent about one hour for each group as participants in this category were released in groups of $25 \times 2 = 50 + 1 = 51$. Added together the researcher spent approximately two (2) hours for this group of the respondents.

When interviews were conducted for this category the researcher was not comfortable despite the fact that security was accorded to her and therefore could not conduct personal interviews on this group though there was oral communication on language issues with them.

Where clarification was sought by the respondents with regard to a particular question, the researcher was available to respond. The researcher gave them freedom to interact with the questionnaires without her interference so that she could obtain as much reliable information as possible. In the category of the convicted persons, respondents participated in oral interviews as well as in the written interviews through questionnaires. Respondents were given ball points to fill in the questionnaires in their dining hall.

With regard to other categories who participated in the project the researcher relied on the categories’ nature of work and did not provide them with pens and writing material.

The researcher noted the advantages and disadvantages of using the questionnaire method in qualitative research. One of the advantages is that they saved the researcher's time and funds to travel. Disadvantages included restriction of the discussion and prevention of a full exploration of views and non-return of the questionnaires.²²⁸

Over and above these factors, questionnaires assisted the researcher to come to the general view of the phenomenon under investigation through quantification of the results during interpretation of the data.

3.3.1.4 Official records and documents/documentary evidence

Official records and documents were another source of information. The researcher made every effort to find first-hand accounts and artefacts of an event first. The legal documents were used to establish a coherence that gave meaning to the event.²²⁹ During the court visit for questionnaires and oral interviews the researcher requested court records for cases heard in indigenous languages. The researcher combined these processes to save time and funds for travelling. It took the researcher the whole day to accomplish these processes in some

visits. In other instances, the researcher was compelled to revisit because she could not finalise everything in a day.

Similarly, with regard to obtaining court records on previous cases, logistical problems which might occur during the main study using the proposed methods were identified in the pilot study. In other courts, authorization was required and a letter to that effect was written while in other courts this was not a problem.²³⁰

²²⁸ See Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p.198. It has been observed that poor return of questionnaires is common in certain circumstances and this is such an example.

²²⁹ Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p.165.

²³⁰ See Tivani Magoro Magistrate's Court documentary evidence. This case was also recorded in Chapter Two of this study.

The researcher managed to obtain a court record where the matter was heard in Xitsonga in the entire trial as indicated in Chapter two of this study. The researcher perused court records to investigate how language was used. She took notes on aspects proximate to her research questions.

3.3.1.5 Camera

The nature of the court proceedings does not allow photographs to be taken during court proceedings.

While other researchers prefer audio recordings and cameras to collect information, these devices were not allowed to collect the data and this was confirmed in “Televised court proceedings”, E.CNA, @ 12:52, 05 November 2014 where it was alluded that only the *Pistorius* case and other selected cases were allowed to be televised. These were the only court proceedings in South Africa in which cameras and audio tapes were officially and legally allowed. For the first time in South Africa, parts of a trial were being televised live. Small CCTV-style camera could be seen in corners of the courtroom.²³¹

To augment this position, the researcher and her research assistant took photographs at the Mitchel’s Plain Magistrate’s Court on the [25.09.2013] as they were leaving the court after finishing interviews and at the Khayelitsah Magistrate’ Court on the [26.09.2013] to validate their data but could not photograph the proceedings due to these reasons.

²³¹ Smith, D, “Oscar Pistorius: a runaway interpreter, then the trial of the century begins”, available from *The Guardian*, Monday 3 2012, 21.37 GMT, <http://www.theguardian.com/world/2014/mar/03/oscar-pistorius.reeva.steenkamp>, (accessed 21 April 2014). See *Multichoice (Proprietary) Limited and others v The National Prosecuting Authority and Oscar Pistorius (case no. 10193.2014) In re: The State v Oscar Pistorius (case no. 13/25513) and in RE: Media 24 and others and Director pf Public Prosecution North Gauteng, Oscar Pistorius (case no. 10378/14)*

3.3.1.6. Audio tapes and transcription

Some authors do not recommend this technique of data collection because of its disadvantages, some of which were stated earlier in this study. For example, they say it is intrusive as explained earlier. This was confirmed by the researcher during oral interviews whenever using this method. However, some are of the view that they are indispensable²³² for the purposes of authenticity of information. Similarly, with cameras, though criminal cases are heard in an open court, they cannot be recorded. In all South African Prisons, such electronic devices are not allowed at all.

The researcher had in her possession electronic devices for data collection where it was viable to do so. The assistant researcher was very resourceful in this regard as he was timeously available to assist the researcher on recording while the researcher would be listening and taking notes. The cellphone was the most available electronic device.

The researcher captured information through audiotape and transcribed the interviews for the purpose of this study.

Though in many instances the respondents were not comfortable with audio tapes, the researcher managed to audio tape few respondents.

At all material times, the researcher was accompanied by a research assistant.

3.3.1.7. Television

Television was another source of information. The researcher was privy of developments on language issues in South Africa and managed to find information through screens. A recent case

²³² Lincoln, Y.S. & Guba, E.G, 1985, cited in Hoepfl, M.C, “Choosing Qualitative research: A Primer for Technology Education Researchers”, *Journal of Technology Education*, vol. 9. no. 1,1997, on this aspect, <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014). Hoepfl considers it a matter of preference by the researcher.

of *S v Pistorius*²³³ was a source of information to answer the research problem. In this case the judge asked a witness as to whether the latter wanted to give evidence in English or Afrikaans (*ETV, 26 February 2014 around 10H00*). There was another scene of the trial [televised, but the researcher did not note the time] where the state counsel spoke directly with the accused during cross- examination. The researcher found this information relevant and recommendable for this study.

3.3.1.8. Observations

In this study the observational data was also collected to support other mentioned methods of data collection. The researcher observed the proceedings entirely conducted in the language of the accused as an outsider. It was meant for the purpose of describing the court setting and the meanings of what is observed from the perspective of the participants. The qualitative researcher may be either as a relative outsider²³⁴ without being observed²³⁵ and in this study the researcher chose the former method of observation. As criminal court proceedings are conducted in an open court, the researcher adopted this strategy to collect data.

Observations were non-standardised and unstructured²³⁶ but they led to deeper understanding than interviews alone.²³⁷

Magistrate's court	Technique	Date and time
Khayelitsha Magistrate's Court, Western Cape	Observation	26.09. 2013 09H-15H00

²³³ *S v Pistorius* [2014] CC113/2013 ZAGPPHC 793, (12 September 2014).

²³⁴ Leedy, P.D. & Ormrod, J.E., "Practical Research: planning and design", 9th edn, 2010, p. 147.

²³⁵ Lincoln, Y.S. & Guba, E.G., 1985, cited in Hoepfl, M.C., "Choosing Qualitative research: A Primer for Technology Education Researchers", *Journal of Technology Education*, vol. 9. no. 1, 1997, <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014) on this aspect.

²³⁶ Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p.147.

²³⁷ Lincoln, Y.S. & Guba, E.G., 1985, cited in Hoepfl, M.C., "Choosing Qualitative research: A Primer for Technology education researchers", *Journal of Technology Education*, vol. 9. no. 1, 1997, <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014).

Province, Wynberg District, Walter Sisulu RD & Steve Biko RD, Cape Town, 021 360 1400		
Mutale magistrate's court, Mutale Village, Vhembe District Tshilamba Location 015 967 6209	Observation	05.01.2016 @ 09H:00-12H00
Dzanani magistrate's court, Vhembe District Makhado Location, Louis Trichardt, 015 970 4005	Observation	08.10.2014 09H:00-11H:13

The proceedings observed for the purpose of the problem statement were very helpful. As already explained earlier, the setting of this court was that the entire court proceedings were conducted in the mother-language of the accused. This was the main reason for this observations.

The researcher relied on field notes. As Leedy²³⁸ acknowledges that written notes are often insufficient to capture the richness of what one is observing, the author also admits that audiotapes and videotapes are not always completely dependable either. The author further lamented that the very presence of tape recorders and video cameras could make participants uncomfortable. This was also observed by the researcher during this study where the introduction of this technique scared some of the respondents off.

²³⁸ Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p.147. See also Lincoln, Y.S, & Guba, E.G, 1985, cited in Hoepfl, M.C, "Choosing Qualitative research: A Primer for Technology Education Researchers", *Journal of Technology Education*, vol. 9. no. 1, 1997, <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014).

The researcher adopted the strategy of hearing cases in indigenous languages without picking up an interest in the nature of the offence. Then the researcher had to narrow issues in this regard and identified what was important for the purpose of accomplishing the research objectives. The proximity of these observations to the research questions was whether it was practical to conduct cases in indigenous language only and for the purpose of a fair hearing which removed any language barrier. It was fascinating to hear the presiding officer communicating with the accused in the accused's mother-tongue and the accused responding to statements made in his or her mother language. Everyone, defense attorneys, state prosecutors, magistrates and the accused were speaking the language of the accused. Interpretation was not required.

A “suffix” for this research technique is “OBS”.

3.4 COMPLETION OF THE STUDY AND LEAVING THE FIELD

The decision to stop *sampling* must take into account the research goals, the need to achieve depth through triangulation of data sources, and the possibility of greater breadth through examination of variety of *sampling* sites.²³⁹ In this study the researcher took into consideration the nature of the phenomenon and the new developments²⁴⁰ that are currently emerging in relation to this phenomenon and decided to remain in the field until the last report.

The primary goal of the researcher was therefore based on the fact that the decision to leave the field should take into account the possibility of greater breadth through contact with as many participants as possible.

²³⁹ See Lincoln, Y.S. & Guba, E.G, 1985, cited in Hoepfl, M.C, “Choosing Qualitative research: A Primer for Technology Education Researchers”, *Journal of Technology Education*, vol. 9. no. 1,1997, <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014).

²⁴⁰ An example of “Language equality in courts unrealistic-judge”, in Legalbrief Today, legalbrief@legalbrief.co.za, 2014/12/11, sustained this study. See also extensive critics on Oscar Pistorius case such as D. Schafer, “ Poor Quality of Translation in Oscar Pistorius Trial a Concern”, 04 March, (2014). www.politicsweb.co.za. Also *Lourens v Speaker of the National Assembly of Parliament* (20827/2014) [2016] ZASCA 11 (10 March 2016) 12 at pars. 30-31, <http://www.saflii.org/za/cases/ZAEQC/2014/2.html>, (accessed 22 March 2016).

Through lengthy and extensive involvement in a study, the researcher has an acute awareness of the master plan, the relation of each component to the total study that totaled to its completion.²⁴¹

The researcher left the field during the Autumn of 2016 having collected enough data for this study.

3.5 CONCLUSION

As indicated in Chapter one of this study, two types of data were used i.e. (a) literature and case law review which constituted chapter two; and (b). empirical study details of which are captured in chapter three. It is therefore the aim of this chapter to reveal the right of the accused person to a fair trial by using his or her mother-tongue in the entire trial and the right to language as contemplated by the Use of Official Languages Act of 2012 through the establishment of Indigenous Languages Courts in the Vhembe District.

The approach adopted by the researcher, qualitative methods paradigm, was outlined in this chapter and the reasons thereof were narrated. The research design and methods were presented by addressing data collection processes and procedures. The trustworthiness of the study was engrafted in the study. The author has acknowledged participants in this study by enumerating them – both as individuals and as groups. Information obtained from literature and case law review has been reported without distortion. In most instances, in literature review, the researcher made her voice heard to avoid possibilities of plagiarism. It is further presented that the data used in this study has not been fabricated.

Having taken the reader through the data collection processes through the explication of the research methodology chapter, the next Chapter focuses on the findings of this study as its contribution to knowledge. The nature of the approach adopted by the researcher is *mixed-method design* and therefore the findings were qualitative in nature and per the chosen research approach. However, part of the discussion in the ensuing chapter is also based on quantification of the results.

²⁴¹ Leedy, P.D. & Ormrod, J.E., “Practical Research: Planning and Design”, 9th edn, 2010, p. 297.

CHAPTER FOUR

FINDINGS AND PRESENTATIONS

4.1 INTRODUCTION

In trying to arrive at the aims of this study, the researcher, through research the methodology discussed in Chapter Three, focused on finding answers to the research questions of the study. According to the problem statement, the study was concerned that English and Afrikaans are the only languages used in criminal court proceedings despite the constitutional provisions on language rights, particularly section 6 (3) (b) which states that Municipalities should have regard to the language usage and preferences of their residences. This study was based in the Vhembe District. Its focus was on the Use of Official Language Act of 2012, thereby refusing the accused person the right to a fair trial through the use of language. In order to accord the accused person the right to a fair trial, this study sought to countenance the accused person the right to use his or her mother-tongue in the entire trial as it has been found that some interpretations are not accurate through the operation of Indigenous Language Courts. This objective was assisted by an investigation of the following phenomena that built up to the main phenomenon: (a). whether there are existing legal tools that are instrumental to the perpetuation of the use of English and Afrikaans languages of criminal courts thereby negating the right to a fair trial; and (b). exploring the establishment of Indigenous Language Courts in terms of the Use of Official Languages Act 12 of 2012.

The researcher should, at the end of this study, have demonstrated that the Use of Official Languages Act of 2012 implies that the existing legal tools that perpetuate the use of English and Afrikaans only in criminal proceedings are not in accordance with the object of this Act. This study should further expose that the Use of Official Languages Act implies that the indigenous language courts should be established and that these courts will subsequently guarantee the accused his or her right to a fair trial

through the use of his or her own language, particularly the mother-tongue, as the language of the court.

Literature and case review contextualise the findings of this study and the empirical research identified problems on the grounds that these are related to the contextual findings. It was due to this contextualisation that the researcher developed theories that assisted her to reach her conclusions.

Finally, the findings present two perspectives from which this study can be approached: (a). how law and other legal instructions could nullify the accused the right to use his or her mother-tongue as the language of the court record for the purposes of the right to a fair trial and (b). that in as much as legislation may restrict the accused the right to use his or her own language in this context, it is as well capable of affording the accused his or her right to use mother-tongue through its development. The persistent use of indigenous language through the Pilot Project by the Department of Justice and Constitutional Development and lessons derived from the empirical study advocate for these perspectives.

The pre-suppositions as stated in the hypotheses of this study are supported by these language developments.

4.2 QUALITATIVE AND QUANTITATIVE RESEARCH RESULTS

This part of the dissertation presents the findings of the study. Qualitative results are presented in a narrative form and quantitative results are stated in numbers (not percentage as the statistical analysis is not the aim of this study). In some instances, quantitative results are presented in table form for easy reference.

The results will be compared concurrently to the relevant literature.

THEME 1: The existing legal tools are instrumental to the continuation of the use of English and Afrikaans languages of criminal courts thereby negating the right to a fair trial.

The domination of English and Afrikaans as languages of criminal courts have far-reaching consequences on the accused person and beyond. This is pursuant to law and legal instructions. This theme aimed at demonstrating this scenario and is further categorized into three parts, i.e.: (a). legal mechanisms that lead to the preservation of English and Afrikaans as languages of criminal courts; (b). inaccuracy of interpretation and its impact on the right to a fair trial; and (c). culture and language as inseparable commodities were instrumental to discrimination of other languages. These categories are further divided into small segments to give the reader a good grounding of this study.

Category 1: Legal mechanisms that lead to the preservation of English and Afrikaans

This study was aimed at finding whether there are legally enforceable mechanisms that promote these two languages at the expense of the accused person's own language. This was found to be true with reference to both literature review and empirical study. Sub-categories that will be discussed under this category are: (a). legislative provisions; and (b). Constitutional provisions; and (c). legislative interpretation.

- **Sub-category 1: Legislative provisions**

From literature review as well as empirical data it was discovered that the provisions of the legislation or their application restrict the use of mother-tongue by all participants for the purposes of the right to fair trial in criminal proceedings.

Meizhen bewailed that if legislation and legal instructions do not fulfil the idea they established, they operate in such a way that many people would still feel the treatment of unfairness and inequalities.²⁴² In South Africa, and subsequently in the Vhembe District, the present “*policy*”²⁴³ requires that criminal proceedings be conducted in English or Afrikaans and consequently may deprive the accused who is not the speaker of these two languages the right to a fair trial. This aspect is well exposed in Chapter two under the heading “*Language legislation and legal instructions restricting the use of indigenous languages in criminal proceedings*”. Section 6 (1) and 6 (2) of the Magistrate’s Court Act and sections 6 and 35 (3) (k) of the Constitution of South Africa were under scrutiny. Over and above these provisions, section 51, Part VII of this Act of 1944 provides for English as the Language of the Court. Language policy regulating this section was found to be non-existent. There was enough literature review where these legislations were examined. For example, one reviewing judge set aside the case heard in isiXhosa merely because the Department of Justice and Constitutional Development did not give directives on the use of indigenous languages in court.²⁴⁴

Similarly, an announcement by the Provincial Head of South African Police service in the Western Cape on the use of English only within the service caused quite an uproar.²⁴⁵ From empirical research the two participants in the Department of Justice and Constitutional Development, DJ&COND respondents, when asked whether there is a language policy that regulates the use of language in court, revealed that there is no clear “*policy*” on language

²⁴² See Meizhen, L, “Legal Language and Power: Research on the Phenomenon of Interactive Interruption in Court Session”, *Law, Language and Linguistic diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, September 2004, pp.195-213. See also Sennitt, A, “South Africa Seeks to Shore up Indigenous Languages”, *Media Network*, 13 March 2012, (accessed 27 March 2012).

²⁴³ The researcher could not find a policy on the use of English and Afrikaans only except the repealed Republic of South Africa Constitution Act before the 1996 Constitution in which English and Afrikaans were the only official languages of record mentioned by the presiding judge in *S v Damani* (DR224/14) (2014) ZAKZPHC 60, (9 December 2014) at par. 8, and also section 51 of the Magistrate’s Court Act of 1944 on English as the language of the court. If this section provides for English only, how did Afrikaans come to the language of the court? Probably through practice. Therefore discrimination of indigenous languages is assumed to emanate from apartheid policy: English was declared the official language of the Cape Colony in 1822 and developed to be the country’s lingua franca and the primary language of government, business and commerce: stipulated the Human Science Research Council.

²⁴⁴ *S v Damoyi*, 2003 JOL 12306 (C) at 3 par. 4.

²⁴⁵ *SA Language Rights Bulletin*, vol. 1, issue 05, January 2007, p.11, Prepared for Pan South African Language Board by the Unit for Language Management, University of Free State.

use in court except that it is historically common practice that English and Afrikaans are the languages of court criminal court. Respondent DJ&COND/2 in particular said “there is no policy in place but English is recommended by the Department as the language of court record”. It was found in Finland that as a result of these legislative flaws, there is no specific legislation covering the use of Romani languages in court proceedings.²⁴⁶

One respondent CTOPI/1 confirmed that English is the only language used in that court and referred to legislation that confines them to use English only despite the fact that Afrikaans is the predominantly used language in that Magistrate’s Court and despite the fact that he could not produce that enactment. He indicated that “government policy requires us to use English only and that there is no Afrikaans court” (as postulated by media²⁴⁷ that the court in this district uses Afrikaans only to conduct criminal cases). The court manager, CTOPI/4 who is responsible for languages in that court also lamented the lack of policy on the use of other languages other than English. Rikhotso²⁴⁸ put it more clearer when saying that the fact that there is no language policy statement does not necessarily mean that African Countries do not have language policies. It simply means that the culture that they have developed over time will enable them to use their own languages in future.

In South Africa, the apartheid government’s divide –and-conquer approach to black language policy is allied to the whole *degrading system of laws* that keep blacks in permanent poverty. Enlightened policy is needed in the area of language as well as all other aspects of political life.²⁴⁹ The implications of the Use of Official Language Act on this lack of policy is the basis of this study. Beaudoin confirms that law can extinguish

²⁴⁶ See Rasia, C, & Ervo, L, “Legal Bilingualisation and the Factual Multilingualisation: A Comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy”, *International Journal of Law, Language & Discourse*, vol.2. no.4, 2012, p.71.

²⁴⁷ den Hartigh, W, “ African Languages in SA Courts”, 12 March 2009, www.mediaclubsouthafrica.com, (accessed 15 December 2011).

²⁴⁸ Rikhotso, A. M, “Language Policy and Language use in South African Social Security Agency (ASSA), *Masters Degree Mini-Dissertation*, University of Limpopo, Turfloop Campus, 2014, p.18.

²⁴⁹ Marjorie, L, “Language Policy and Oppression in South Africa-Cultural Survival”, 08 February 2010, <http://www.culturalsurvival.org/publications/south-africa/langua>, (accessed 08 August 2013).

language, for example, French civil law endured the assault of the dominant language for many years, English. The co-existence of French and English languages in Canada and the legal systems have come at the expense of the quality of the French language”.²⁵⁰

Respondent DJ&COND/2 made mention of the evidence of legal instructions to rely on interpretation rather than to record evidence directly from the accused or witnesses by the judges who may speak the same language. This legal instruction was in the form of *circular 50/2005* which restricted isiXhosa-speaking-judges to record evidence directly from the witnesses and instructed them to rely on interpretation, poor as it is. As long as it was a *directive* from the department.

Hlophe confirmed legislative restrictions on the use of one’s language when he said: “for many South Africans from previously disadvantaged communities, the continued emphasis on English and Afrikaans would appear to confirm their suspicions about the integrity of the justice system”.²⁵¹ When welcoming the judgment in *Lourens v Government of South Africa*,²⁵² Chris Swepu, the former acting chief officer of PanSALB,²⁵³ said that “we have been labelled as a toothless watchdog because our founding legislation i.e. Pan South African Language Board Act 59 of 1995 does not bestow enough monitoring mechanisms to deal with transgressors. We want more authority to perform our monitoring role”. Some may argue that there were other internal problems that were established for the board’s failure to promote multilingualism in South Africa²⁵⁴.

²⁵⁰ Beaudoin, L, & Sherbrooke, L.L.L, “Systematic and Linguistic Specificities of Legal Language (s): A case in Point-Legal Translation in Canada”, *Law, Language and Linguistic Diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September 2004, p.6.

²⁵¹ Hlophe, J.M, “Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society”, *A Paper delivered at the University of Cape Town on 17 September 2003, Forum*, 2004, p. 42, as shown earlier, is of the view that it is clear that, at present in the courts, two languages continue to dominate. One of the reasons for this is lack of clear policy or commitment to the language issue.

²⁵² *Lourens v Government of South Africa and others*, 2013 (1) SA 499 (GNP).

²⁵³ Pan South African Language Board (PanSALB) welcomes court ruling on language act, www.afrilang.uct.ac.za/news, March 2010, (accessed 09 March 2011).

²⁵⁴ See the reasons for its dissolution in Chapter three.

The chief officer further stated that “whilst we appreciate the ruling, as PanSALB we find it regrettable that it took a court case of this nature to sensitise government about the need to honour the Constitution and cater for the linguistic needs of all our communities”.²⁵⁵ The board was particularly concerned about lack of mechanisms to deal with transgressors. On a follow up process, Zwane, PanSALB Chief Officer, said: “we will engage with the law makers with the aim of amending the PanSALB Act which is currently limiting PanSALB’s ability to enforce its decisions”.²⁵⁶

Having heard the policy makers that there is no “*policy*” on indigenous languages use in court while the Constitution provides for 11 languages including indigenous languages in terms section 6; and having heard that PanSALB is coming up with regulation/policy which is not functional; it is then imperative to turn to the respondents who are affected by the use of language in court to confirm or negate the truthfulness of the findings on these legislative provisions that deny them the right to use their mother-tongue.

Due to the fact that these are issues of policy development in the justice system that have not been known to the community of the accused and convicted persons, the researcher generalised their perceptions and facts and put them into perspectives for the purpose of answering this research question.

With the aim of determining whether there are legal tools that perpetuate the continued use of English and Afrikaans only in criminal proceedings as one of the research objectives, the researcher asked a question either through personal interviews or questionnaires from the category of the accused persons and the convicts.

²⁵⁵ Pan South African Language Board (PanSALB) welcomes court ruling on language act, www.afrilang.uct.ac.za/news, March 2010, (accessed 09 March 2011).

²⁵⁶ PanSALB Media Release, “World Focus on Language Rights”, *Regional Language Colloquium*, 2013, www.panslab.org.za/news.html, (accessed 17 April 2014).

In order to find answers to this crucial aspect of the research, important questions were asked as to which language was used in these respondents' trial to determine the existence and/or non-existence of a policy on languages. The following was the outcome:

<p>APQI: In 50 out of 51 English was used. 01 did not respond.</p> <p>APPI: in all 02, isiXhosa was used in the entire trial. Though in 01 English was only used during postponement of his case as isiXhosa –peaking magistrate was not available.</p>	<p>CONQI: 37 out of 40 English, 02 Tshivenda 01 isiZulu.</p> <p>CONPI: in all 09, English was used.</p>
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Table 1: Represents findings on language policy in court.

It is uncertain whether in the other three CONQI's, one isiZulu and two Tshivenda, these languages rather than English were used. The only assumption is that English was used and these respondents were allowed to use their language through mandatory interpretation.

In all these categories none of the respondents is an English speaker. This is an indication of “policy” on the use of English only in criminal courts which most probably leaves the people with the feeling of unfairness. Findings in this subject matter postulate lack of policy on language use in criminal courts.

The findings in this subject matter postulate lack of policy on language use in criminal courts. CTOPI/12 respondent elaborated on the reasons for not continuing with Xitsonga under the Pilot Project and mentioned that he did not know what the problem was. He supposed it has been due to lack of directives from the Department of Justice and Constitutional Development to continue in Xitsonga. The reason advanced by this respondent coincides with the one given by the DJ&COND/1 and most CTOPI informants on the failure of the project. The former stated that its failure was due to lack of policy and poor management of the project. COTPI/14 also stated that

she did not have an idea why this process has been discontinued. This again confirmed lack of policy as being problematic.

Respondents CTOQI were specifically asked their opinion on how they think the Use of Official Languages Act of 2012 affects the use of English-only language in our criminal courts. Most of the respondents were silent on this issue while few prefer the use of English only in court.

CTOPI/18 indicated the existence of a *policy* which is not complied with and in particular referred to the Act of 2012. This scenario was confirmed by an extension of the due date for policy in terms of section 4 (2) (a) of the Act of 2012 after policy makers requested extension.²⁵⁷ There is coincidence between this scenario and the information advanced by the DJ&COND respondents particularly on *status quo* for using interpretation. DJ&COND/3 admitted that the department at national level had not complied with this directive in terms of this Act.

The problems encountered by the majority of the accused in criminal courts as a result of language use because of lack of clear *policy* are perpetual in the Vhembe District.

- **Sub-category 2: Constitutional shadow**

The comments on the provisions of section 6 (2) of the Constitution that “the government must take practical and positive measures to elevate the status and advance the use of indigenous languages” vary from the fact that there is no legal framework that binds the state to actually implement this clause; that there is no language that is more important than the other,²⁵⁸ and that constitutional provisions on languages make a mockery of the provisions of the Constitution that recognises the eleven official languages of the country.

²⁵⁷ “Extension of the Due Date for Adopting Language Policies”, *Sunday Times*, 07 December 2014.

²⁵⁸ Mashatile, P. cited in Sennitt, A, “South Africa Seeks to Shore up Indigenous Languages”, shares the sentiment, 13 2012, <http://blogs.nmm.nl/medianetwork/>, (accessed 27 March 2012).

One commentator lamented:

To state that section 6 of the Constitution does not prescribe how the state should take practical steps as provided in this section is tantamount to the fact that this section becomes obsolete. Our Constitution is clear as mud on the issue of language rights.²⁵⁹

One of the questions that was asked during the interviews was whether respondents are aware of the constitutional provisions on the use of official languages. One respondent CTOPI/1 stated that “despite the constitutional provisions on the use of official languages and elevation of indigenous languages, English is the language of the court”. When asked whether he thinks the use of English accords the accused the right to a fair trial, this respondent candidly said: ‘it is good to use the language every party to a court case speaks and understands and because this is as well provided in our Constitution’.

The application of the Constitution is further shadowed by the way courts approach its provisions.²⁶⁰

- **Sub-category 3: Legislative interpretation**

The Magistrate’s Act in terms of Section 6 (2) provides for the right to call an interpreter where the accused is not conversant with the language of the court. The Constitution also was found to

²⁵⁹ De Vos, P, “All Languages Equal but English (and Afrikaans?) More Equal? *Constitutionally Speaking.co.za*, 30 April 2008, (accessed 08 August 2013).

²⁶⁰ See both cases as narrated in this study *Lourens v Speaker of the National Assembly of Parliament and Others* (EC08/12) [2014] ZAEQC 2; 2015 (1) SA 618 (EqC) (17 September 2014) at pars.4 and 29, <http://www.saflii.org/za/cases/ZAEQC/2014/2.html>, (accessed 22 March 2016). *Lourens v Speaker of the National Assembly of Parliament* (20827/2014) [2016] ZASCA 11 (10 March 2016) 12 at pars. 30-31, <http://www.saflii.org/za/cases/ZAEQC/2014/2.html>, (accessed 22 March 2016).

have a similar provision under section 35(3) (k). The interpretation accorded to the constitutional provisions on the language of choice revealed that these sections are interpreted to mean the language the accused understands in the context of the provision of interpretation²⁶¹ at the expense of the accused's own language in the entire trial.

A respondent CIPI/1's response was that it is very important to interpret the proceedings to the accused because the court punishes the accused due to language. She further said that the presiding officers are very careful on language if the accused is fluent in English. The presiding officer's inquiry in the proficiency of the accused's language takes the following form:

- Which school did you attend?
- Which language was the medium of instruction at that school?
- Which language do you speak at home?
- Which language do you speak at work?

It is clear that the interpretation of section 35 (3) (k) of the Constitution and/or section 6 (2) of the Magistrate's Court Act and/or any legislation to that effect compounds the linguistic problems experienced in this district, particularly on access to justice. Post-constitutional cases²⁶² implemented the constitutional right to "the language he or she understands, if that is not practicable, to have the proceedings interpreted in that language", by imposing the interpreter on the accused rather than according to the accused's right to use his or her mother-tongue in the whole proceedings, even where all parties to the proceedings speak the language of the accused. The resultant use of language brings about confusion in court in the analogy of this statement from the case of *Tran*:²⁶³

"...when such application of the law will be interpreted to mean that the first preference is to accord the accused with the services of an interpreter".

²⁶¹ See *S v Mthethwa* 1998 (3) BCLR 336 (N) at 342H the accused speaks in his or her own language and translated into English and Afrikaans even when all the parties before the court speak a first language other than English or Afrikaans. Other examples are *S v Matomela* 1998 (3) BCLR 336 (N) at 342H and *S v Damoyi* 2003 JOL 12306 (C).

²⁶² See this subject in Chapter Two of this study.

²⁶³ In *R v Tran's case* (1994) 92 C C C (3d) 218, it was stated that at the same time the courts cannot permit a person charged with a criminal offence and facing deprivation of liberty who genuinely cannot speak or understand the language of the proceedings to dispense either wittingly or unwittingly with the services of an interpreter.

This is evident also from many South African cases.²⁶⁴

The inquiry is not whether everyone can speak the language of the accused so that proceedings could be conducted in that language. This interlocutory process leaves the accused with a sense of justice.²⁶⁵

All CTOQI respondents acknowledged that they are aware of the Constitutional right of the accused to his or her own language in terms of sections 6, 30 and 35 (3) (k) of the Constitution. Indeed, some of them understand this right in the context of interpretation to give effect to this right. The intention of the researcher was to establish whether the right of the accused to language is respected by using his or her language throughout the entire trial.

Category 2: Inaccurate interpretation and its impact on the right to a fair trial

In this category the study sought to narrate this persistent and well-established phenomenon in the justice system – both from literature review and empirical data. The aim was to assist the researcher to accomplish the objective of this study due to the continued use of English only in criminal courts and its dire implications on the right of the accused to a fair trial. This category is divided into three sub-categories: (a) the use of interpreting; (b) inaccuracy of interpreting; and (c) the impact of inaccurate interpreting on the right to a fair trial.

- **Sub-category 1: The use of interpretation in criminal proceedings.**

The researcher wanted to find out the participants' experience and perceptions on the use of interpretation in order for her to correlate it with other aspects of the research such as the inaccuracy of interpretation and its impact as the determination of the use of interpretation was not

²⁶⁴ See for example the case of *S v Ngubane* 1995 (2) SA 811 (TPD) at 812A.

²⁶⁵ *Siseka Siyotula v The State* (CA247/2001) [2002] ZAECHC 9 (24 April 2002).

one of the aims of this study, but only to show that its continued use contributes to linguistic problems in criminal courts.

The courts adopted the approach of inquiring as to whether an interpreter is needed in court and if this question was answered in the negative, if it would mean that it was irregular for the presiding officer not to do that.²⁶⁶

The respondent DJ&COND/2 referred to the “landmark” case of *Pistorius* on language undercurrents in South African criminal proceedings when he emphasised the use of interpretation that qualified interpreters are used to avoid confusion due to legal terms. He further elaborated that: “usually in high profile cases such as that of *Pistorius*, interpreters are very reluctant to interpret and the state will be forced to hire professional interpreters to perform these duties. I was once requested to interpret in a Judge Goldstone commission of inquiry because interpreters refused to interpret”. The researcher learned that the interpreter in this case did not continue with interpreting. She was emotional at the first interpreting because she was crying²⁶⁷ and this has confirmed the respondent’s assertion that in high profile cases interpreters are reluctant to interpret. By contrast, this study found the assertion that qualified interpreters are meant for good interpretation to be incorrect as exposed in this case.

A question was asked to APQI respondents as to whether an interpreter was used during their trial. Forty-seven (47) agreed and the other four disagreed. Though there was consistency in these two preceding answers one wonders which language was used in these four trials. Without analysing this answer, it should be noted that in none of these proceedings was one language used, because there is no evidence to that effect. CTOPI/8 indicated that the use of interpreters is not good for court trials since it delays the proceedings. CIPI/1’s opinion is that interpretation should remain a

²⁶⁶ See *S v Ndala* (1996) 3 ALL SA 65 (C) at 66C. See also Hlophe, J. M, “Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society”, *A Paper delivered at the University of Cape Town on 17 September 2003, Forum*, 2004, p. 43.

²⁶⁷ Smith, D, “Oscar Pistorius: a runaway interpreter, then the trial of the century begins”, available from *The Guardian*, Monday 3 2012, 21.37 GMT, <http://www.theguardian.com/world/2014/mar/03/oscar-pistorius.reeva.steenkamp>, (accessed 21 April 2014).

means of communication in our court system regardless of the implications of the Language Act of 2012 on the use of indigenous languages.

DJ&COND/ 2 respondent further stated that:

in terms of section 76 (3) of the Criminal Procedure Act 51 of 1977 the court has the responsibility of listening to the witnesses and note information as such because he or she is regarded as court of first record, but unfortunately this is not the position in our justice system. Mandatory interpretation is used to effect communication between the court and the witnesses or everyone involved in court proceedings. Court interpreters are considered experts in this regard and should not be undermined. In the analogy of one judge, court interpreter is the master of language and should not be interrupted when performing his or her duties.

This respondent, like some of the informants in this study, was unbending that English should be the language of the court irrespective of the existence of the Language Act. Interpretation is found to be a legal tool that negates the right to the accused to have the court proceedings conducted in his or her own language from both types of data.

- **Sub-category 2: Inaccurate interpretation**

While interpretation is bound to exist for a long period for the society's claim for multilingualism,²⁶⁸ it is found not to afford the accused the right to a fair trial due to its inaccuracy²⁶⁹ in some instances. Both literature review and empirical data revealed that interpreting and translation is used more and more though it still does not solve the communication

²⁶⁸ Rasia, C, & Ervo, L, "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2.no 4, 2012, pp. 66-67. Though interpretation and translation can be used as practical tools to make it possible to communicate in multi-lingualistic situations at the courts; the demands for a fair trial through the use of language and the significance of authentic communication mean big challenges for linguistic professionals. See also two DJ&COND respondents who recommended interpretation.

²⁶⁹ Schafer, D, "Poor Quality of Translation in Oscar Pistorius Trial a Concern", 04 March 2014, www.politicsweb.co.za, (accessed 21 April 2014).

problem in criminal trials. This turns to infringe on the accused’s right to a fair trial. Among the views that were made during the data collection phase was this one:

The widespread use of interpretation and translation by professionals means that communication moves from judge to parties towards interpreters and judges and parties. The language is no longer direct interaction between original actors but it is interceded communication via interpreter. By so doing, communication is no longer authentic”.²⁷⁰ One respondent CTOPI/1 mentioned that “interpretation is used to interpret into the language of the accused and even though is not always accurate. Consequently, it does not afford the accused the right to a fair trial though it is meant to do so.

The following table is meant to show the number of respondents in the categories of the accused person and the convicted persons on the imperfection of interpretation.

<p>APQI: 46 out of 51 conceded to interpretation being a communication barrier. 01 said it was perfect. 03 disagreed that it is a barrier. 01 was neutral. APPI:02 were interviewed and 01 conceded to communication barrier</p>	<p>CONQI: 37 agreed that interpretation impeded communication 03 did not respond CONPI: all 08 indicated interpretation as a communication barrier</p>
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Table 02: Inaccuracy of interpretation.

APPI/1 respondent in his eighteenth year at Khayelitsha Magistrate’s Court was not comfortable with the use of English. He confirmed that he was not conversant with the English language, which was used only during postponement proceedings where isiXhosa presiding officer was not

²⁷⁰ Rasia, C, & Ervo, L, “Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy”, *International Journal of Law, Language & Discourse*, vol.2.no. 4, 2012, p. 67.

available. The use of this language deprived him of the right to follow the proceedings. All forty-six (46) APQI respondents stated that interpretation was not perfect. Thirty-seven (37) CONQI respondents also indicated that interpretation was not perfect. The results on the use of the interpreter and whether interpretation was perfect corresponds well for the latter category. Instances like this one are common in the criminal justice system. A convicted defendant claimed that there were inaccuracies in the interpretation of his case.²⁷¹

There has, however, always been complaint about the quality of the African language service. The quality of the English language often leaves much to be desired for the quality of the English produced is not always of acceptable standards.²⁷² This study found out that of the twelve (12) CIPI respondents interviewed, none of them was an English speaking person, including whites. They were expected to interpret English into other languages. Even where interpreters might have been English speaking individuals, there is a finding that in interpreting, the interpretation is not always trustworthy.²⁷³ Some CTOPI and CIPI respondents confirmed that there are usually misunderstandings when communication moves from the originator to another person, or from one language to another. CTOPI/7 respondent after admitting that it is the context which is not understood and not the language *per se*, further acknowledged that “using the accused’s language in the entire trial minimises the problem of contextual misunderstanding/meaning”. The respondent DJ&COND/2 also acceded to the fact that it is the context in which the concept is not understood but not necessarily the language itself.

²⁷¹ Louw, P, “Court Interpreters lost in translation”, available from *The Herald*, 08 June 2015.

²⁷² du Plessis, T, “Language Facilitation and Development in South Africa”, “Language Facilitation and Development in South Africa”: *Papers read at an International Forum for Language Workers on 6-7 June, 1997* in *Interpreting at the Hearing of the Truth and Reconciliation Commission: April 1996 to February 1997*, See Louw, P, “Court Interpreters lost in Translation”, in *The Herald*, 08 June 2015, where the author said performance of interpreters was “alarmingly poor”. The landmark case of *S v Pistorius* [2014] CC113/2013 ZAGPPHC 793 (12 September 2014), confirms these contentions.

²⁷³ Rasia, C, & Ervo, L, “Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy”, *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p. 67. Respondent CTOPI/ 7 also admitted that it is the context which is not understood. For this reason, (my emphasis) an English –speaking-interpreter may not understand the context and this will definitely lead into infringement of justice.

In *S v Mpopo*²⁷⁴ the court came to the conclusion that interpreting may not be entirely satisfactory, but the court is bound to respect that interpretation. It also concluded that the court is compelled to take note of what the interpreter is saying and not what the witness is saying. DJ&COND/ 2, a well experienced official on languages in court, referred to this case of *S v Mpopo* in which the court stated that despite the fact that interpretation may be inaccurate, court interpreters are compellable witnesses in court proceedings and that this is in terms of the rule of law.

The researcher admitted knowledge of the case of *S v Mpopo* and she was puzzled as to whether it takes access to justice to its completeness. The respondent DJ&COND/2 continued to state that due to the fact that judges, magistrates and prosecutors would feel humiliated when they could not find any indigenous language concept during trial, they prefer to rely on interpreters. This study is adamant that we cannot live with intercepted communication for life when it causes destitutions to the broader masses of the society. This is also evident in the implication of the right to a fair trial on other constitutional rights as discovered in this study.

On confirming the inaccuracy of interpretation, DJ&COND/2 again referred to Chief Justice Mogoeng Mogoeng who is concerned about poor interpretation in South African criminal courts. When asked what he viewed as a solution to the problem of misinterpretation this respondent was honest and said “there seems not to be any solution in the near future to this problem on interpreting because the government is moving towards privatising interpreting, for the purpose of professional interpreting. There is new law, i.e. the South African Language Practitioners’ Council Bill, passed by Parliament to regulate interpreters in South Africa”. This was confirmed by this study when it discovered that this law made its way into Parliament on Tuesday 04, March, 2014.²⁷⁵

The case of *S v Pistorius* is a landmark recent case on language dynamics in court. An interpreter leads to the information being lost due to misinterpretation. The interpretation throughout the trial

²⁷⁴ *S v Mpopo* 1978 (2) SA 424 (A) at 426G.

²⁷⁵ ‘Parliament this week passes a new Law to regulate language practioners in South Africa’, <http://www.timeslive.co.za>, (accessed 17 April 2014).

in question [*S v Pistorius*] was regarded as one of imperfection.²⁷⁶ To buttress this assertion, we could look at this quote from the proceedings:

Van Rensburg (in Afrikaans): "...when we arrived there were towels and black garbage bags on the scene..."

Interpreter: "...there were black clothing..."

Van Rensburg: "...the person was already dead when the paramedics arrived..."

Interpreter: "The body died on arrival."

The following is the responses of the CTOPI and CTOQI respondents on the question of the accuracy of interpretation:

<p>CTOPI: 18 were interviewed and 13 agreed that interpretation is not accurate. The remaining 05 were not clear in their answers</p>	<p>CTOQI: 30 were interviewed: Agreed: none Strongly agreed:06 Disagree:15 Strongly disagree: 09</p>

Table 03: Responses from the magistrate, prosecutors and lawyers' experiences on the inaccuracy of interpretation.

Respondents were requested to rate their answers on the statement as to whether interpretation into the accused's language in criminal trials is not accurate and if it may subsequently lead to wrong conclusions. None of them agreed. Six (6) strongly agreed, fifteen (15) strongly disagreed and the other nine (9) strongly disagreed. This table proved preference for English use amongst the court officials. Those six (6) who strongly agreed concurred with the majority of the CIQI and the APQI and CONQI who were adamant that interpretation is inaccurate and may lead to wrong conclusions.

²⁷⁶ Abreu,V, "Oscar Trial Lost in Translation?", www.iol.za, 14 March 2014, (accessed 21 April 2014).

Another CTOPI/14 respondent who is worth mentioning is the one who indicated that she is an isiZulu speaker and if interpretation is not correct she interrupts the interpreter. “The defense attorney had to correct the interpreter on misinterpretation several times”: lamented Abreu.²⁷⁷

The responses from the category of interpreters on whether interpretation was impeccable or not, was as follows:

<p>CIPI: 04 were interviewed. 03 said interpretation is not perfect. 01 said it is perfect.</p>	<p>CIQI: 09 are of the view that interpretation is not always perfect 03 said it is perfect.</p>
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Table 4: Responses from interpreters on the accuracy of interpretation.

Amongst the nine (9) respondents who said interpretation is not always perfect there are those who indicated that they were interrupted by the presiding officer for wrong interpretation. Some admitted that interpretation may deprive the accused of his or her other rights such the right to life and dignity. It has been confirmed that “ordinary South Africans are simply not exposed to interpreting. Where possible the commissioner try to communicate in the victim’s own language”.²⁷⁸

It is clear from the CIQI respondents that the accused person does not receive first-hand information.

The manner in which interpreters speak was also a concern for some respondents, because they could not be able to answer to statements he or she did not hear or comprehend. One CONPI/2 respondent averred that “the speed in which the interpreter was talking prevented me from hearing certain aspects said about my case”. She could not formulate her defence due to the high speed in which the interpreter was talking. She indicated that the offence

²⁷⁷ Abreu, V, “Oscar Trial Lost in Translation”, www.iol.za, 14 March 2014, (accessed 21 April 2014).

²⁷⁸ du Plessis, T, “Language Facilitation and Development in South Africa”: Papers read at an International Forum for Language Workers on 6-7 June, 1997” in *Interpreting at the Hearing of the Truth and Reconciliation Commission: April 1996 to February 1997*.

was trivial that she felt that five years' imprisonment without an option of a fine was unfair. In addition, it was produced through unfair procedures. Another experience showed that interpreters may also get in the way of justice.²⁷⁹ Nomsa Majeng, an interpreter said some interpreters “like attention”: they like to add things and you find the gallery laughing.²⁸⁰

There are many typical cases where the hearing revolved amongst the presiding officers, the interpreter and the prosecutor. As the other respondent APPI/1²⁸¹ mentioned, the predicament he found himself in when court officials spoke amongst themselves as if the case did not concern him was frustrating. The CONPI/7 respondent who was arrested for shoplifting and beaten by three security guards was sentenced to fifteen years' imprisonment. During her trial, the magistrate, the interpreter and her legal representative were speaking in English and she could not hear or understand anything. Also CONPI/6 went through the same experience.

Generally, most CIPI and CIQI respondents consider most interpretations of proceedings inaccurate. This is also acknowledged by some of the categories of Court Officials while other COTQI respondents consider it accurate contrary to acknowledgement by most CIQI respondents and CIPI respondents. Also, most CONQI, CONPI, APQI and APPI respondents, as well as DJ&COND respondents consider interpretation as being not one of perfection.

Finally, if present legally recognized methods encourage the use of English and Afrikaans only, it suggests that there is a relationship between translation and interpretation problems and possible unfair trials as it is revealed in this study. The implications of this Act of 2012 are well founded in this study in that its implementation will minimise the use of English and Afrikaans only as languages of court and ultimately give way to the use of the language of the accused person.

²⁷⁹ den Hartigh, W, “African Languages in SA Courts”, 12 March 2009, www.mediaclubsouthafrica.com, (accessed 15 December 2011).

²⁸⁰ Majeng, N, cited in Louw, P, “Court Interpreters lost in translation”, available from *The Herald*, 08 June, 2015.

²⁸¹ See the accused persons from Khayelitsha magistrate's court.

Sub-category 3: The impact of the inaccurate interpretation on the right to a fair trial.

The effect of misinterpretation includes reaching wrong conclusions; the court granting mistrial, that is, trial vitiated by error; dismissal of confessions; a trial being unfair; thereby infringing the very purpose of interpretation which is to afford the accused the right multilingual court hearing. A DJ&COND/1 respondent acknowledged that interpretation may take one's life away. In his narration of the situation in our country he shared his experience with the researcher by giving an example of the use of the word "medicine" which refers to "sehlare" in Sepedi. "Sehlare" may of course mean two things in English, either "medicine" or "tree". The interpretation offered was to the effect that "sehlare" meant a "tree". But because the accused was conversant with English he challenged the interpretation offered and said he cannot drink a "tree" but "medicine".

The social media's comments on *S v Pistorius*'s case included statements such as that "the interpretation was regarded as one that is likely to mislead the judge".²⁸² CTOPI/7 respondent's response on the impact of misinterpretation on the right to a fair trial was that "it is meant to accord the accused the right to a fair trial and its inaccuracy may of course in one or the other affect the decision of the court". CTOPI/3 informant stated that: "using English only in court has bad effects more especially on the accused and witnesses as it may lead them to make statements that they did not actually mean or recorded statements that they actually did not make".²⁸³ Other cases were often overruled or referred back to the trial court once they went under automatic review proceedings.²⁸⁴ Another commentator stated that mistakes by interpreters had dire implications on the outcome of the case.²⁸⁵

²⁸² Abreu, V, "Oscar Trial Lost in Translation", www.iol.za, 14 March 14 2014, (accessed 21 April 2014).

²⁸³ See CONPI/4 respondent whose statement read 16:30 instead of 18:30. See also responses from the prosecutors at Sekhukhune Magistrate's Court who confirmed that the use of Sepedi in criminal proceedings facilitates court proceedings and justice is seen to be done because justice delayed is justice denied.

²⁸⁴ Mpahlwa, M, cited in Louw, P, "Court Interpreters lost in translation", available from *The Herald*, 08 June 2015.

²⁸⁵ Kruger, J, cited in Louw, P, "Court Interpreters lost in translation", available from *The Herald*, 08 June 2015.

Some personal interviews from the empirical data may shed light on these issues. The respondent in a maintenance case almost paid R20, 000, 00 *per* month because of incorrect interpretation. It was a volunteer prison warder (CONPI/9) who detected the interpreter's misinterpreting of the court order to mean that the respondent was ordered to pay R20, 000, 00 of his salary instead of one third of his salary. As she was the court police officer, she advised the respondent to consult the presiding officer for clarification of the order. Indeed, the presiding officer confirmed that the order was referring to a one third of the respondent's salary and not R20, 000, 00 as mentioned by the interpreter.

The researcher observed the following flaws from this matter: (a). what if the police officer did not hear the outcome of the case properly? (b). does it mean then that this person might have been confined to such a harsh sentence which is not imposed by the magistrate?

APPI/1 who was supposed to appear in isiXhosa court at Khayelitsha Magistrate's Court raised some concerns that are worth noting. He said: "an interpreter was used to interpret into my language where isiXhosa magistrate was not available that day during his postponement proceedings". When asked whether he was comfortable with the use of an interpreter, this is what he had to say:

Firstly, I do not understand English properly. Secondly, I was terrified by the fact that people in court may say something I would not understand. Thirdly, that I may say something in isiXhosa and then turn out to be something else upon interpretation into English. In particular, I am afraid that they may say things that might implicate me and I would not be able to respond to such statements because they speak in the language which is not my mother-tongue.

This was concomitant with the researcher's experience where an Afrikaans-speaking judge was speaking directly with the Afrikaans-speaking state counsel while the researcher could not understand Afrikaans.

Amongst the pathetic stories told to the researcher, is the one narrated by CONPI/4 who was a Xitsonga speaker who made a warning statement to a Sepedi speaking police officer and the statement was recorded in English. According to her story, the statement recorded that she was raped at 16:30 while she said six thirty, referring to 18:30. The culprit was proved to have been at a different place at 16:30. During the trial she insisted that she was raped at six thirty (18:30). The court found that she was a sophisticated person and therefore should have read the statement and consequently found her guilty of making a false statement.

Nakane asserted that for suspects who come from different cultural backgrounds who rely on interpreters in police interviews, ensuring a thorough understanding of their rights and appropriately invoking these rights can be a taunting experience.²⁸⁶ Some lessons have shown that the use of interpreters may taint the dignity of the court proceedings.²⁸⁷

The researcher made the following observations from the CONPI/4 story: without taking into consideration the injuries that she sustained as a result of the rape incidence; without taking into account that the police officer might have laboured under the mistaken belief that she could have said sixteen thirty (16:30) while in reality it was six thirty (18:30); and without at any stage of the trial the court having addressed the issue of language i.e. that you were speaking Xitsonga and the police officer, Sepedi speaker, the court found that she was lying under oath about the culprit and sentenced her to six years imprisonment. Through her experience as a practicing advocate, the researcher encountered many accused who challenged the correctness of warning statements by the police officials.

²⁸⁶ Nakane, I, "Problems in communicating the Suspect's Rights in interpreted Police Interviews", *Oxford Journals, Applied Linguistics*, vol.28, Issue 1, 2007, pp. 87-112, <http://apliij.oxfordjournals.org/content/28/1/87.abstract>, (accessed 08 August 2011).

²⁸⁷ Hartle, R, "Government guilty of failing to train court interpreters" available from *Media on African Languages, University of Cape Town, African Languages*, <http://www.afrilang.uct.ac.za>. (2014).

Category 3: Culture is revealed as a tool for English use only.

It has been revealed in this study that culture and language rights are two inseparable concepts. It is in the breadth of these results that this study sought to find out that: (a). Culture is instrumental to unfair trial; and that (b). culture realizes the right to a fair trial.

- **Sub-category 1: Culture is instrumental to unfair trial**

It is acknowledged that language and culture identify a nation, but they were used to discriminate against indigenous languages in South Africa²⁸⁸ and somewhere around the globe.²⁸⁹ Many indigenous languages have become endangered because of language deaths or linguicide caused by colonization, in which the original language is replaced by that of the colonists.²⁹⁰

In the following scenario it is clear that culture was ignored or went unnoticed during interpretation:

CONPI/1 respondent was sentenced to life imprisonment because of her culture in that she used a respectful concept instead of stating all the elements of rape. This respondent was very adamant that her conviction and sentence were pursuant to cultural practice and language use in her trial because she was the first to volunteer to give information *viva-voce*. This is her heart-breaking story:

²⁸⁸ Marjorie, L, “Language Policy and Oppression in South Africa”, <http://www.culturalsurvival.org>, *Cultural Survival*, 08 February 2010, (accessed 08 August 2013).

²⁸⁹ See Dorais, J. “Language, Culture and Identity: Some Inuit Examples”, *International Journal of Law, Language & Discourse*, volume 2.no.4, 2012, p. 294, www.ijlld.com.

²⁹⁰ Wikipedia.org/wiki/indigenous_language. See also Gutto, S.B.O, “Plain Language and the Law in the Context of Cultural and Legal Pluralism”, *SAJHR* vol.11, (1995), p. 311, who stated that in the history of colonial and imperialist’s domination in Africa, language was a major tool used in the imposition of the values of *domination* and *subordination*.

I was sentenced to life imprisonment on charges of murder where I was almost raped by the deceased. During my evidence I used the Tshivenda concept “anga o ndzhena mapaine” which means “he wanted to rape me” or “he wanted to violate me”. Photos of the deceased showed the latter above the blankets. The presiding officer concluded that I was lying because the deceased was photographed “above the blankets” and not “inside the blankets”. The presiding officer accorded “o ndzhena mapaine anga” a literal meaning “he entered into my blankets”. I was sentenced as a result thereof.

Her cultural background could not allow her to use such naked words such as “rape” or “sexual intercourse”- language and cultural issues cannot be separated. In African culture, a young person cannot say an old person is “lying,” but would rather say “the person made a mistake”.²⁹¹ In Pedi culture when a woman menstruates, she does not say “I am bleeding” instead she says “ke mo matsatsing” literally meaning “I am on my days”. This is an indication that language and cultural rights are inseparable as stipulated in terms of section 30 of the Constitution.

This respondent was actually exercising her language and cultural rights and was ultimately sentenced to life imprisonment.

The implications of the interpretation were also detected from this statement in that the translation of this concept presented it to mean the deceased literally entered into her blankets and for the fact that the deceased was found above the blankets meant that the respondent was lying.

CTOPI/7 respondent enunciated that “in some cases there are cultural concepts or the practice of culture that are not understood”. There are many more issues to consider in interpretation: culture,

²⁹¹ Hlophe, J.M, “Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society”, *A Paper delivered at the University of Cape Town on 17 September 2003, Forum, 2004, p.45.*

dialect, conceptual gaps, register, word play, humour..., the list seems long.²⁹² There are also authors²⁹³ who are obstinate that in adjudication, contextual decisions must be produced through fair procedures. In their contention they made reference to Svea court of appeal judgement which was criticised for having ignored cultural collision and its possible effects to national criminal law. In performing its functions, the Governing Body shall have due regard to the development of the *national culture*.²⁹⁴

One CIPI/3 emphatically stated that culture is one element of language that can deprive someone his or her freedom. This is what she had to tell the researcher when specifically asked the role of culture on language in court; she was very vivid on this aspect in that she said (transcribed):

Culture plays a vital role in how witnesses speak in court. An example is a rape case in which an older woman cannot convey the actual rape in the presence of the audience or court which is, under normal circumstances, dominated by younger people to her. At times, such witnesses will ex rape in a modified manner to an extent that the concept loses its legal meaning. The victim will usually say the culprit put his private parts in her. Upon further inquiry by the presiding officer or the prosecutor or the defence lawyer, this witness is likely to give up because she would feel humiliated as such legal words for rape cannot be pronounced in her culture.

The researcher intercepted to add that this is the case even when it is not an older woman. She alerted this respondent to one of the respondents in this study, referring to CONPI/1, who was convicted and sentenced because of the influence of culture in her evidence. The respondent,

²⁹² Dowling, T, "Lost in translation: "Hilarious" mistakes can be dangerous", available from *Media on African Languages, University of Cape Town, African Languages*, <http://www.afrilang.uct.ac.za>. (2014).

²⁹³ Rasia, C, & Ervo, L, "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p. 64.

²⁹⁴ Donnacha, J.M, "Language Legislation Mechanism of Language Planning", *Law, Language and Linguistic diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September (2004), p.168, on Irish language in terms of section 7 of the Dublin Institute of Technology Act /1992.

CIPI/3 conceded and finally said that “the culprit will usually go away with crime if evidence is not understood in the context of culture by the parties in the trial”. This is confirmed by an argument which says that language is a repository of social, cultural and ideological values²⁹⁵.

According to CIPI/4 the description of rape requires clear evidence on what exactly happened. That is when such witnesses will create the opportunity for the perpetrators to go free because they feel intimidated by the questions asked. In such cases the witness will not disclose the whole information because she feels that in her culture she cannot mention such concepts.

In Canada, language rights are assigned to the existence of linguistic communities in which the accused is a member. While Brown regarded language as the roadmap of a culture,²⁹⁶ in other instances it was used to discriminate against people of particular cultural identities.²⁹⁷ Unfortunately, language and culture were used by the South African apartheid regime as a major tool in the imposition of the values of *domination* and *subordination* in the history of colonial and imperialist’s domination in Africa. In contrast, culture also plays an important role in the preservation of the right to a fair hearing and the right to language in that the individual’s free use of a language without the interference of the state is the basis through which culture finds expression and through which participation takes place.²⁹⁸

Unfortunately, this was not the case. A Bantustan policy was formulated in the 1950’s -60’s by whites to discriminate against “Tsonga-speaking” people based on their identity with the language

²⁹⁵ Gutto, S.B.O. “Plain Language and the Law in the Context of Cultural and Legal Pluralism”, *SAJHR* vol.11, (1995), p. 311.

²⁹⁶ Brown, R.M, cited in Du Preeze, J, “The Language of our Choice- Concerns a Language Bill”, *FW de Klerk Foundation-Center for Constitutional Rights*, www.fwdeklerk.org, (accessed 27 March 2012).

²⁹⁷ See Halala, P, “A Critical Historical Study of the Response of the Vatsonga to Swiss Christian Missionary Activities: The Example of Valdezia, Elim, Kurulen and the Surrounding Areas, 1873-1994”: *PhDThesis*, University of Limpopo, Turfloop Campus, 2011, p. 70.

²⁹⁸ Currie, I, “Minority Rights: Language, education and Culture”, in Chaskalson, M. (ed), *Constitutional Law of South Africa*, 1996, p. 35-10. See also Landman, C, “Can Justice be Embodied in Sexist Language? A challenge to the confession of Belhar”, *Ned Geref Teologiese Tydskrif*, 47, 283-290, www.christina-landman.co.za/belhar.htm, p. 3, (accessed 04 July 2011), who stated that language identifies us, makes us who we are.

“Tsonga”.²⁹⁹ Instead of allowing the accused persons, who thrive in certain communities with common thread to exercise their right to language and culture in court and elsewhere, the justice system treated their languages inequitably.

These examples show that the court environment is intimidating and antagonising to the people whose language is blended with contextual meaning due to the exercise of their culture. The identification of the three languages in this study was meant for the preservation of language and culture as entrenched in the terms of section 30 of the Constitution.

The decisions of the court in this regard denied the respondents in this study their right to language as a cultural symbol hence the right to a fair trial was nullified.

- **Sub-category 2: Culture realises the right to a fair trial.**

The findings on culture as a method of denying the accused his or her right to a fair hearing are to a large extent computed to the promotion of this right through cultural considerations. If it is the text that is not understood and therefore misinterpreted, then we must accept that it is the original speaker of that language who would be able to understand this text and give it proper meaning.

The appointment of the judiciary that would take into consideration language and culture in order to give effect to these rights is imperative. A Tshivenda speaking magistrate or judge should be able to hear cases in Tshivenda and understand the cultural undertones of that community”.³⁰⁰ CTOPI/14 was able to pick up Zulu cultural concepts when the case was heard in isiZulu, in Msinga, KwaZulu-Natal. CTOPI/13 was able to hear Xitsonga and understand the culture of Tsonga- speaking in Malamulele, Vhembe District. CIPI/3 was able to notice that the offender is

²⁹⁹ Harries, P, “Exclusion, Classification and Internal Colonialism: The Emergence of Ethnicity Among the Tsonga-Speakers of South Africa”, in Vail, L, (ed) *The Creation of Tribalism in South Africa*, (1989), p. 82.

³⁰⁰ De Vos, P. “All languages equal but English and (Afrikaans?) More Equal?”, *Constitutionally Speaking.co.za*, 30 April 2008, (accessed 08 august 2013). See also comments by the judge in *S v Matomela* 1998 (3) BCLR 336 (N) at 341H-I.

going scot free due to cultural usage of language. Had she been given a chance to challenge such connotations, the offender would have been convicted.

Language is considered as an integral element of identity; as a cultural symbol in an Irish nation.³⁰¹ The role of language as a symbol of culture is reiterated by many authors. Brock said the forms of knowledge that could have empowered the underprivileged would have built on African culture and tradition and be delivered in African languages.³⁰²

CIPI/4 respondent was adamant that cultural concepts in either Tshivenda or Xitsonga or Sepedi will not be lost in English because most of the staff speak either of these three languages in their court. This is the reason advanced for conducting proceedings in these languages. He indicated the problem with elderly people who will be confined to their culture when giving evidence and said such witnesses may say “you did not assault me” when in reality she is saying “you assaulted me”. Due to the fact that proceedings are conducted in these three indigenous languages at this respondent’s Tivani Magoro Magistrate’s Court, the language spoken by all the parties involved as wished by COTPI/1 respondent, it was easy to detect that this witness did not mean what she said. According to Dorais, all respondents consider the knowledge and use of Inuktitut as indispensable to Northern Native people. The Aboriginal language is intimately linked to their most basic-self-definition.³⁰³

When the researcher interviewed respondent CIPI/4, her aim was to find out how courts users handle culture as the researcher learned from COTPI/18 that all these three languages are used as languages of criminal courts.³⁰⁴

³⁰¹ Donnacha, J.M, “Language Legislation Mechanism of Language Planning”, *Law, Language and Linguistic diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September 2004, p. 165.

³⁰² Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, in *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm, (accessed 8 august 2013).

³⁰³ Dorais, I. J, “Language, Culture and Identity: Some Inuit Examples”, *International Journal of Law, Language & Discourse*, vol. 2. no.4, 2012, p. 299, www.ijlld.com.

³⁰⁴ See *The State v Tonic Ngoveni* HL223/2014 (03 July 2014) 31, pars. 10-20. It is also provided as documentary evidence to this effect in this study.

THEME 2: The establishment of Indigenous Language Courts in terms of The Use of Official Languages Act of 2012 to safeguard the right to a fair trial

This study is meant to enlighten the linguistic communities that it is possible to use their own languages in court for the purpose of maximising communication which will ultimately protect their right to a fair trial. The right to a fair trial is regarded as an absolute right by this study on the grounds that failure of justice may deprive our society of the right to dignity it deserves.

The provision of this Act of 2012 on three languages in a province is implied in this study to identify three indigenous languages in the District of Vhembe, while section 6 (3) (b) of the Constitution on the language usage and preference of residents of the Vhembe District is inescapable. The main aim is to use these languages in indigenous language courts as contemplated by this Act. To accomplish this objective, the study explored certain phenomena as already stipulated above.

This phenomenon is further divided into three categories: (a). the right to a fair trial through the use of language in court; (b). the establishment of the indigenous language courts; and (c). legal teeth. These categories are further delimited into small segments to give the reader a comprehensive view of the problem statement.

The findings in this research are concomitant with the researcher's pre-supposition that the establishment of Indigenous Languages Courts in the Vhembe District that will guarantee the accused's right to a fair trial through the use of these languages is inevitable in terms of this Act of 2012. The use of these languages will consequently protect other rights that might be affected if the right to a fair trial is encroached upon. When this is accomplished, speakers will be placed on the same footing and no language will be seen as important or dominant over another.

This Act will ensure that the society is treated with dignity. The right to dignity is embedded in the life of everyone. It is guaranteed as a right and a constitutional value.

Category 1: The right to a fair trial through the use of language

Language is profoundly anchored in the human condition and language rights are well-known types of human rights as found in the literature and case law review as well as empirical studies. The aim to establish indigenous language courts in this district was prompted by the quest to guarantee the right to a fair trial through the use of one's language. This sub-theme is further divided into three segments: (a). common law right to a fair hearing; (b). fair trial under the legislation; and (c). human rights instruments.

- **Sub-category 1: Common Law right to a fair hearing**

The common law right to a fair hearing, including the right of an accused person to understand what is going on in court and to be understood, is a fundamental right profoundly embedded in the very fabric of the South African legal system. This right to a fair hearing is inherent in the right to a fair trial. The right to a fair trial and the corresponding right to be heard form part of the cornerstone of our justice system. Justice is not only seen to be done when all court parties use the language of the accused and the latter uses his or her own language to make full answers and defend himself or herself, but is also complete.

The respondent APPI/1 is a case in point. This respondent had this to say: "I was not asked my preferred language or my mother-tongue".

The findings on whether the CONQI and APQI respondents understood the language so used are hereunder stated:

<p>APQI: 48 out of 50 disagreed. 03 agreed.</p> <p>APPI: 01 confirmed his lack of knowledge of English.</p>	<p>CONQI: 32 disagreed 06 agreed. 02 no response.</p>
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Table 5: Lack of understanding of the language used in court which is contrary to common law rule on fair hearing and the Constitutional right to a fair trial.

The results demonstrate the fact that common law right to a fair hearing was not accomplished. The question as to whether the respondents would have followed the proceedings better if their trial was conducted in their own language was meted with forty-nine (49) APQI respondents who said “yes” while only two (2) said “no”.

CONPI/8 respondent, a Tshivenda speaker who is sixty-six (66) years old was sentenced to life imprisonment in 1994. She informed the researcher that her lawyer was talking to the magistrate and other court officials in English and therefore could not hear anything said about her case.

The resultant lack of understanding of the proceedings is indistinguishable to miscarriage of justice.

- **Sub-category 2 : Legislative provisions**

Everyone has a right to a fair hearing which includes the right to be informed of the case one has to meet and to make full answers in terms of statutory enactments. Section 4(2) (a) and (b) of Use of Official Language Act of 2012 plays a very significant role in terms of the right to a fair trial. Section 4(2) (a) mandates a policy in compliance with the provisions of section 6(3) (a) of the Constitution of the Republic of South Africa while section 4(2) (b) requires the identification by the department of three languages. The adoption of three languages must take into account the

provisions of section 3 of the same Act on the “indigenous languages of historically diminished use and status”. It is in the spirit of the Constitution and the object of this Act that the accused’s right to a fair trial through the use of language will be afforded in conformity thereof than the current position.

Compliance with the provisions of these sections will resolve the adversities created by the interpretation accorded to sections 6 (1) and (2) of the Magistrate’s Court Act³⁰⁵ and section 35 (3) (k) of the Constitution. An exposition of how these sections are applied in practice is given in chapter two of this study.³⁰⁶ Generally, the interpretation given to these sections leaves much to be desired in terms of the administration of justice. It was found from the presentations by participants in this study that justice is not carried out as a result of these provisions.³⁰⁷

COTPI/18 postulated the importance of this Act when he said “while Use of Official Languages Act may take long time to be implemented, it is a legal instrument to put the language policy into practice”.

- **Sub-category 3: Human rights instruments**

The Constitution of South Africa provides for the right to a fair trial with regard to language in terms of section 35(3)(k) which provides that an accused person is entitled to the right to be tried in a language the accused person understands or if that is not practicable, to have the proceedings interpreted in that language. An arrested person and detainee also have the right to a fair hearing with regard to language in terms of this section, hence CONPI/4 respondent’s story was crucial in this study.

³⁰⁵ *Magistrate’s Court Act 32 of 1944.*

³⁰⁶ See cases such as *Ohannessian v Koen, N.O and another* 1964 (1) SA 663 (TPD) at 664E. *S v Mafu* 1978 (1) SA 454 (CPD) at 459B-C and *Naidenove v Minister of Home Affairs and Others* 1995 (7) BCLR 891 (T) at 898I-I-J.

³⁰⁷ See table 6 -8 in this Chapter.

Section 30 of the Constitution also guarantees the right of everyone to language and to participate in their cultural activities. The manner in which language and culture are closely related in terms of court participation is explained in this study.³⁰⁸ General language provisions are in terms of section 6 of the Constitution. A question was advanced on whether the APQI respondent's mother-tongue is one of the indigenous languages as well as an official language in terms of the Constitution of the Republic of South Africa.

Most of the APQI and CONQI respondents' mother-tongue is one of the indigenous languages in terms of the Constitution of the Republic South Africa. The table below is worth considering:

<p>APQI: 45 said their mother-tongue is constitutionally guaranteed. The other 06 is not.</p> <p>APPI: For both 02 isiXhosa is one of the indigenous languages in terms of the Constitution.</p>	<p>CONQI: 26 agreed that their mother-tongue is one of the official languages in terms of the Constitution.</p> <p>14 said their languages are not safeguarded by the Constitution.</p> <p>CONPI: all 08 said it is.</p>
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Table 6: Represents mother-tongue of the accused and the convicted persons as one of the official languages in terms of section 6 (1) of the in the Constitution.

Forty-five (45) APQI respondents' mother-tongue was found to be one of the indigenous languages and official languages as provided by section 6 (1) of the Constitution. This number is composed of Tshivenda, Xitsonga and Sepedi. The other six (6) respondents' language is not one of the indigenous languages and not an official language in terms of the Constitution. For example, some of them were speaking Chechewa. The language is neither official nor spoken in South Africa³⁰⁹ but the government is bound by the right of the accused to a fair trial to ensure that he or she is accorded the right to a fair trial through the use of language.

³⁰⁸ See category three of theme one of this study.

³⁰⁹ See in this study on how these languages happen to be predominant in the Vhembe District Courts.

With regard to CONQI respondents, about thirteen (13) of them speak Shona and one (1) Chechewa. As such, their languages are not part of the official languages in terms of the Constitution. The rest of the twenty-six (26) is as well comprised of the three indigenous languages.

The right to a fair trial in terms of the Constitution is defined in Chapter one under definitions of terms.

The presiding officers are obliged to advise the accused of his or her right to use his or her own language in terms of the Constitution³¹⁰ and/or the use of Official Language Act of 2012 and conduct the proceedings in that language. These provisions are closely intertwined with the right to a fair trial in terms of section 6 (1) of the Magistrate Act of 1944, as postulated earlier. It is against this background that this study wanted to find out whether this is true in practice. Below are the findings:

APQI: 47 disagreed. 04 confirmed.	CONQI: 38 negated. 02 affirmed.
APPI: both 02 were not asked.	CONPI: all 08 were not asked.

Table 7: Lack of information with regard to the right to use one's own language in terms of sections 6 (1) and (2) and section 35(3) (k) of the Constitution.

With regard to the APQI category, forty-seven (47) disagreed that the presiding officers asked them their preferred language while four agreed. The results of the four respondents might have been pursuant to the fact that they misunderstood this question because the court in practice enquires from the accused which language does he or she prefer and the accused will indicate preference of his or her own language. The purpose of this enquiry is to use interpretation to interpret into the accused's language and not necessarily for the purposes of using his or her own language in the entire trial. This is despite the fact that all parties involved in the matter speak the

³¹⁰ See *S v Ngubane* 1995 (2) SA 811 (TPD).

language of the accused. The same scenario might have occurred with regard to the two CONQI respondent.

The two APPI respondents were both isiXhosa speakers and their cases were heard in isiXhosa court hence this question was not crucial to them.

The participation of the accused is evident from the provisions of article 6 of the European Convention for Human Rights which guarantees the right to a fair trial by ensuring parties' right to participate and advocate in the procedure in an active, equal and factual way.

The outcome on whether the language used was the language of choice of the APQI and CONQI respondents, is hereunder mentioned:

<p>APQI: 49 of the 51 disagreed. 02 agreed.</p> <p>APPI: 01 said he was not asked his preferred language during the postponement. In other 01, this question did not feature because isiXhosa, his mother- tongue, was used.</p>	<p>CONQI: 32 out of 40 disagreed. 08 agreed.</p> <p>CONPI: this question did not feature.</p>
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Table 8: The reality of language use in court where the language of the accused was not used in the entire proceedings in contravention of the Constitution and the Act of 2012.

The language of choice in practice means the language the accused prefer to speak so that interpretation should be provided in that language. The results of this study, with regard to these respondents, indicate that the English language was used regardless of the existence of the provisions of the Constitution on most of the respondent's language as official language and the subsequent provisions of the Act of 2012 on policy for three languages. This is also regardless of how the accused persons in previous cases had endured injustices as a result of the application of the Constitution on language rights. The case of *Mthethwa*³¹¹ points to this aspect. The trend of

³¹¹ *Mthethwa v De Bruin N.O. and Another* 1998 (3) BCLR 336 (N) at 338D.

our case law also supports this contention.³¹² The meaning adopted to implement the right to a fair trial in relation to language in terms of section 35(3) (k) of the Constitution was “the language the accused understands” rather than “the language of his or her choice”. In accordance with the Supreme Court of Canada, *Forget’s* case, the court declared section 58 of Quebec’s Charter of the French Language which prohibited non-official signs in English discriminatory, since it had the effect of “nullifying the fundamental right to express oneself in the language of one’s choice”.³¹³

The CONQI respondents were requested either to agree or disagree with the statement to the effect that being discriminated against through the use of their language deprived them of choice of their language. Thirty-nine (39) disagreed while one agreed. This is evidence of misunderstanding of the question because there is no one who would welcome discrimination. In reality, there is no one who could concede to the deprivation of his or her right.

Policy makers, i.e. DJ&COND respondents were aware of the existence of the Constitutional rights on languages and the object of the Act of 2012, but prefer English as the language of court rather than the implementation of language provisions thereof.

In addition, most CTOQI respondents said that they are conversant with the accused’s constitutional right to language, but that they are obliged to use English or Afrikaans as per DJ&COND directive or “policy” and the provisions of the Act of 2012. CTOPI/1 respondent supports the use of the accused language in the entire trial because, according to him, it is a constitutional right. They were as well asked whether criminal proceedings conducted in a language other than the accused’s language of choice, afford the accused his or her right to a fair trial. The response was that fifteen (15) out of thirty (30) respondents are of the view that if criminal proceedings are to be conducted in a language other than the accused’s language of choice, the accused is afforded his or her right to a fair trial while the other fifteen (15) don’t share

³¹² See *S v Ndala* (1996) 3 ALL SA 65 (C) and *Siseka Siyotula v The State* (CA247/2001) [2002] ZAECHC 9 (24 April 2002). These are just few examples. See this trend in Chapter Two of this study.

³¹³ Joseph-G-Turi, “Language Law and Language Rights”, *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, pp. 8, 15 and 16.

the same sentiment because they view interpretation as a loss of meaning of words and therefore not affording the accused the right to a fair trial.

Category 2: Establishment of Indigenous Language Courts

The promulgation of the Act of 2012 dictates the establishment of the indigenous languages and the creation of courts of law where the language of the accused person in terms of section 4(3) will be the language of the court. This category will be discussed under six sub-categories to afford it its comprehensive conceptualization: (a). creation of indigenous language courts to give the right to a fair trial its efficacy; (b). the use of the accused's mother-tongue in the entire criminal proceedings; (c). the implications of the use of language on other constitutional rights; and (d). territorial use of a language.

- **Sub-category 1: Creation of indigenous language courts of law for the purpose of the right to a fair trial.**

The OBS indicated a practical use of Tshivenda at both Mutale and Dzanani Magistrate's Court as reiterated by the DJ&COND pilot project. Also in Khayelitsha, Western Cape Province, isiXhosa is one of the indigenous languages and is being used as the language of the court because it is predominantly spoken by the majority of local population. It has been recognized that "Choosing as the language of instruction an indigenous language – a language people speak, are familiar with – would distribute power from the privileged few to the masses".³¹⁴

It would mean that the government should establish Tshivenda court, Sepedi court and Xitsonga court which would be in accordance with language demographics in this Vhembe District.³¹⁵

³¹⁴ Brock-Utne, B, "The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy", *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm. (accessed 8 August 2013).

³¹⁵ See the 2011 census on language demographics in the Vhembe District as already shown in Chapter three of this study.

CTOPI/17 indicated that most magistrates in his magistrate's court are multi-lingualists because they speak Tshivenda, Xitsonga, Sepedi and isiZulu. According to this respondent these groups of court officials would not have difficulties in using indigenous languages in their courts should such courts be introduced by the Department of Justice and Constitutional Development. He further referred the researcher to an email which he just received the same day on the resuscitation of the Pilot Project on indigenous languages in the District of Vhembe. CTOPI/16 respondent also confirmed receipt of this email.

For this study to be able to establish these courts, it is imperative to find out the propensity of mother-tongue as the indigenous language in terms of the Constitution. This finding is represented by table six above. Hence CTOPI/17 respondent on the language demographics of their personnel and accused persons, said "most magistrates are Tshivenda speakers and ninety-nine percent of the accused persons are Tshivenda-speakers".³¹⁶

The position in the Vhembe District is accustomed with the one in Khayelitsha where isiXhosa is the dominant language spoken by the residents of that area. A minority language such as Sepedi in this district should be elevated to the status of use as the language of court as well as in terms of Section 6 (2) of the Constitution.³¹⁷

Thus, this study wanted to find out the attitude of the respondents on the establishment of indigenous language courts which would safeguard the accused's right to a fair trial.

The researcher wanted to find out the attitude of the respondents in the first five categories as *per sampling* towards the establishment of Indigenous Language Courts in this district

³¹⁶ This is an estimation that emanated from the respondent's experience and not necessarily based on the official statistics.

³¹⁷ Donnacha, J.M. "Language Legislation Mechanism of Language Planning", *Law, Language and Linguistic diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September 2004, p. 161. The Irish language was declared the national language because it was the historic distinctive speech of the Irish despite the fact that the Irish-speakers were minimal.

that would advantage the community with regard to access to justice through the use of their own languages. The outcome is presented below:

APPI: 02 proved its success in Khayelitsha	CONPI: all 08 were confirmed	CTOPI: 15 in support and 08 no comments	CIPI: 03 in full support 01 prefer <i>status quo</i>	DJ&COND 01 completely against this idea 01 skeptical
APQI: 49 agreed and 02 disagreed	CONQI: all 40 were agreeable	CTOQI: 21 in support 09 against	CIQI: 09 in support and 03 neutral	

Figure 9: The views from these categories about the establishment of Indigenous Languages Courts in the Vhembe District.

According to these results, almost all the categories of respondents agree that the establishment of Indigenous Language Courts in the Vhembe District will accord the accused the right to a fair trial, with the exception of DJ&COND/1 and some few respondents in the category of court officials who believe English proceedings are the best option. One respondent CIPI/2 said that the use of isiXhosa only makes the court run smoothly and the accused is free to form his defence when he or she speaks in his or her own mother-tongue as the proceedings go on. It is important to take note at this juncture that this is the respondent who said the appeals and reviews should no longer be advanced as obstacles to the use of indigenous languages as languages of court because some judges of appeal and review speak indigenous languages. The OBS by the researcher also experienced this process where the proceedings are conducted in the language of the accused in Indigenous Language Courts. He or she was placed on the same footing as all the parties in court. CTOPI/5 respondent said “the use of indigenous languages makes it easy for all the parties in a trial to participate fully and understand well. That language use other than the parties’ language hinders speech”.

CTOPI/17 respondent was very sure that indigenous languages in court would be received with warm hands because currently minor offences such as domestic violence and maintenance are heard in Tshivenda or Xitsonga or Sepedi depending on the mother-tongue of the parties involved, but the verdict is recorded in English. He went further to say that such cases are heard in chambers. Also, a magistrate in Sekhukhune, Limpopo Province, hears minor cases in Sepedi, according CTOPI/9.

Twenty-four (24) CTOQI respondents agreed while six (6) disagreed to the question as to whether their courts ever conducted criminal proceedings in any of the indigenous languages. Further comments for those who disagreed included that the language of the accused is used only if the accused is Afrikaans or English speaking because courts conduct proceedings in these languages and they happen to be the languages of the accused. Where English or Afrikaans is used as the language of the court, it is not the language of the accused; proceedings are interpreted to give effect to language rights.

Where respondents said “no” as their answer, they found it unnecessary to answer a follow-up question as to the elimination of errors because proceedings were not conducted in indigenous languages. Some answers proximate to this finding are found in the accuracy of interpretation above.

CTOQI respondents were also asked to advance reasons for *not* using indigenous languages in criminal proceedings, where applicable. Most respondents who responded to the question that they use indigenous languages in court could not comment on this question because it was not necessary. Those who said they use indigenous languages in their criminal proceedings undoubtedly, were presumably referring to the situation where interpretation is used to interpret into indigenous languages and not necessarily that the indigenous languages were used throughout the entire trial. This observation is confirmed by those who said that they used indigenous languages when responding to this question by saying that most court officials speak either English or Afrikaans. (This shows how respondents may interpret questions from the questionnaire).³¹⁸

³¹⁸ Leedy, P.D, et al. “Practical Research: Planning and Design”, 9th Ed, (2010), p. 189.

Those who responded in the negative advanced reason of not speaking any of the indigenous languages and further stated that indeed interpretation is used in those instances.

These findings are concomitant with the observations made by one commentator who mentioned that speaking English by magistrates, prosecutors and lawyers seems to be blended with status to the disadvantage of the majority of the community who suffer the abuse of English use.³¹⁹ This abuse is confirmed by the study when the impact of language used in criminal trials on other constitutional rights proves hash consequences that befell the respondents CONPI and APQI.³²⁰

Most CTOPI respondents conceded that the pilot project ensured the accused the right to a fair trial because everyone speaks the same language. Moreover, the accused were comfortable with the proceedings. One respondent CTOPI/23 confirmed that “the establishment of these courts will ensure court service rather than the judicial power that our indigenous people in this district have endured for decades. They will also help to ensure access to justice through communication and interaction of judges and parties which are the most important tools in a trial”.

Cases heard under the heading “*Post-Constitutional Cases in terms of the Department of Justice and Constitutional Development Pilot Project on Indigenous Languages in court*” as illustrated in Chapter two shed more light on the problems mitigated by the use of indigenous languages as languages of court. The case of *S v Ngobeni*³²¹ at Tivani Magoro Magistrate’s Court as well is one such incidence. In support of this case the CTOPI/18 said “when I deliver judgment in indigenous language I feel confident”. On the other hand, respondent CTOPI/19 held a different view. According to her indigenous language courts are not possible and English is the most practical language of the court.

³¹⁹ de Vos, P, “All Languages Equal but English (and Afrikaans?) More Equal? *Constitutionally speaking.co.za*, 30 April 2008, (accessed 08 August 2013).

³²⁰ See how this category of respondents displayed their anguish on the violation of their constitutional rights due to language somewhere in this study.

³²¹ *The State v Tonic Ngoveni* HL223/2014 (03 July 2014).

By creating Indigenous Language Courts, the accused persons will be able to communicate effectively with the rest of the parties in court.³²² In the analogy of a commentator, they will be able to answer the allegations put against them and formulate their defences in their own mother-tongue as required by common rule on the right a fair hearing which includes the right to answer to allegations and cross-examine witnesses.³²³

Sibiya³²⁴ implied the Use of Official Languages Act of 2012 on the use of indigenous languages in court from the fact that the office of the Chief Justice, as a result of Public Service Act of 1994, Proclamation No. 103 of 1994, is now equal in status to the national department. Therefore, he obliges the Chief Justice to oversee the establishment of a language unit within the national department to ensure compliance with the provisions of the Use of Official Languages Act and the Constitution. This author further referred to Malan who emphasised this commitment that, the judiciary, as the third arm of the state, cannot be exempted from fulfilling and giving effect to the obligations imposed by the Constitution. By the same token, Sibiya submitted that the provincial divisions of the high court and the magisterial regions, be given the autonomy to decide which official languages they use as languages of court records. This study has already shown that the recognition of three languages in this district is implied in terms of section 4 (3) of this Act of 2012 and the Constitutional provision in terms of section 6 (3) (a) and (b). The illustration by these two latter authors strengthens this study's objective. The reference by the court in *S v Damani*³²⁵ of the implications of the Use of Official Languages Act of 2012 on the use of languages in court was commended by this study, for the judge confirmed the objectives of this study on the implications of this Act on the establishment of indigenous languages courts. It is hoped that such protocols and

³²² See CTOPI/12 and CTOPI/13. See also Brock-Utne, B, "The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy", *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm, (08 August 2013), who maintained that the transition from English to the national languages as the medium of instruction helped to destroy the barrier that existed between the privileged English educated classes and the ordinary people.

³²³ See Hlophe, J.M, "Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society", *A Paper delivered at the University of Cape Town on 17 September 2003, Forum*, 2004, p. 43.

³²⁴ Sibiya, Z, "From *Damoyi* to *Damani* :Critical reflection on the use of indigenous languages in the magistrate's courts", by, *a Paper read at the Society of Teachers of Southern Africa Conference, Durban, July 6-8, 2015*, pp.5-6.

³²⁵ *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014) at par.13.

directives by the Chief Justice will take this study into account and allow the courts in this district to conduct criminal proceedings on the three designated languages for this district.

It is against this background that this study investigated the use of indigenous languages as the languages of court, where translation would not be necessary and analyse the findings thereof on how they impact on the right to language and fair trial.

For the reasons enunciated in this study, it is ideal that indigenous language courts be established to enhance access to justice through the use of indigenous languages.

- **Sub-category 2: The use of the accused's mother-tongue in the entire criminal proceedings**

Studies in and outside South Africa revealed that the language other than the accused's own language does not accord him or her the right to a fair trial.³²⁶ This argument prompted the researcher to find out whether the accused mother-tongue will not solve the problem as mentioned in the problem statement. Rasia confirmed that the right of defence is guaranteed when a party to the case performs his act in his mother-tongue.³²⁷

Generally, from literature and case law review it is accepted that justice will be best delivered in one's mother-tongue when one looks at the study's findings. The comments such as "we can only be satisfied once we are a nation that acts internationally about its mother languages/tongue while promoting multilingualism because language is a fundamental human rights issue":³²⁸ Zwane of PanSALB told an International Conference on Language Rights, speak to this scenario. Case law indicates that where proceedings are conducted in the accused's mother-tongue, problems created

³²⁶ See this position in Chapter Two where the study attempted to give an overview of this argument particularly South African Courts which accorded the accused the right to interpretation irrespective of whether all the parties in court spoke the language of the accused.

³²⁷ Rasia, C, & Ervo L, "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2.no. 4, 2012, p 85.

³²⁸ PanSALB Media Release, "World Focus on Language Rights", *Regional Language Colloquium*, 2013, www.panslab.org.za/news.html, (accessed 26 January 2012).

by interpretation are eliminated and the accused’s right to a fair trial is safeguarded.³²⁹ The “OBS” in this study found that where the entire trial is conducted in the mother-tongue of the accused, communication runs smoothly. It was submitted that South Africans love their mother-tongue³³⁰.

This study found that the accused is entitled to use his or her mother-tongue in order to formulate his or her defence because he or she will follow court proceedings that are conducted in mother-tongue when one takes into consideration the right to freedom to receive and/or disseminate information and ideas as announced by the judge in the case of *Multichoice (Proprietary) Limited and Others*.³³¹

Tables 10-16 pronounce the perceptions, beliefs and aspirations from respondents in all the seven categories on the use of mother-tongue in criminal courts during empirical research:

APPI: 02 are very sure that the use of isiXhosa, their mother-tongue afforded them the right to a fair trial.
APQI: 49 prefer mother –tongue for effective communication in court. While 02 were neutral.

Table 10: The accused persons’ views on the use of mother-tongue in the entire trial.

CONPI: 08 are adamant that their mother- tongue would have protected them from wrong convictions and heavy sentences. One is excluded because she was a warden.
CONQI: 36 believe that the use of mother –tongue would have protected them from wrong convictions and heavy sentences. 01 disagreed. 03 were neutral.

Table 11: The convicted person’s views on mother-tongue in the entire trial.

³²⁹ One such example is *S v Damoyi* 2003 JOL 12306 (C). The review court in this case appreciated that the proceedings were conducted in the accused mother- tongue and eliminated interpretation problems thereof, but was bound by policy on English and Afrikaans use to decide that English was supposed to have been used and no isiXhosa, the language of the accused. See also “APPI” and Pilot Project cases in Chapter Two.

³³⁰ Dowling, T, “Stop holding your tongue, seriyas!” available from *Media on African Languages, University of Cape Town, African Languages*, 12 February 2014.

³³¹ *Multichoice (Proprietary) Limited and Others v The national Prosecuting Authority and Oscar Pistorius (case no: 10193.2014) In Re: The State v Oscar Pistorius (case no: 13/25513) and In Re: Media 24 and Others and Director of Public Prosecution North Gauteng, Oscar Pistorius (case no: 10378/14)* 4 par. 6.

Forty-nine (49) APQI and thirty six (36) CONQI respondents prefer the use of their mother-tongue for the purpose of formulating their defenses in the quest for a fair trial. All thirty-six (36) CONQI respondents acceded to the fact that had their trials been conducted in their mother-tongue, perhaps the courts would have come to different conclusions. All forty-nine (49) against two (2) APQI respondents hold the belief that if their hearings were to be conducted in their mother-tongue, the court might come to a different conclusion. Of course this category was responding to this question in anticipation that the court might come to wrong conclusions due to wrong interpretation. All CONQI respondents also believe that the decision of the court in their respective cases would have been different had their mother-tongue been used.

The APPI respondents in Khayelitsa, indicate their comfort in the use of isiXhosa, their mother-tongue, in their criminal trials. Their responses were almost similar with one respondent who insisted that, according to Dorais, the Inuit need their mother-tongue, because they feel more comfortable when they speak it.³³² A witness in the case of *Pistorius* insisted that she can speak English but wanted to speak Afrikaans as she was comfortable in speaking her mother-tongue.³³³

The APPI/2 respondent further indicated that he was very much comfortable in using isiXhosa in his trial because he could communicate with all court officials in his mother-tongue and could therefore follow every detail of his trial.

This is a different scenario altogether where different languages are used. CONQI/4 respondent's story is a case in point as narrated in this study. Based on her statement, this respondent was found guilty and was vulnerable to a heavy sentence.

³³² Dorais, I.J, "Language, Culture and Identity: Some Inuit Examples", *International Journal of Law, Language & Discourse*, vol. 2. no.4, 2012, p. 299, www.ijlld.com.

³³³ Schafer, D, "Poor quality of translation in Oscar Pistorius trial a Concern", 04 March 2014, www.politicsweb.co.za, (accessed 21 April 2014)

The views of the category of court officials on the use of mother-tongue is represented in the following table:

CTOPI: 17 support the use of mother-tongue, and 06 remained skeptical.
CTOQI: 18 are agreeable that it affords the accused the right to a fair trial, while the other 12 hold a different view based on the fact the accused, in any event is accorded fair trial through interpretation

Table 12: Court officials’ views on the use of mother-tongue in the entire trial.

Eighteen (18) CTOQI agreed that the use of indigenous languages (being one of the accused’s language) in our criminal proceedings will afford the accused the right to a fair trial than the use of any other language. A respondent CTOPI/13 acknowledged that “the use of indigenous language makes everyone comfortable because ideas flow easily in one’s mother–tongue”. CTOPI/14 had this to say: “to a certain extent the proceedings in mother-tongue, isiZulu in this instance was helpful to the accused. Generally, even court officials felt more comfortable when they communicated in their own mother-tongue”. Twelve (12) CTOQI disagreed. Usually these are the respondents who still believe that English proceedings afford the accused the right to a fair trial through interpretation. They were reluctant to comment on the accuracy of such interpretation relied upon. This group falls under the category of court users whose “mind-sets” prevent them from thinking about the constitutional right to use one’s language.

CTOPI/1 respondent maintained and acknowledged that “the use of Afrikaans-only at Mitchel’s Plain Magistrate’s court under the Pilot Project was a good practice as the accused was able to speak in his or her mother- tongue or in the language he or she understands better as this right is provided in the Constitution of the Republic of South Africa, that everyone has the right to use official language they understand better and/or her mother-tongue”.

Statements such as “To Teach Your Children Well, Do so in Their Own Language, mother –tongue education was needless victim of the struggle”³³⁴ are inevitable in this constitutional era and also confirm this study’s objectives on mother-tongue use as language of the court. PanSALB’s involvement in Mother-Tongue Day is commendable. It is not necessarily impossible to use the mother-tongue of the accused where he or she speaks one of the indigenous languages because in most cases the majority of the parties involved in court cases speak the language of the accused. This is evident from cases such as *Damoyi*, *Mthethwa* and *Matomela* above.³³⁵ Hlophe³³⁶ differed with the idea that the right to language does not necessarily mean mother-tongue,³³⁷ in that he said the issue of mother-tongue in our legal system like so many other social issues has in South Africa unfortunately been politicized and is consequently more problematic than elsewhere in the world.

CTOPI/8 respondent, when requested to comment on the use of isiXhosa only in criminal trials, was filled with overwhelming appreciation on the process. The use of isiXhosa for this respondent, amongst other reasons, saves time and accords the accused the opportunity to receive first-hand information and is beneficial to all involved in the trial.

A Sekhukhune presiding officer who insisted on the use of Sepedi, the mother-tongue of the community in Sekhukhune District Magistrate’s Court, in minor offences, proved that mother–tongue is an important source of effective communication in court and accords the accused the right to a fair trial, said a CTOPI/10 respondent, who is a prosecutor in that magistrate’s court.

³³⁴ Maake, N, “To Teach Your Children Well, Do so in Their Own Language”: International Mother Language, *Day Sunday Times*, 16 February 2014, p. 21. Dowling, T, “Stop holding your tongue, seriyas!” available from *Media on African Languages*, University of Cape Town, *African Languages*, 12 February 2014 alerted that UNESCO has declared February 21 World Mother Language Day,

³³⁵ See an exposition of these cases in Chapter Two of this study. See also CTOPI/17.

³³⁶ Hlophe, J.M, “Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society”, *A Paper delivered at the University of Cape Town on 17 September 2003*, *Forum*, 2004, p. 42. See also Kriel, M, “Justice for All in Indigenous Language Courts” in *South African Language Rights Bulletin*, vol.3.issue 7, March 2009, where he said that English and Afrikaans are used in court, even when the magistrate, prosecutor, defence counsel, defendant and witnesses spoke the same language which was neither of the two.

³³⁷ See Joseph-G-Turi, “Language Law and Language Rights”, *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p 7.

The following table represents the views of the category of interpreters on the use of mother-tongue:

<p>CIPI: 03 respondent encouraged the use of mother -tongue because it makes communication easy for everyone in court. The other 01 believes that interpretation accords the accused the right to a fair trial.</p>
<p>CIQI: 09 Prefer the use of mother-tongue while 03 prefer <i>status quo</i>.</p>

Table 13: Court interpreters on their preference for mother-tongue in the whole trial.

Respondent CIPI/2, also acknowledged the importance of the use of mother-tongue for the benefit of the accused. This respondent informed the researcher that when the whole trial is conducted in isiXhosa where everyone in court proceedings can speak this language, sits in court and does nothing perhaps until a witness who is not isiXhosa speaker is involved in the proceedings. Besides this, he will be sitting in court and not committed to any interpreting.

Fortunately, he was a permanent interpreter unlike in other courts, in the same Magistrate’s court, where interpreters are hired to interpret a certain language for the purpose of according the accused the right to fair trial.

Respondents from the CIQI category also emphasised the use of mother-tongue for the accused to be able to defend him or herself.

Generally, from the categories of CTOQI, CTOPI, CIPI and CIQI categories there are those who say that access to justice is better ensured if one is tried in one’s language and that one is more comfortable if he or she speaks own language. It has been established that the flow of ideas can only be possible in one’s mother- tongue and that the use of English and Afrikaans in court denies the accused the right to the use of language.³³⁸

³³⁸ Hlophe, J.M, “Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society”, *A Paper delivered at the University of Cape Town on 17 September 2003, Forum, 2004*, p. 43.

The respondents DJ&COND had this to say:

DJ&COND: 02 respondents still believe in English only use notwithstanding their acknowledgement that wrong interpretation may attract conviction.

Table 14: DOJ&COND respondents' take on mother-tongue as language of court.

The respondents in this category prefer the current *status quo*, where interpretation should be used despite the fact that the Constitution and the Use of Official Languages Act provide for everyone's language.

University of Cape Town African Languages Centre's view was as follows:

UCT African Languages Centre staff:

01 interviewed staff aspire that mother-tongue will ultimately be used through the courses in *isiXhosa legal concepts* and *isiXhosa communication for law* that have been offered at the University for the purpose of indigenous languages in court.

Table 15: UCT African Languages Centre respondent's on mother-tongue as the language of the entire trial.

The respondent considers mother-tongue inherent in human nature hence they developed courses at this institution for the purpose of mother-tongue use in court.

The body that is entrusted with the powers to promote languages in South Africa on mother-tongue, PanSALB responded in this manner:

Pan South African Language Board official:

01 respondent submitted that the development of Multilingual Legal Terminology Booklet by this board is meant to facilitate the use of indigenous languages i.e. mother-tongue in court proceedings.

Table 16: Pan South African Board respondent on the mother-tongue to become the language of the court

The PanSALB is striving to make this nation a proud one because they developed a legal terminology booklet. The frustrations experienced by the CTOPI will be eliminated.

The “OBS” at selected magistrate courts in this study proved that proceedings in mother-tongue accorded the accused his or her right to a fair trial and acknowledged the importance of the whole trial being entirely conducted in the accused’s mother-tongue. The Court environment was user-friendly and not hostile to the accused persons. The communication moves from the presiding officer to the accused and his or her legal representative without the interference by any interpretation.

The use of mother-tongue plays a vital role in the protection and preservation of the accused’s rights to dignity and freedom by ensuring that the accused and witnesses receive first-hand information regarding statements made in court.

This study is of the view that the accused can invoke this Official Languages Act to demand the use of his or her right to use mother–tongue for him or her to follow proceedings in which his or her right to a fair trial is at stake. The Indigenous Language Courts in the Vhembe District established through these instrument i.e. Official Languages Act, is seen as the solution to language problems encountered every day in our courtrooms.³³⁹ In the process of this linguicide, the most affected community of the society that suffers most is the accused persons. Most participants, especially in the category of the accused persons and convicts and the court interpreters in this study are in favour of mother-tongue use in criminal trials because it is their first language.

It is hoped that through this study, indigenous languages, mother–tongue of most of our indigent people, will be used in court to give them complete right of access to court.

³³⁹ See also comments on *Pistorius case* such as by Smith, D, “Oscar Pistorius: a runaway interpreter, then the trial of the century begins”, available from *The Guardian*, 03 Monday 2012, 21.37 GMT <http://www.theguardian.com/world/2014/mar/03/oscar-pistorius-reeva-steenkamp-mu>, (accessed 21 April 2014).

- **Sub-category 3: The implications of the right to a fair trial on other constitutional rights**

It may well be that language implications do not infringe only the right to language and the right to a fair trial as language is instrumental not only to the right to a fair trial, but also to other constitutional rights which are complimentary or inseparable to the right to a fair trial. It is in the same object of this Act as well as the letter and spirit of the Constitution and consequently the aim of this study that other rights of the accused should be protected through the right to a fair trial. In *S v Matomela*,³⁴⁰ the court also stated that it has a negative impact on the welfare of the accused. This is clear from the CONPI respondents in this study. Other authors alluded to this aspect of language. Rasia referred to Tallroth's research, who said usually, lack in linguistic rights and linguistic competence is equated with violations of other rights. Therefore language rights have a significant practical value as instruments and tools to realise other rights.³⁴¹ This study discovered that justice is complete when one is heard in his or her own mother-tongue. It further revealed that without proper communication justice is flawed.

Some CTOQI and CTOPI respondents conceded that the establishment of indigenous language courts would safeguard rights such as dignity, life, access to justice, language and culture only if the right to a fair trial is guaranteed. It is through their experience on the use of English or Afrikaans that they came to realise that the society's constitutional rights may be better guaranteed through the use of its own language. Another category which was agreeable that indigenous languages may ensure that other constitutional rights are not violated is the category of interpreters.

The following are rights that are found to have been affected by communication in criminal trials and that require protection from the use of one's language that accomplishes the right to a fair trial:

³⁴⁰ *S v Matomela* 1998 (3) BCLR 336 (N) at 342H.

³⁴¹ Tallroth, cited in Rasia, C, & Ervo, L, "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p. 63.

a. The right to dignity of a person

Section 10 of the Constitution guarantees everyone the right to dignity. To show that dignity is very important to human existence, it is provided in the Constitution as a right in terms of section 10 and as a value in term of section 39 (1) (a). Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected. Section 39 (1) (a) provides that “when interpreting the Bill of rights, a court must promote the values that underlie an open democratic society based on human dignity, equality and freedom”.

A CONPI/2 respondent who was sentenced to five years’ imprisonment for violating the protection order was concerned about her dignity due to interpretation problems. Language plays an important role in human existence, development and dignity. To emphasise the significance of this provision see how Hlophe attached human dignity to language rights-dignity and self -respect as are protected through language.³⁴² The accused person’s right to dignity cannot be guaranteed if the accused person cannot follow the proceedings as a result of language use. The CONQI respondents feel that they have lost their dignity due to wrong decisions as a result of language use in their criminal trials.

Du Preeze furthermore reiterated this Constitutional right by saying that human dignity was closely linked to people’s perception of the worthiness and value of the language in which they perceive the world and expressed their innermost views and opinions.³⁴³

When one weighs the interests of justice against those of the individual who prefers English, justice requires that everyone should be treated with dignity and the fact that most

³⁴² Hlophe, J.M, “Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society”, *A Paper delivered at the University of Cape Town on 17 September 2003, Forum*, 2004, p. 43.

³⁴³ See PanSALB Media Release, “World Focus on Language Rights”, *Regional Language Colloquium*, 2013, www.panslab.org.za/news.html, (accessed 26 January 2012), comments on the *SA Languages Bill, 2011*.

CONQI respondents were serving heavy sentences because of language vindicates the objectives of this study.

b. The right to language and culture

The Bill of Rights provisions relating to language and culture and to education, also require that every person shall have the right to use the language and to participate in the cultural life of his or her choice.

The use of language other than mother-tongue in criminal trials absolutely infringes the right of everyone to his or her own language as entrenched in section 30 of the Constitution of South Africa. The reverse is the same: mother-tongue protects language and cultural rights because it is valued by the speakers as the easiest way to express their inner feelings and inner thoughts, and as a symbol of who they really are.³⁴⁴ Language rights are regarded as basic rights and for the preservation and existence of linguistic communities in which everyone is a member. CONPI/1 is a good example of the violation of the right to culture. The cultural concept “*o ndzhena mapaine anga*” instead of “*he penetrated me*”, sent her to life imprisonment. Junod sees language as the common thread that hold together the Tsonga as a “tribe” or “nation”.³⁴⁵

Also, less consideration of culture on the appointment of the judiciary is equivalent to infringement of this right when contextual decisions should be produced through fair procedures as a result of cultural reflections.³⁴⁶ A similar situation arises when people view the extinction of languages in schools as a deprivation of their heritage.³⁴⁷

³⁴⁴ Dorais, I. J, “Language, Culture and Identity: Some Inuit Examples”, *International Journal of Law, Language & Discourse*, vol. 2. No.4, 2012, p. 295, www.ijlld.com.

³⁴⁵ Junoid cited in Harries, P, “Exclusion, Classification and Internal Colonialism: The Emergence of Ethnicity Among the Tsonga-speaking of South Africa”, in Vail, L, (ed), *The Creation of Tribalism in South Africa*, 1989, p. 87.

³⁴⁶ See also CTOPI/7 who sustained the contextual misunderstanding as a result of language use.

³⁴⁷ “Languages as school subject: problems in KwaZulu-Natal”, *The South African Language Rights Bulletin*, vol. 3, Issue 11, July 2009.

This right is already elaborated in this study as might be considered as the source of law but it is repeated under this subject as a right and not in that context. For the fact they are intimately related, no further exposition is required save to say this right will be protected if the judiciary is transformed along cultural considerations and that indigenous language courts in terms of this Act of 2012 are the most commendable fora that will realize these rights.

c. The right to life, liberty and security of a person.

Language defines the fate of a person in court proceedings. The life of a human being may be taken away if language issues are not adequately addressed.

In Canada, section 14 of the Charter on the right to interpretation is read with section 7 relating to the right of life and liberty of a person. This is equally so in South Africa. Section 35 (3) (k) of the Constitution³⁴⁸ is read with sections 11 and 12 relating to the right to life and freedom and security of a person respectively, of the Constitution. The right to “freedom” is also advocated by these provisions under scrutiny, i.e. sections 11 and 12 of the Constitution.

Most respondents in the categories of CONQI and CONPI were wailing that had their trials been conducted in their own mother-tongue, their right to life which was infringed through incarceration in prison would have been safeguarded.

All CONQI and APQI respondents were concerned about the use of language in their trials and to the fact that this affected or may affect their right to life and freedom of a person. A CONPI/6 who was sentenced to life imprisonment because she could not hear anything in court had the following to say: “I did not know the language spoken in court because I am not educated, but it was not Tshivenda”.

The only thing she could hear was that the husband of the deceased apologised for accusing his other co-accused persons of the murder of his wife, including herself, because he was

³⁴⁸ *The Constitution of the Republic of South Africa 108 of 1996.*

then speaking in Tshivenda. Take also into consideration an example of CONPI/I above, on cultural concepts.

As a result, the use of any language other than the mother-tongue of a person effected by law enforcement mechanisms have a negative impact on these fundamental rights.

One writer reported on a case in the US where a warning statement had been made in Toi-shan dialect yet the accused responded in Cantonese which is essentially a different language. As a result the judge ruled in admissible the accused' confessional statement due to misunderstanding as a result of language.³⁴⁹ By contrast, a warning statement of one CONPI/4 respondent which was recorded in English where the police official was a Sepedi speaker and the respondent a Xitsonga speaker was admitted by the court and the respondent was sentenced to six years imprisonment for lying.

The right to life in particular, is at stake where the accused is unable to receive statements in his own language. It is found that the court may arrive at a wrong conclusion as a result of interpretation and consequently, the accused's other rights may intensively be affected.³⁵⁰ Had the defense lawyer not alerted the difference between "murder" and "killing", his client would have implicated himself and a conviction would have ensued. The accused could possibly have been hanged for the offence.³⁵¹ Had the accused, in the example given by DJ&COND/1 not contested against the interpretation of "sehlare" which meant "medicine" in Sepedi, he or she would have been subjected to dire consequences. For an unrepresented accused, the courtroom is a hostile environment which can easily bring their freedom, or their lives, to an end. Moeketsi said language barrier can cost someone's life³⁵².

³⁴⁹ Feldman, P, "Society Increasingly Multilingual: LA Courtrooms: Judges, Jury and Interpreter", *LA Times*, 05 May 1985, http://articles.latimes.com/1985-05-05/news/mn-8446_I_court-interpreter, (accessed 06 May 2010).

³⁵⁰ See an exposition of these language dynamics in this study.

³⁵¹ Brock-Utne, B, "The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy", *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm, (accessed 08 August 2013).

³⁵² Moeketsi, R.H, "Redefining the Role of the South African Court Interpreters", http://www.najit.org/memebersonly/library/Proteus/HTML.%20Version/v8n3-4/moeketsi_v, (accessed 08 August 2013).

The researcher presupposes that the right to a fair trial is fundamental to the right to life and freedom and security of a person hence her study to introduce Indigenous Language Courts in this District is of paramount importance to safeguard these human rights.

d. The right to administrative justice

The use of any other language other than the accused's mother-tongue certainly infringes the right of everyone to administrative justice. The right to administrative justice is provided in section 33 of the Constitution.³⁵³

CONQI's and APQI's consider it miscarriage of justice when they are convicted or tried in the language that can be understood by court officials and interpreters only. This seems to be of less concern for the respondents DJ&COND who consider English as the only language to be used in court. According to these respondents, justice can be administered through the use of English only while the findings of this study are to the effect that justice can be administered through the use of the accused's primary language throughout the entire trial. DJ&COND respondents are bestowed with the responsibility of seeing to it that justice is done. The absence of language policy for the implementation of indigenous languages, proves lack of administration of justice. Their insistence on the use of English is an indication that they do not regard language usage in the manner that is revealed in this study as violation of the right to administration of justice.

In Finland the purpose of section 2 of the Language Act, the Code for Judicial Procedure and Sa'mi Language Act (Criminal Procedure Act covers specific regulation in criminal cases,) was to ensure administration irrespective of language and secures the linguistic rights of an individual person.³⁵⁴ The South African Constitutional provision on administrative justice imposes a duty on law enforcement, in this case, the Department of Justice and Constitutional Development to act fairly

³⁵³ *The Constitution of the Republic of South Africa 108 of 1996.*

³⁵⁴ See Rasia, C, & Ervo, L "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p.72.

towards their residents where the right or legitimate expectations are threatened or affected. It is acknowledged that justice is complete when one is heard in his or her own mother-tongue.

The priority given to administrative justice is also evident in *S v Zuma and Others*³⁵⁵ in which it was stated that the state of affairs must seriously prejudice the general administrative justice as well as the interest of numerous accused persons affected. Language was said to have a central significance not only to individuals but also for the society itself by certain authors.³⁵⁶

e. Access to Court

Access to justice is a fundamental process in the administration of justice because it does not only mean going to court but also that one follows the proceedings. The right to access to court is provided under section 34 of the Constitution.³⁵⁷ This section provides that 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. The section was intended to protect the fundamental rights in Chapter 2 of the Constitution, particularly the right to a fair trial in terms of this study.

Looking at the information provided by the CONQI and APQI respondents that they have been denied the right to access to justice when proceedings are conducted in the language they cannot understand, one becomes obstinate that justice is not carried out. One CIPI/4 respondent was adamant that justice is better served in one's mother-tongue. After most of the CIQI agreed that the court may come to wrong conclusion due to interpretation, it was the view of this category that if one is denied the right to use his or her language that is tantamount to denial of justice. They conceded that misinterpretation amounts to the denial of the right to access to justice. One of the

³⁵⁵ *S v Zuma and Others* 1995 (4) 401 BCLR (CC) at 409G-H.

³⁵⁶ See Rasia, C, & Ervo "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p. 62.

³⁵⁷ *The Constitution of the Republic of South Africa 108 of 1996*.

purposes of the Pilot Project on indigenous languages in court was to accelerate access to justice through the use of one's mother tongue.³⁵⁸

Courts are important fora where realities of language rights or absence thereof are put on display. Any law enforcement department must be the guardian of enforcement of rights. There is no doubt that through the use of indigenous languages in court the accused will be accorded the right to access to justice. This is in conformity with the object of the Use of Official Languages Act of 12012. Access to justice is the cornerstones of the orderly co-existence of citizens of the country. Furthermore, that access to justice is not necessarily the ability to walk to and reach the building where justice is administered but it becomes complete when one feels had access to qualitative justice, said President Jacob Zuma.³⁵⁹

f. The right to equality

The accused's right to equality is guaranteed in terms of section 9 of the Constitution. Section 9 (3) is of significance to this study as it guarantees equal use of language. This section prohibits any discrimination based on language. When the government is enjoined by the Constitution in terms of section 6 to make equitable use of languages, the purpose was to ensure that the accused person is not discriminated on the basis of language.

The use of the accused's mother-tongue accords him or her the right to equal protection of the law. CONQI and APQI respondents were resolute that when their languages, indigenous languages, were not given equal treatment in court, their right to equality is violated by the government.³⁶⁰

³⁵⁸ Kriel, M, "Justice for All in Indigenous Language Courts", *South African Language Rights Bulletin*, vol. 3, issue 7, March 2009, p.2.

³⁵⁹ DOJ&CD: Newsroom-Speeches, 2010, <http://www.justice.gov.za>, (accessed 15 December 2011).

³⁶⁰ See *Lourens v Government of South Africa and others*, 2013 (1) SA 499 (GNP).

The ideal of making the language in which communication is expressed and simple is to make it easy for ordinary people.³⁶¹ It is important, therefore, that in interpreting or giving meaning to the constitutional provisions the numeral language requirements in the Constitution are to be taken into consideration.

To minimize communication in criminal proceedings in the Vhembe District, through the use of Tshivenda, Xitsonga and Sepedi will accord the accused the right to equality and can be achieved through indigenous language courts, in terms of the Act of 2012.

- **Sub-category 4: Territorial use of a language.**

An obligation to use the language territorially where most people live, as opposed to national protection was also recognized as one such step that would take the objectives of this study further in terms of section 4 (2) (b) and 4 (3) of the Use of Official Languages Act of 2012 of in conformity with section 6 (3) (a) and (b) of the Constitution. Both the Constitution and this Act of 2012 contemplate territorial use of languages terms of these sections. The historically diminished languages in particular, and the municipalities being enjoined to take into account the language usage and preferences on their residents when identifying three languages for the purpose of criminal court proceedings, respectively.

This study implies this scenario in that once the national department, as illustrated by DJ&COND/3, and subsequently the provincial departments develop language policy in terms of this Act, municipalities such as the Vhembe District will follow suit as they are governed by these superior departments. The territorial use of languages is therefore implied from these sections. Indigenous languages distinguish a community that has been settled in the area for many generations. On that score, it would therefore be territorially based.

³⁶¹ Gutto, S.B.O, "Plain Language and the Law in the Context of Cultural and Legal Pluralism", *SAJHR*, vol 11, 1995, p.314.

The Use of Official Languages Act of 2012 requires that these native people, in terms of the definition of indigenous languages in Chapter one, speak their languages, particularly in court as it was found from literature review that linguistic rights can be met geographically because it is seen as an absolute human right for individual.³⁶² To support the need for territorial linguistic use, in the analogy of Du Plessis, each hearing has a unique language combination and LFP arranges for the regional interpreters to render an interpreting service at the hearing.³⁶³

DJ&COND/1 respondent informed the researcher that should Tshivenda be used in the Vhembe District, it will have its own repercussions such as reviving the old segregation system. This argument cannot be sustainable taking into consideration the overwhelming findings on territorial use of indigenous language as one of the effective tools that can give effect to the right to a fair trial.

Lessons in the region Trentino-Alto Adige, where the Italian legislator clearly chose a separate system in this region, in which the language used in trials can only be German, which is therefore equivalent to Italian, the official language of the state, as put forward by Court of Justice of the European Union.³⁶⁴

³⁶² Rasia, C, & Ervo, L, “Legal Bilingualism and Factual Multilingualism: A comparative study of the Protection of linguistic minorities in civil proceedings between Finland and Italy”, *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p. 63. See also *Mthethwa v De Bruin N.O. and Another* 1998 (3) BCLR 336 (N) at 338D: the accused is also accorded the right to choose a language among the official languages as provided for in the Constitution, hence *Mthethwa* demanded to use his mother-tongue, isiZulu as one of the official languages in terms of the Constitution. See also Joseph-G-Turi, “Language Law and Language Rights”, *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p. 5, on territorial designation of languages. He mentioned that depending on the circumstances, one of the two principles is applied: linguistic territoriality (basically, the obligation to use one’s designated language within a given territory) or linguistic personality (basically, the right to choose a language among official languages).

³⁶³ du Plessis, T, “Language Facilitation and Development in South Africa”, See also The European Charter for Regional or Minority Languages (1992), where for example, covers only minority and territorial languages based on historical reasons and its main purpose is to protect and strengthen those languages which could otherwise disappear or become too weak to exist. In the letter and spirit of our Constitution, Tshivenda, Xitsonga and Sepedi are “diminished” languages. It amounts to territorial level protection of a language.

³⁶⁴ Rasia, C, & Ervo, L, “Legal Bilingualism and Factual Multilingualism: A Comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy”, *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p.79.

The courts confirmed the so-called “territory based” linguistic protection criterion.³⁶⁵ The language predominately used in the area. This approach was well clear from the case of *S v Damani*³⁶⁶ where the court in *obiter dictum* referring to the Chief Magistrate Forum undertaking to do an audit of indigenous languages predominantly in use within Administrative Regions in order to assist the National Department responsible for language policy in determining the most used languages within specific clusters. Also the remarks of the presiding judge on the anticipated jubilation when every court in the country will be operating in the language predominately used in that court’s area.³⁶⁷

The pilot project on the implementation of indigenous languages in court proved that it is practical to use all eleven official languages if they are implemented territorially because the project used languages according to their dominant usage in their respective areas. Proceedings were conducted in the dominant language of the local area to endure the right to a fair trial. [The reasons for the project’s discontinuity are embedded in this study and most of the respondents relate it to the mind-set, not necessarily practicality].

The following table represents the outcome of the interview of the respondents on the success and failure of this project with regard to the right to a fair trial.

CTOPI: 14 out of 18 recommended the project for affording the accused his right while 04 were not considerate of that fact. Lawyers were not asked this question.	COTQI: Only 21 recommended the project 09 did not respond.
DJ&COND/1 said it failed, while DJ&COND/2 viewed it as a success with reference to Khayelitsha use of isiXhosa only.	OBS showed that it was successful.

Table 17: The views of respondents on the success and/or failure of the use of indigenous languages in court during pilot project, particularly on whether it ensured a fair trial.

³⁶⁵ Joseph-G-Turi, “Language Law and Language Rights”, *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p. 83.

³⁶⁶ *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014) pars.19.3-19.4.

³⁶⁷ *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014) parg.12.

The question in particular which was closely related to this issue was that the CTOQI respondents were asked their views on whether these indigenous language courts afforded the accused the right to a fair trial. Their answers are postulated under the heading “*Establishment of Indigenous Language Courts*” above.

Territoriality of languages is confirmed in a Canadian Constitution which established the equality of French and English. However, in reality, the equality of languages and the legal system was partial and territorial. Most CTOPI respondents indicated that the use of indigenous languages through that project was a success, in that the accused indigenous language was used in the whole trial. CTOPI/9 respondent also acknowledged that the use of indigenous languages at territorial level ensures effective communication between the accused and the court officials and as every party to the matter spoke the same language. This respondent further said that the Pilot Project³⁶⁸ minimized the possibility of human error during translation of court proceedings and prevent delays resulting from unavailability of interpreters, but could not continue with the hearing in indigenous languages because everyone things about English.

This study discovered that about forty-eight (49) APQI respondents and all forty CONQI respondents support the use of Tshivenda, Xitsonga and Sepedi in the Vhembe District. In particular, the use of a language territorially, is welcomed and accepted because it will ensure their right to speak their languages in court and consequently protect their right to a fair trial and other constitutional rights such as the right to life. Similarly, in Mahlabathini district, “99.9 per cent of accused are isiZulu speaking” and the presiding magistrate, the prosecutor and the accused were all isiZulu speakers, hence the court in the case *S v Damani*³⁶⁹ conducted the trial in isiZulu to give effect to the right to a fair trial in terms of the Constitution. The magistrate in this case said he would not apologise because isiZulu is an official language.³⁷⁰ This was the response to a

³⁶⁸ See also Kriel, M. “Justice for all in Indigenous Language Courts”, *The South African Language Rights Bulletin*, vol. 3, Issue11, July 2009. See also Sennitt, A, “South Africa Seeks to Shore up Indigenous Languages”, *Media Network*, 13 March 2012, (accessed 27 March 2012).

³⁶⁹ *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014), at par.5

³⁷⁰ “Language equality in courts unrealistic”, available in *Legalbrief Today*, 11 December 2014, <http://legalbrief.co.za>, (accessed 18 November 2011).

question on why the presiding magistrate conducted the entire proceedings in indigenous language, the mother-tongue of the accused in this regard.

The OBS by the researcher in this study proved that territorial use of the language is possible and keeps the language alive. Like the Irish State, the Government of South Africa by so employing languages territorially, would have maintained these indigenous languages and given them their status as languages spoken by the people living in the Vhembe District.

CTOPI respondents who do not support the use of the language territorially are mostly those who prefer English-only criminal trials and raised the issue of judges of appeal not being indigenous languages speakers and the delay in transcription, whereas these reasons are no longer sustainable in terms of the findings of this study.

Territorial linguistic recognition will harmonise the linguistic diversity in the Vhembe District criminal justice system. “*Know who you are serving*” approach is relevant in this regard. The inhabitants of this district have been deprived of their right to use their indigenous languages or mother-tongue for decades due to the dominance of English and Afrikaans. As Joseph-G Turi³⁷¹ designated, the fundamental goal of *modern linguistic legislation* is to resolve, in one way or another, the linguistic problems arising from those linguistic contacts, conflicts and inequalities, by legally determining and establishing the status and use of the language in question.

To put the question posed at the beginning of this subject matter into perspective, i.e. whether there is an obligation to use the language territorially, the researcher is of the view that it will enable the Vhembe District to use the indigenous languages predominantly used in this district.

The continued use of English and Afrikaans cannot escape the test of the moment in terms of the Use of the Official Languages Act 2012.

³⁷¹ Joseph-G-Turi, “Language Law and Language Rights”, *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p. 2.

Category 3: Legal teeth: linguistic legislation with legal remedies is imperative

Language instruments without enforceable legal mechanisms render these rights obsolete. In Finland, special linguistic legislation exists which has specific rules on the status and use of the official and minority languages in the country.³⁷² In the quest to promote and protect human rights, including the right to a fair trial, the then Minister of Justice and Constitutional Development, Envy Surty, vowed to pass several legislations.³⁷³ Respondent DJ&COND/3 informed the researcher that the department anticipated developing a legislation on language in court and this process was scheduled to begin with a colloquium around March 2016. The thinking was that should this materialise, the population that was found to be suffering in the hands of injustices caused by language usage will be protected as a result thereof.

This study has already showed how the constitutional and legislative provisions are interpreted to annul the accused's right to a fair trial, including the legal instructions to that end. It has as well offered the reader with a critic on the Constitution as a legal tool that is considered by many commentators to be a mere paper. It is against this background that this study views linguistic legislation with legal remedies as imperative.

This study discovered that there are certain factors that built up to this category that impede the use of indigenous languages in court. This category was further delimited into sub-categories which included: a. lack of legal teeth; b. judicial skills; c. lack of legal terminology in indigenous languages; d. practicality; e. mind-set; f. appeals and reviews; g. legal power and; h. inequitable use of languages. It is found that the origin of all these factors is lack of clear policy,³⁷⁴ i.e. lack of legal teeth.

³⁷² See Rasia, C, & Ervo, L, "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p.69.

³⁷³ Ndawonde, "Government Continue Bringing Justice Facilities Closer to the Poor", DOJ&CD: Newsroom, <http://www.justice.gov.za>, available from *Cape Argus*, March 23, 2009, (accessed 15 March 2011).

³⁷⁴ See Rasia, C, & Ervo, L, "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p.72, who narrated a similar situation as the objectives of this study and said that in Finland, the purpose of section 2 the Language Act, the Code for Judicial Procedure and Sa'mi Language Act (Criminal Procedure Act covers specific regulation in criminal cases,) was to ensure the constitutional right of

- **Sub-category 1: Lack of legal teeth**

From empirical research it was found that since its promulgation, the Use of Official Languages Act of 2012 allows the government to use three languages for any given purpose in terms of section 4(2), to date there is little evidence that the Department of Justice and Constitutional Development identified and uses these languages in court of law. The researcher strives to accord the accused his or her right to a fair trial through the use of his or her mother-tongue in terms of this section, in order to avoid injustices perpetuated by the provisions; or application of the linguistic legislation; and/or interpretation. Meizhen maintains that many people still feel the treatment of unfairness due to language use as a result of legislative provisions and/or their application despite progress made in the development of language legislation.³⁷⁵ In support of this statement, Gutto bemoaned that if law remains or is perceived to be an institution for the erection or maintenance of extreme form of inequalities, the broader masses of the society would still feel inaccessibility of justice.³⁷⁶

The most unacceptable development by this study on languages is the extension of the due date, i.e. 02 November 2014, for the adoption of language policy by National Departments in terms of section 4(1) of the Use of Official Languages Act of 2012 to 02 May 2015 by the Minister of Arts and Culture, Nathi Mthethwa³⁷⁷ when the country is in dire need for the implementation of this Act. Upon further inquiry by the researcher on whether this date was extended, an informant OAC as *per* schedule on “Other Participants” in the office of the Minister of Culture indicated that the date of the May 02, 2015 was not extended. According to DJ&COND/3 the department of Justice and Constitutional Development had developed a policy which was in the draft stage, i.e. Policy

every person to use his or her own language, either Finnish or Swedish, before courts and authorities and ensure the right of everyone to a fair trial.

³⁷⁵ Meizhen, L, “Legal Language and Power: Research on the Phenomenon of Interactive Interruption in Court Session”, *Law, Language and Linguistic diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, September 2004, p.199.

³⁷⁶ Gutto, S.B.O, “Plain Language and the Law in the Context of Cultural and Legal Pluralism”, *SAJHR* vol.11 1995, p.316.

³⁷⁷ “Extension of the Due Date for Adopting Language Policies”, *Sunday Times*, 07 December 2014.

on Use of Official Languages of the Department of Justice and Constitutional Development³⁷⁸ in compliance with section 4(1) of the Use of Official Languages Act of 2012 and circulated for public comments. At the time of interaction with this respondent, the department was incorporating public comments in the draft policy. In terms of this policy the official language in court proceedings including court processes, and recording of court proceedings shall be regulated by rules of court or any other applicable legislation. The researcher observes avoidance or vagueness in the application or provisions of linguistic law.

This study revealed that there is no obligatory legislative clause to ensure that languages are used in criminal court.³⁷⁹ It also revealed that policy makers are reluctant to use language equitably,³⁸⁰ hence the implications of this Act on the use of indigenous languages in court to compel the use of languages equitably. The fact that there is no policy on the implementation of all official languages despite the provisions of the Constitution on eleven official languages and despite the provisions of section 4(1) of the Use of Official Languages Act of 2012 confirms the lack of legal teeth. This finding culminated into the failure of the pilot project on Indigenous Language Courts. Most CTOQI respondents did not respond to the question on how the Use of Official Languages Act affects English-only criminal proceedings while few said they prefer English only in court. According to the latter group, this Act should not affect the present situation in anyway.

The fact that interpretation was found to be a preferred method of affording the accused the right to language, and its subsequent imperfection, rather than the use of the accused's language even where all parties speak the language of the accused is good evidence that the right to a fair trial has been infringed as a result of legislative provisions.³⁸¹ The fact that the respondents APQI and CONQI were not asked the language of their choice to be used in the entire trial by the presiding officers as shown in this study confirms the assertion by the law makers, DJ&COND respondents

³⁷⁸ *Government Gazette No. 387788 dated May 11, 2015.*

³⁷⁹ Hlophe, J.M, "Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society", *A Paper delivered at the University of Cape Town on 17 September 2003, Forum, 2004*, p. 42, said the problems encountered in our courtrooms are as results of lack of clear policy.

³⁸⁰ See findings on the two DJ&COND respondents. The above newspaper article, "Extension of the Due Date for Adopting Language Policies", *Sunday Times, 07 December 2014*, also confirmed this attitude.

³⁸¹ This is confirmed by the findings in literature and case law review, in Chapter Two.

that there is no language policy that regulated indigenous languages use in our courts. Some of the CTOPI and CTOQI respondents and the CIPI and CIQI respondents as well confirmed lack of policy on indigenous language use in court. There is no doubt that this lack of policy indeed tramples on the accused persons the right to a fair trial.

One author put this area of language issues into perspective by saying that the right to “a” language will become an effective fundamental right only when it is accompanied by mandatory provisions that identify as precisely as possible the holders and the beneficiaries of the language rights and language obligation, as well as the legal sanctions that accompany them.³⁸² Otherwise the official languages of most of the accused person in terms of the Constitution without these legal teeth will remain not substantially official; but only formally official and then only a symbolic official language, acknowledging what Joseph-G Turi³⁸³ pronounced in terms of official languages of a country.

While the Language Act is silent on court remedies for non- compliance with the Act, at least the South African Language Bill of 2010 in terms of section 11 afforded anyone the right to apply to court for an appropriate relief with regard to non-compliance with a recommendation, finding, or decision of the PanSALB in relation to this Act. Accordingly, Equality Court³⁸⁴ is an alternative in the absence of such remedy in terms of the enabling legislation. This remedy seems to be available to the broader masses of the poor and vulnerable society because no fees are payable. Also no legal representatives are needed. Other bodies such as commissions are avenues that can be employed to enforce rights but they are not common to the public. In this regard the Equality Commission may be approached to impose one’s right to language.

³⁸² Joseph-G-Turi, “Language Law and Language Rights”, *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p. 14.

³⁸³ See Joseph-G-Turi, “Language Law and Language Rights”, *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p. 5.

³⁸⁴ Equality Courts in South Africa established for conformity with the Promotion of equality and Prevention of Unfair Discrimination Act 4 of 2000.

In terms of section 9 (5) of the Use of Official Act of 2012 the Minister concerned is empowered to instruct a national department that has failed to comply with the provisions of this Act within a time period determined by the Minister, but in a remedial fashion.

Should it be well considered in the Vhembe District, language planning processes could achieve positive outcomes in relation to language attitudes and language ability.

There is therefore a need for enabling legislation that would make provision for monitoring mechanisms for PanSALB to deal with transgressors before it could provide mechanisms to the public to seek relief against PanSALB.

The relevant sections that regulate PanSALB in terms of this Act of 2012, to mention some, to ensure the use of indigenous languages in terms of this Act thereof are:

❖ *Section 6 : Functions of National languages Unit*

Section 6(1) (a) (ii) emphasis the need for the mechanisms to promote parity of esteem and equitable treatment of the official languages of the republic and facilitate equitable access to court enterprises.

❖ *Section 7: Establishment of Language Units*

This section provides for the establishment of Language Units to promote the use of languages in court, by implications. The functioning of language units may facilitate the implementation of indigenous languages for the purpose of the right to access to justice.

Currently, on a daily basis our courts are expected to handle a certain number of cases. In practice, it was found that language units are not known in our courts, as pronounced by CI/1nad CI/2. According to DJ&COND/3, these units will be established after language policy is in place.

It is the aim of the study to develop policies in terms of the Act that would enable the use of the identified languages in the Vhembe District courts. It is hoped that when it is assimilated to the

provinces and districts as *per* the objective of this study, this District under investigation will implement it in accordance with the constitutional provision on language preference of its residents and not in terms of this unclear policy. The case of *S v Damani*³⁸⁵ on the language policy that will take into account the most used languages within the specific cluster confirms the purpose of this study. It is on this basis of the objectives of this study that one of the essence of transformation of the judiciary included the use of indigenous languages in courts to facilitate accessibility of justice through geographic proximity to the people the courts are intended to serve.³⁸⁶

- **Sub-category 2: Judicial Skills**

Judicial language proficiency is one of the factors found to have negated the use of indigenous languages in court for it has been said that the presiding officers cannot speak these languages. It is found from literature review that the demand for the right to a fair trial through the use one's language dictates that judicial skills should not be determined on the basis of academic qualifications and experience of the judges only, but also and most importantly language proficiency and cultural background of the community they serve.³⁸⁷ This contention is crucial when one looks at the findings by one researcher who found that mistakes caused by interpreters were sometimes went undetected because some presiding officers or court officials did not know indigenous languages spoken in the Eastern Cape.³⁸⁸

The perception by the judiciary prompted other users of these languages to propose that “on the development of a language policy for our courts that would compel lawyers and magistrates and judges to speak not only English and Afrikaans but also one of the indigenous languages in a specific demographic area for the purposes of court

³⁸⁵ *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014) at par.19.3.

³⁸⁶ See “The essence of the transformation of the judiciary in South Africa”, *Address to the Black Management Forum Annual Conference*, 17 October 2008.

³⁸⁷ De Vos, P, ‘All languages Equal but English and (Afrikaans?) more Equal?’, *Constitutionally Speaking.co.za*, 39 April 2008, (accessed 08 August 2013).

³⁸⁸ Mphahlwa, M, cited in Louw, P, “Court interpreters lost in translation, available from *The Herald*, 08 June 2015.

communication and to draft documents in any of these languages.³⁸⁹ This development could allow for regional differences as recognised by the Act of 2012. This would mean for example, that in the Western Cape lawyers and magistrates and judges would be allowed to speak not only English and Afrikaans but also isiXhosa in court”.

Another writer declared that the justice system in South Africa today requires that lawyers and judges should inherently speak the languages of the majority population of the country.³⁹⁰

These contentions are found to have been in conformity with this study’s exploration on implications section 4 (3) of the Use of Official Languages Act concurrent with section 6 (2) of the Constitution on practical measures to elevate the use of indigenous languages in court. Indigenous languages in the Vhembe District can be elevated to the status of court usage only if they are accorded effective legal treatment such as regulatory provisions for the appointment of judges and magistrates on the bases of language and culture. This means that in the Vhembe District, judges, magistrates and lawyers would be required to speak Tshivenda, Xitsonga and Sepedi as their mother-tongue over and above their proficiency in English or Afrikaans. The fact that majority of the accused in this District are these language speakers add more value to this contention.

The need for the judiciary to reflect broadly the racial and gender composition of South Africa dictated the proposition of black judges to approximately 34% in 2003 from under 2% in 1994.³⁹¹ So just over 37% of our judges are African.³⁹² This number had since increased to 39% by March 2010.³⁹³ In Ireland the Courts of Justice Act 1924-1936 (section 44) compels judges to learn the

³⁸⁹ De Vos De Vos, P, ‘All languages Equal but English and (Afrikaans?) more Equal? *Constitutionally Speaking.co.za*, 39 April 2008, (accessed 08 August 2013).

³⁹⁰ Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm, (accessed 08 August 2013).

³⁹¹ Hlophe, J.M, “The recent opened Constitutional Court “Constitutional Court” is written in 11 Official SA Languages” *Papers read at UNIN Law Week*, p 19.

³⁹² “The essence of the transformation of the judiciary in South Africa”, *Address to the Black management Forum Annul conference*, 17 October 2008, p. 1.

³⁹³ “Transforming the Judiciary” available in *Justice and Correctional Services- South Africa Yearbook*, 2010/2011, p. 344, <http://www.gov.za/about.sa-yearbook/2010-adminjustice>, (accessed

Irish language if they want to be appointed to courts serving Irish –speaking areas to have sufficient Irish to conduct their duties through the medium of Irish without the assistance of an interpreter.³⁹⁴

The study found that a piece of legislation that would compel judges, magistrates and prosecutors to speak Tshivenda, Xitsonga and Sepedi if they want to serve speakers of these languages, should be developed. While it is true that the current instrument to compel the judges to be proficient in the languages of the District of Vhembe is the Use of Official Languages Act of 2012, the revelation of this study³⁹⁵ on this aspect of policy implementation vindicates the finding that language issues in our country needs more attention than ever before, as this study does. The reason for doing this is to imply a compellable pool of these indigenous language speakers, through this Act for the purpose of its implementation. Thus, the appointment of judicial officers fluent in African languages would allow for recognition of the country’s linguistic diversity.³⁹⁶ This finding is also found in other jurisdiction where it was maintained that the adjudication that produces fair contextual decision requires new kinds of professional skills that would respond correctly to these current demand.³⁹⁷ CTOPI/7 justified this contention when she conceded on contextual misunderstanding as a result of language. Also CONPI/1 respondent’s situation and the information provided by CIPI/3 and CIPI/4 on cultural evidence.

As indicated in this study, we no longer have a problem of judges who only speak English at both lower and appeal courts.³⁹⁸

³⁹⁴ Donnacha, J.M, “Language Legislation Mechanism of Language Planning”, *Law, Language and Linguistic diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September 2004, p. 171.

³⁹⁵ “Extension of the Due Date for Adopting Language Policies”, *Sunday Times*, 07 December 2014.

³⁹⁶ Hlophe, J.M, “Receiving Justice in Your Own Language—the Need for Effective Court Interpreting in our Multilingual Society”, *A Paper delivered at the University of Cape Town on 17 September 2003, Forum*, 2004, p. 43.

³⁹⁷ See Rasia, C, & Ervo, L, “Legal Bilingualisation and the Factual Multilingualisation: A Comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy”, *International Journal of Law, Language & Discourse*, vol.2.no. 4, 2012, p. 64.

³⁹⁸ So just over 37% of our judges are African³⁹⁸. Similarly, see the comments by the presiding officer in the case *S v Damani*³⁹⁸ where he said in Mahlabathini district, “99.9 per cent of accused are isiZulu speaking” and the presiding magistrate, the prosecutor, the complainant and the accused were all isiZulu speaking, hence the court in the case was conducted in that language. See also CTOPI/17 of Thohoyandou magistrate’s court on this issue.

- **Sub-category 3. Lack of legal terminology in indigenous languages**

Another reason advanced by the CTOPI and DJ&COND respondents on the use of English only is that there is no legal terminology in indigenous languages. The DJ&COND/1 respondent was of the view that one cannot expect people who obtained their Degrees in English to conduct criminal trials in indigenous languages. He also made mention of the fact that we derived our law from Roman Dutch Law of which legal concepts are in that law. Latin concepts were indicated as one of the reasons for continuing in English because the presiding officers and other court officials learned these concepts at the university and therefore cannot be expected to discontinue using them merely because of the need to use indigenous languages. DJ&COND/2 also indicated that lack of legal concepts in indigenous languages frustrate judges, magistrates and prosecutors hence they prefer to rely on interpreters. This was confirmed by two CTOPI respondents who said that it is frustrating to seek for concepts during trial. CTOPI/13 on a question on how did she find the use of Xitsonga only in court proceedings during the Pilot Project said: “I must admit that it was good because the accused was able to understand the proceedings fully and that there was no translation. But the only problem I had was when I had to translate a legal term which was in English into Xitsonga. I experienced problems in that regard”. CTOPI/14 also confirmed this when she said: “using English terminology in isiZulu where you find that there are no such terms in isiZulu was a daunting experience. There were other little but crucial problems such as using English terminology in isiZulu where you find that there are no such terms in isiZulu. Names such as January exist in Zulu, but one tends not to know this month in isiZulu despite the fact that you are isiZulu-speakers. On that premise, I find it confusing. No one at that moment in court, including the accused, is able to provide such concept”.

This trend is obvious in the analogy of other authors who maintained that the terminology associated with a given working environment, subject area or domain is not known to all the users of the speech community. Sometimes interpreters are at loss for appropriate legal or linguistic

equivalent because no such term exists in the targeted language (TL).³⁹⁹ A scholar asserted that even when translation facilities are available, fatal mistakes can still occur because there are certain expressions which are, at best, incapable of an exact interpretation. Others cannot be translated. For example, there is no equivalent concept for “murder” in African languages. The most common concept used is “killing” which does not mean murder.⁴⁰⁰ Speakers who can only command their indigenous languages often remain disadvantaged and excluded which cannot even be cured by interpretive services provided to them in court either.⁴⁰¹ DJ&COND/1 respondent conceded to this finding.

It has been revealed that “it is in the school that basic tuition in the African languages most prevalently spoken in the region is necessary to develop all official languages on an equitable basis”.⁴⁰² During the Bantu education era, Bantu languages developed a *lexicon* through which biology, maths or arithmetic, etc. could be taught, learnt and discussed without recourse to English,⁴⁰³ said one commentator. We can do it in terms of language for the purpose of court proceedings. A concern was raised that the use of English must come to an end at the universities for the purpose of LLB degree.⁴⁰⁴ Respondent CTOPI/18 also mentioned that children should speak mother-tongue to enhance the use of a language but that unfortunately you find them speaking English even at home. One commentator supported the ideology of learning language at school when he said: “This University is amongst those who are concerned with our indigenous languages the role they can play in reconstructing power relations and just society who have just started working on their

³⁹⁹ Alberts, M & Mollema, N, “Developing Legal Terminology in African Languages as Aid to the Court Interpreters: A South African perspective”, <http://lexikos.journals.ac.za/pub/article/view/1203>, (accessed 10 March 2016).p.32.

⁴⁰⁰ Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*,www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm. (accessed 8 august 2013).

⁴⁰¹ Government Gazette, vol. 597 Pretoria, 30 March 2015, No. 38646.

⁴⁰² One unanimous respondent cited in De Vos, P, ‘All languages Equal but English and (Afrikaans?) more Equal? *Constitutionally Speaking.co.za*, 30 April 2008, (accessed 08 August 2013), See also comments by the judge in *S v Matomela* 1998 (3) BCLR 336 (N) at 341H-I.

⁴⁰³ Maake, N, “To Teach Your Children Well, Do so in Their Own Language”: International Mother Language Day, *Sunday Times*, 16 February 2014, p. 21.

⁴⁰⁴ “Minister pushes for African Language in LLB”, in *Legalbrief/your legal news pub*, 23 Monday November 2015.

implementation”.⁴⁰⁵ The comments are endless. People want to see their languages spoken and recognized. The fact that these languages are declared “official” in the Constitution, will not make them survive. They must be used in order to be empowered.⁴⁰⁶

In Ireland, section 7 of the Dublin Institute of Technology Act /1992 states, relating to the functions of the Governing Body of the Institute, that in performing its functions the Governing Body shall have due regard to the preservation, promotion and use of the Irish Language.⁴⁰⁷ A similar body as that one of Ireland in South Africa that ensures the use of languages in this country is the PanSALB which has an obligation to develop and promote all South African Languages. Development of legal terminology, in the analogy of the PanSALB respondent at the University of Venda, is one of the measures that will be used to implement indigenous languages in court.

In terms of the Use of Official Languages Act 2012 this board is empowered to monitor the use of languages in government departments.

When asked the role of the board on promotion of the use of indigenous languages in court, the PanSALB respondent had this to say: “The board has the responsibility of making sure that all languages are used in all government departments including courts in terms of the Constitution”. The researcher was skeptical about this statement because currently indigenous languages are not implemented in courts in the Vhembe District.

He was further asked the question on how do they make sure that these languages are used in court. His response was: “by creating conditions to use indigenous languages. We developed facilities for the purpose of implementation on languages which includes national lexicography units, national language bodies, provincial language committees, language units and Multilingual Legal

⁴⁰⁵ “Low Production and Consumption of African –language books- a Lack of Incentives”, *The South African Language Rights Bulletin*, vol. 3, Issue11, July 2009.

⁴⁰⁶ See Dowling, T, “stop holding your tongue, seriyas!” available from *Media on African Languages, University of Cape Town, African Languages*, 21 February 2014.

⁴⁰⁷ Donnacha, J.M, “Language Legislation Mechanism of Language Planning”, *Law, Language and Linguistic diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September 2004, p. 168.

Terminology Booklet”⁴⁰⁸ as indicated during this respondent scheduled oral interview earlier in this study. His contention was confirmed by the statement that “nine National Lexicography Units were registered in 2001, their task being to compile monolingual explanatory dictionaries and other products to help with language development.⁴⁰⁹ The writer further indicated that the Tshivenda Lexicography Unit, based at the University of Venda launched the world’s first Tshivenda dictionary in July 2004, and said it expected to publish the final draft in 2006 or 2007”. Upon investigation on this language issues with the University of Venda respondent, the latter specified that the first Tshivenda dictionary was launched in 2006. Also DJ&COND/1 upon further interview with him indicated that his office is in the processes of developing Lexicography Unit for the purpose of indigenous languages use in all government departments.

This respondent provided very crucial information for the purpose of this study, particularly with the development of legal terminology for the use of indigenous languages in court because this has been advanced by many respondents as one of the reason for not continuing with indigenous languages in court.

A question as to what was the role of PanSALB in making sure that the Pilot Project on indigenous languages in court was successful, was inevitable. His response was “he could not remember its role and further that he did not know how this project fared”.

One commentator said that the development of African languages is very minimal as there are no African-language books other than school textbooks.⁴¹⁰

The Centre for African Languages Diversity at the University of Cape Town, Western Cape Province, developed short isiXhosa language courses for lawyers for the purpose of

⁴⁰⁸ Also see “Celebrating ten years”, 2007, <http://www.pansalb.org>, (accessed 05 April 2016), p.11, where it was confirmed that The Standardization and Terminology Development (S&TD) focuses on development of terminology of 11 languages to enable them to develop into fictional languages in all spheres of life.

⁴⁰⁹ [Htt://www.south.africa.info/about/democracy/pansalb.htm](http://www.south.africa.info/about/democracy/pansalb.htm). Thursday 11 August 2011.

⁴¹⁰ Kriel M, “Justice for All in Indigenous Language Courts”, *South African Language Rights Bulletin*, vol. 3, issue 7, March 2009, p.3.

addressing language imbalances in court because isiXhosa is the most predominantly spoken language in the Western Cape. Also a Centre called “The Centre for Legal Terminology in African Languages” at the same university was established as a result of the need to make legal terminology more accessible to the local indigenous people.⁴¹¹ This Centre developed a “Legal Terminology” dictionary for the purpose of court proceedings because of the legal language or “legalese” that many people find hard to understand.⁴¹²

When asked whether there is an intention to extend the court in isiXhosa at Khayelitsha to two or three courts or to other areas of the Province, the DJ&COND/2’s response was that “we have not thought about this yet. You are in fact bringing it to my attention and I will consider tabling it at our meetings”.

It is hoped that with the development of the language courses at the University of Cape Town, more indigenous language courts will be established in that province and that this lesson will extend to the Vhembe District, with the University of Venda playing the central role with the idea of implementing these languages in court in terms through the development of legal terminology courses. An Act of Parliament to compel law studies in indigenous languages will enhance legal terminology for the purposes of use in court better than short courses that would cater for a few individual. Pursuant to this Act of 2012, this institutions of higher learning in the Vhembe District is also under obligations to develop language policies for their education not only for the day to day use of languages.

- **Sub-category 4: Practicality**

Practicality was indicated as one of the reason for continuing with English and Afrikaans in court. According to these findings, it is not practical to use all official languages in court. The issue of

⁴¹¹ Alberts, M, “Legal terminology in African Languages”, <http://dx.org/10.5788/7-1-979>, (accesses 05 April 2016).

⁴¹² South African Translators’ Institute, “SATI-Bringing language barriers”, awarded its 2015 Prizes for Outstanding Translation and dictionaries to winners including Prinsloo, M, Alberts, M, & Mollema, N, who received this price as editors of Legal Terminology: Criminal Law, Procedure and Evidence at International Translation Day, 1 October 2015, (accessed 10 March 2016).

practicality: that it is not practical to use indigenous languages as languages of court record or rather the accused's mother-tongue was elaborated in the case of *S v Damoyi*⁴¹³ where the court stated that the issues of use of official languages in court proceedings has not yet been resolved, is capable of, and has the potential of costly implications in the administration of justice. The court went further and stated that if parity of the eleven languages were to be adhered to in court proceedings it could result in a considerable strain in resources which, in turn, could impact on quality of service delivery in the administration of justice. These sentiments were echoed in the case of *S v Damani*⁴¹⁴ when the reviewing judge stated that the use of 11 languages is likely to have administrative and budgetary implications on the part of the Government or the Office of the Chief Justice.

The decision of the review court in both cases is contrary to what had already happened in the *court aquo* where the court conducted the whole proceedings in isiXhosa or isiZulu because these courts have already succeeded in using the indigenous languages in the entire trial. It is also against the empirical research results in which it was found that "it was a good practice to use the accused's language because the language understood by every party to a dispute is being used and everybody is comfortable" as proclaimed by other CTOPI respondents. The issue of practicality was emerged in the case of *Mthethwa v De Bruin N.O. and Another*⁴¹⁵ wherein the court ruled that it is clearly not practicable for the accused to demand to have proceedings conducted in any language than English or Afrikaans.

The reason forwarded by the DJ&COND respondents and some of the CTOPI and CTOQI that the indigenous languages cannot be implemented because of the problems encountered with the regard to appeals and reviews is intertwined with this factor of practicality. It is their contention that judges of appeal and review cannot speak indigenous languages, the assertion that was proved incorrect in this study.⁴¹⁶ With reference to Khayalitsha, DJ&COND/2 admitted that it is practical.

⁴¹³ *S v Damoyi* 2003 JOL 12306 (C) 3 par.4.

⁴¹⁴ *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014) par.22.

⁴¹⁵ *Mthethwa v De Bruin N.O. and Another* 1998 (3) BCLR 336 (N) at 338D.

⁴¹⁶ See Appeals and Reviews on this subject and also sub-category on the Judicial Skills in this Chapter.

According to the DJ&COND, “it is not practical to use indigenous languages in court hence English is the preferred language”. He further equated this issue with the failure of the Pilot Project when he said “this difficulty was evident from the implementation of the Pilot Project on indigenous languages in court which was a fiasco”, without him elaborating how this project failed to prove his contention. This study discovered that the failure of the project was due to factors such as mindset and lack of directives from the department, as enunciated in this study, and nothing in precise. This respondent was asked the question why it is practical in Khayelitsha, but he was inaptitude with his answers. In the analogy of Hlophe, those who are comfortable with the use of these English and Afrikaans only nurture practicality as a ground for non-implementation of indigenous languages.⁴¹⁷ Language dynamics, particularly on practicality, were as well observed by one scholar who bewailed that as far as language is concerned, a majority of the Eastern Arctic Aboriginal people seem to view the Inuktitut/English dichotomy as one opposing identity and practicality.⁴¹⁸

The court at Tivani Magoro, Hlanganani Satellite Magistrate’s Court, proved that it is practical to use indigenous languages in court but that, said one CTOPI/18, “the problem lies with policy implementation on languages, for example, the Use of Official Languages Act of 2012 is promulgated but is not implemented”. Most COTPI and CTOQI respondents unwaveringly confirmed that it is practical to use indigenous languages, the mother-tongue of the accused in the entire trial with reference to lessons experienced in the Pilot Project.

A linguistic legislation with penalties for transgressors may address this attitude.

⁴¹⁷ Hlophe, J.M, “Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society”, *A Paper delivered at the University of Cape Town on 17 September 2003, Forum*, 2004, p. 43. See also Gibson, K, “The Myths of Language Use and the Homogenization of Bilingual workers’, *Identities, Second Language Studies*, University of Hawai, 22(2), Spring 2004, p. 1-60 on this aspect.

⁴¹⁸ Dorais, I. J, “Language, Culture and Identity: Some Inuit Examples”, *International Journal of Law, Language & Discourse*, vol. 2. no.4, 2012, p. 303, www.ijlld.com.

- **Sub-category 5: Mind-set**

The researcher heard some respondents' attitudes towards indigenous languages, which were found to be the mind-set that threatens the use of these languages in our criminal courts. This attitude was also evident from the reasoning of the presiding officer in the case of *S v Damani*⁴¹⁹ when he stated that from theoretical perspective any of the 11 official languages may be used in court proceedings but that from empirical perspective the realization and implementation of this constitutional ideal has, thus far proved elusive or impractical. The presiding officer's contention was not substantiated with evidence except the fear of transcriptions taking time and therefore blended with mindset on the use of English only.

One writer opined: "a change of mind-set cannot happen if there is a reluctance to participate in on-going sensitivity training".⁴²⁰ Another one recommended: "lawyers would have to take at least non-English course to qualify to be a lawyer in certain district though this may not be popular with white lawyers,⁴²¹ (the last leg of this statement attests to mind-set).

The following respondents substantiated this finding. One of them is respondent CTOPI/7 who said "it is not the language *per se* that is not understood but the context in which the concept is used. Accordingly, the use of English only is a solution". Another respondent who put the issue of indigenous languages in court into bad spotlight is CTOPI/10 when he said "it is the mind-set that is problematic. Nothing prevents courts to proceed in Sepedi in criminal courts". Also CTOPI/15 confirms that it is practical to use Tshivenda only. OBS also proved this.

⁴¹⁹ *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014), par.12

⁴²⁰ See Hlophe J.M, "Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society" *A Paper delivered at the University of Cape Town on 17 September 2003, Forum*, 2004, p. 43.

⁴²¹ De Vos, P, "All languages Equal but English and (Afrikaans?) more Equal?", *Constitutionally Speaking.co.za*, 30 April 2008, (accessed 08 August 2013).

The two respondents DJ&COND insisted on the use of English despite the disadvantages of using the language other than the accused's language in the entire trial.

This study found that these policy makers do not concern themselves with policy issues on the use of indigenous languages in court but are rather still embroiled in the mentality on the use of English and Afrikaans only as languages of sophistication. Respondent DJ&COND/1 stated that the use of English should be perpetuated in our criminal justice system. He gave his own reasons for this view and stated: 'the fact that sophisticated and educated people send their children to English medium schools, according to him, is enough evidence for the need to continue English in our courts. The main reason being that one cannot expect a person who attended English medium school to take evidence in his or her own mother-tongue in court merely because his or her mother-tongue is an indigenous language that have been used at that time in point. That would be depriving such a person the benefits of having attended model "C" school'. Crowling⁴²² also advocated this attitude when he stated that if judgments are not in English they will not contribute to international jurisprudence. In contrast, ANC MP Mathole Motshekga lamented that the dominance of Roman-Dutch law and English in the South African justice system needed to come to an end.⁴²³

This attitude was also observed by de Vos⁴²⁴ who indicated that English is seen as the language of money and status and often amongst lawyers and magistrates and judges (as well as others in the professional world), this means that it is taken for granted that everyone will speak English and if they cannot or will not speak it well, that they are stupid. Another writer, on "*the language repertoires and language attitudes of black children*" said 'elites, young and old, seem to equate sophistication with the use English'.⁴²⁵ Respondent CTOPI/10 continued and indicated that "the use of Sepedi placed everyone on equal footing for the purpose of communication, but does not

⁴²² Crowling M.G" The Tower Babel-language usage and the court", *SAJL* (1) 124, 2007, cited in Sibiya, Z, "From Damoyi to Damani :Critical reflection on the use of indigenous languages in the magistrate's courts", *a Paper read at the Society of Teachers of Southern Africa Conference*, Durban, July 6-8, 2015, pp.14-15.

⁴²³ "Minister pushes for African Language in LLB", available from *Legalbrief/your legal news hub*, 23 Monday November 2015.

⁴²⁴ De Vos, P, "All languages Equal but English and (Afrikaans?) more Equal?", *Constitutionally Speaking.co.za*, 30 April 2008, (accessed 08 August 2013).

⁴²⁵ Ramphele, M, in "Low Production and Consumption of African –language books- a Lack of Incentives", *The South African Language Rights Bulletin*, vol. 3, Issue11, July 2009, p.3.

insist on the use of this language because he said one always thinks about English”. He further reaffirmed stereotypical element against indigenous language by saying “there is a lot of reluctance on the part of court officials, including himself, to use indigenous language”. Another linguist said that the need of the majority cannot be sacrificed to maintain the comfort of the few who prefer the *status quo*.⁴²⁶ CTOPI/15 respondent when asked the reason for not continuing with Tshivenda language in accordance with the Pilot Project, stated: “it was due to stereotyping because no one was interested in this project. Further that people were only involved because it was a project introduced by the Department, but otherwise they were not eager to use Tshivenda at all”. The fact that the Pilot Project was reinstated in selected areas, as advanced earlier in this study, and was not implemented in some of those areas is in support of the reluctance on the use of indigenous languages as languages of court record. There is no mandatory legislation that is used as a legal mechanism to ensure that these individuals do not enforce their own will.

Generally, the category of court officials acknowledged the fact that they are stereotyped for using English only. This aspect also points to the fact that there is no mandatory legislation that compels these individuals who peruse their own will at the expense of the majority who suffer the injustices caused by language in court. It is a matter of choice.

It is in the light of this lack of commitment to language issues that this study revealed that without legal teeth, Use of Official Languages Act or any other legal mechanism, the right to a fair trial through the use of indigenous languages will remain a mere right in terms of the language instruments i.e. the Constitution without enjoyment of this right. It was lamented that “there can be no doubt that the exclusive by-passing of indigenous languages in (South Africa) in enacting laws and conducting legal proceedings creates enormous obstacles for the native speakers of those

⁴²⁶ See Hlopho J.M, “Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society” *A Paper delivered at the University of Cape Town on 17 September 2003, Forum*, 2004, p. 43. See also Dorais, I. J, “Language, Culture and Identity: Some Inuit Examples”, *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p. 295, www.ijlld.com on English being seen as rather a tool, necessary to compete efficiently in the modern world.

languages”.⁴²⁷ This consequences is observed from interviews with CONPI and CONQI respondents who most of them received heavy sentences including life imprisonment because of language use in their criminals trials.

- **Sub-category 6: Appeals and Reviews**

The case of *S v Damoyi's*⁴²⁸ is still a case in point. After the court of first instance conducted the proceedings in isiXhosa, the review judge said English is the language of the court. One of the reasons advanced by the judge is that judges of appeal and review cannot speak any other language except English. In contrast, the court in *S v Matomela*⁴²⁹, an earlier judgement than this one, found that this reason can no longer be sustainable because more and more blacks are making their way to appeal courts. This study found the latter to be true given the statistics on African judges earlier.

Two respondents, CTOPI/7 and CTOPI/2 were of the opinion that English only criminal trials limits lot of confusion and saves time but referred to appeals and reviews as one of the reason for preference of English and Afrikaans languages.

DJ&COND/2 referred to appeals and reviews as receptive to English use –only because judges of appeal and review may not speak indigenous languages. There was a mention of two judges for appeal and the fact that one or both of them may not be indigenous language speakers. Both CTOPI/7 and DJ&COND/2 informants were specifically asked the question whether the use of isiXhosa in Khayelitsha is beneficial to the accused persons, their answer was in the affirmative, because everyone speaks the language of the accused, but the challenge is when it comes to appeals and reviews. Judges of appeal and reviews do not speak the language of the accused and translation becomes a problem, according to them.

⁴²⁷ Ailola, & Montsi, (1999:135), cited in Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm, (accessed 08 August 2013).

⁴²⁸ *S v Damoyi* 2003 JOL 12306 (C) 3 par. 6.

⁴²⁹ *S v Matomela* 1998 (3) BCLR 336 (N) at 341H-I.

The popular view is that should the case be heard in indigenous the language it will be difficult to translate the whole court proceedings into English or Afrikaans. That it will also be time consuming. In *S v Damani* the court showed appeals and reviews as one of the reasons why indigenous languages should not be used.⁴³⁰

One respondent CIPI/2 continued and specified that “appeals and reviews should not any longer be advanced as reasons for not using indigenous languages because judges of appeal speak indigenous languages, as their mother-tongue”. His view stands the moment of the time: ‘statistics reveal that 90% of the cases heard in lower courts involve indigenous African-language speakers’.⁴³¹ COTPI/17 estimated that 90% (inclusive) of the presiding officer in Thohoyandou Magistrate’s Courts speak either Tshivenda, or Xitsonga, or Sepedi, or isiZulu while 99% of the accused persons speak Tshivenda, though this statistics were not tested. His estimation is through her own experience as the presiding officer and the head of office in that Magistrate’s Court. The researcher’s experience is that in the High Court of Venda, sometimes at the beginning of the constitutional dispensation, two judges were appointed, one was a Xitsonga-speaker, but also fluent in Tshivenda and Sepedi, and the other judge a Tshivenda-speaker. During court proceedings the former judge would reprimand interpreters for misinterpretations.

Unfortunately, the DJ&COND reprimanded judges who were recording proceedings in isiXhosa in terms of circular 50/2005, in the analogy of DJ&COND/2, demonstrated that we no longer have problem of judges who only speak English at courts of appeal and was back then in 2005. The leadership of the judiciary- at least at the face it- is firmly in African hands. The Chief Justice is African. His deputy is African. The president of the High Court of Appeal is African. Most Judges President are African.⁴³²

⁴³⁰ *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014) par.20.

⁴³¹ Hlophe, J.M., “Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society”, *A Paper delivered at the University of Cape Town on 17 September 2003, Forum*, 2004, p. 43.

⁴³² “The essence of the transformation of the judiciary in South Africa”, *Address to the Black Management Forum Annual Conference*, 17 October 2008, p. 3.

The findings on the fact that appeals and reviews should no longer be a problem due to the fact that most judges of appeal speak indigenous languages as their mother-tongue are overwhelming and precisely dictate the implementation of language policy in terms of this Act of 2012. Alternatively a piece of legislation such as in Ireland is required as explained earlier.⁴³³

- **Sub-category 7: Legal power that manifests itself in courtrooms**

One of the factors found by this study to be the reason for encroaching on the accused's right to a fair trial is legal power. The case of *Lourens v the President of South Africa*⁴³⁴ is such an example where the judge tendered the judgment in Afrikaans because, according to him or her, an English judgment would be insensitive towards Lourens, the applicant, whereas the judge allowed respondents to be exposed to interpretation.

It was acknowledged that the power that is entrusted to the judge in courtrooms should in fact be exercised cautiously and legally.⁴³⁵

It was indicated by the DJ&COND/2 that legal power is one of the challenges facing our multilingual courts because the interpreters do not want to be interrupted by the presiding officers during their interpretation. There is evidence from the CIPI respondents that "they are sometimes interrupted for inaccurate interpretation". This *power play* culminates itself into a situation where the court comes to wrong conclusions because at times he or she cannot intervene when inaccurate interpretation is given. There is also evidence from COTPI respondents as already indicated in this

⁴³³ See Donnacha, J.M, "Language Legislation Mechanism of Language Planning", *Law, Language and Linguistic diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September 2004, pp. 167-168. In terms of The Courts Justice Act 1924-1936 (section 44) judges appointed to courts serving Irish-speaking areas should have sufficient Irish to conduct their duties through the medium of Irish without the assistance of an interpreter and Legal Practitioners (Qualifications) Act, 1929 (Section 3) and as amended by the Solicitors Acts, 1954-1994 that people being appointed as solicitors and barristers should have a "competent knowledge of the Irish language" and be able to perform their duties effectively in Ireland.

⁴³⁴ *Lourens v Government of South Africa and others*, 2013 (1) SA 499 (GNP).

⁴³⁵ Meizhen, L, "Legal Language and Power: Research on the Phenomenon of Interactive Interruption in Court Session", *Law, Language and Linguistic diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, September 2004, p.213.

study that they sometimes interrupt the interpreter if they hear that the interpretation is incorrect, especially where the presiding officer or a lawyer is conversant with the language of the accused or witness. CTOPI/14 confirmed this contention. DJ&COND/1 said interpreters become upset when presiding officers interrupt them for inaccurate misinterpretation. The right to a fair trial suffers in the hands of misunderstanding or conflict. Hence it is important to transform justice system by employing as many indigenous language speakers as possible to become a nation that communicate in indigenous languages and where interpretation will disappear or become of minimal use.

This legal power manifested itself even when the accused person, CONPI/4 respondent, tried to explain that she meant 18:30 and not 16:30 as recorded by the police official. The court did not take into account her injuries as exhibited as proof that she was struggling to ward off the rapist. In order to emphasise this, one author said the tension is further compounded when the hearer is in a position of *power* and cannot only misinterpret the desires of the speaker, but can thwart this expression, forcing the speaker into an entirely different, perhaps unwanted, identity.⁴³⁶ Another author said that the fact that legal power manifests itself in the daily legal activities in the lawyers' offices, police stations and courtrooms all over the country tends to support anomalies emanating from interruptions in the criminal justice system.⁴³⁷ In Finland, the language development has gone from the judicial power towards court service.⁴³⁸ That is only when speakers are placed on the same level as a result of language use.

The advantage of these interruptions is when the presiding officers intervene because they find interpretation inaccurate or wrong and this is usually the case where the presiding officer is conversant with the accused's language.

⁴³⁶ Gibson, K, "The Myths of Language Use and the Homogenization of Bilingual workers", *Identities, Second Language Studies*, University of Hawaii, 22(2), Spring 2004, p.2.

⁴³⁷ See Meizhen, L, "Legal Language and Power: Research on the Phenomenon of Interactive Interruption in Court Session", *Law, Language and Linguistic diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, September 2004, p. 198.

⁴³⁸ Rasia, C, & Ervo, L, "Legal Bilingualism and Factual Multilingualism: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p. 63.

This is proof of legal power and insensitivity towards other language users whose mother-tongue is one of the official languages in terms of the Constitution. Should all parties use one language in indigenous language courts, the judge will be seen more as a helper of the parties than the actor who is using his public power to make final decisions when he speaks the language of the accused?

Without legal mechanisms to regulate such practices, the majority of court users still have to endure the legal abuse of English and Afrikaans in the courtrooms.

- **Sub-category 8: Inequitable use of languages**

The use of mother-tongue ensures the accused's right to equal protection of the law as guaranteed by section 9(1) of the Constitution, as observed from the information provided by APPI respondents. This section provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Also section 39 (1) (a) provides equality as value as provided earlier in this. Equality⁴³⁹ is respected as a right as well as value on which an open democratic society is premised.

It is in the breadth of this section that the accused should be accorded the right to use his or her own language so that he or she benefits from the law.⁴⁴⁰ It is also in the spirit of section 6 (4) of the Constitution on parity of esteem and "equitable use" of all official languages. The reality is that the official languages do not enjoy "parity of esteem" and are far from being treated equitably by the courts in South Africa.⁴⁴¹ Therefore inequitable use of languages does not conform to the

⁴³⁹ Berg, N, "Language Bill must Treat all Official Languages Equitably", www.politicsweb.co.za/politicsweb/view/page, 02 March 2012, (accessed 27 March 2012); de Lange, D, "Sparks Fly in Debate on language parity, 09 January 2012, www.iol.co.za/news/politics/sparks-fly-in-debate-on-language-parity-1.1215946, (accessed 19 January 2012).

⁴⁴⁰ See Brock-Utne, B, "The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy", *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm, (accessed 08 August 2013), on how language use can benefit the society.

⁴⁴¹ Hlophe, J.M, "Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society", *A Paper delivered at the University of Cape Town on 17 September 2003, Forum*, 2004, p.42.

equality clause in the Constitution. In other countries there is an attempt to address the inequalities and injustices perpetrated by the use of language, i.e. Walker, R-Gambrills of Capital withdrew English only Bill from council on the basis that it was labeled as racist.⁴⁴²

Having found that the Use of Official Languages Act does not provide for the indigenous languages to be used in court proceedings while it provides for the use of only three languages as official languages in a province, this study aims at affording the accused's equal protection and benefit of the law by using his or her own language, indigenous language, in the criminal court proceedings.

Inequitable use of languages was also evident from the case of *Lourens v The Government of South Africa*⁴⁴³ to force the government to treat all local languages equally in terms of section 6 of the Constitution. As a result thereof the Use of Official Languages Act was promulgated of which its object is to afford equitable use of all eleven official languages in terms of section 6 of the Constitution of South Africa.

Language development in South Africa which culminated into the Language Bill being promulgated attracted critics in the quest to produce a state that treats all constitutional languages equitably. It was commented that the Bill, in its current form will hamper the equitable treatment of languages rather than encourage it.⁴⁴⁴ This is an indication that languages should be treated equitably in South Africa. And such equity will be accomplished in terms of this study when the three languages are used in the Vhembe District criminal courts. The quest for this constitutional conformity is evident from this outcry.

See also the purpose of Equality Courts as explained earlier in this Chapter. The most recent court case of *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014),

⁴⁴² Bourg, A, "Walker Withdraws English Language Bill from Council", *The Capital*, 07 March 2012, <http://www.hometownannopilis.com>, (accessed 27 March 2012).

⁴⁴³ *Lourens v Government of South Africa and others* 2013 (1) SA 499 (GNP).

⁴⁴⁴ See Berg, N, "Language Bill must Treat all Official Languages Equitably", www.politicsweb.co.za/politicsweb/view/page, 02 March 2012, (accessed 27 March 2012); e Lange, "Sparks Fly in Debate on Language Parity", www.iol.co.za/news/politics/sparks-fly-in-debate-on-language-parity-1.1215946, 19 January 2012, (accessed 19 January 2012; Du Preeze, J, "The Language of our Choice- Concerns a Language Bill", *FW de Klerk Foundation-Center for Constitutional Rights*, www.fwdeklerk.org, (accessed 27 March 2012), and also Sennitt, A, "South Africa Seeks to Shore up Indigenous Languages", *Media Network*, 13 March 2012, (accessed 27 March 2012).

The court in the case of *Lourens v Speaker of the National Assembly of Parliament*⁴⁴⁵ where an application for discrimination was brought that Bills of Parliament are discriminatory on Afrikaans language because they are invariably in English. On finding that such Bills are not discriminatory, the court made distinction between “equity” and “equitable use” of languages. This study is of the view that such judgments perpetuate the use of English only. The Bill of rights belongs to everybody, and not to a minority group. The results of such findings prompted the researcher to also support the fact the Constitutional provisions on language are made farce by the custodian of these rights, i.e. courts.

The category of convicts, CONQI, was alerted to discrimination of their languages with reference to the right of choice of their language in terms of the Constitution.

01 agreed that his or her language was treated inequitably.	39 disagreed that their languages were discriminated.
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Table 18: Inequitable use of languages.

Although the question on whether being marginalized through the use of language deprived the respondents choice of language seemed to have been misunderstood by almost all the CNOQI respondents as postulated in table 18. The question was intended to place their languages on equal footing with English and Afrikaans in terms of section 9 of the Constitution. If the court is not able to conduct the proceedings in one’s own mother-tongue, it deprives that person the right to protection of the law through the use of language. One function of PanSALB was to create awareness about language human rights to the society through Language Indabas⁴⁴⁶ and the public will demand its rights to this end.

⁴⁴⁵ *Lourens v Speaker of the National Assembly of Parliament* (20827/2014) [2016] ZASCA 11 (10 March 2016) 12 at pars. 29-31, <http://www.saflii.org/za/cases/ZAEQC/2014/2.html>, (accessed 22 March 2016).

⁴⁴⁶ PanSALB Media Release, “Indaba to Audit Language Status in the Country, www.panslab.org.za/news.html, (accessed 17 April 2014).

De Vos⁴⁴⁷ stated with dismay that but because English is such a dominant language and because it is also an aspirational language of most people in our country, even second language speakers of English often do not insist on fair treatment for their indigenous languages. The response from the DJ&COND/1 respondent is evident of this attitude due to the fact that he said one cannot expect people who attended English medium Schools to speak indigenous languages in court. , in some countries people demand the equitable use of their languages. In the contrary, there are debates on equal treatment of languages. Examples are: the accused in the case of *S v Mthethwa.*'s⁴⁴⁸ demanded that his trial be conducted in isiZulu, his mother-tongue, as is one of the official languages in terms of the Constitution; people take pride in their mother-tongue;⁴⁴⁹ CTOPI/1 informant was of the opinion that it is equitable to use the language everyone understands because this is in terms of the Constitution; through the experience of the researcher as a lecturer, an email was sent by the Commission on Equality to academics around the country requesting as to whether there are incidences of language discrimination such as the one advanced to this commission by two candidate attorneys who demanded to use their mother-tongue during court proceedings and the denial thereof was regarded by these study as discriminatory. Hlophe shares the same sentiments on equitable treatment of languages.⁴⁵⁰ From other jurisdictions it was found that a group of more than hundred advocates boycotted courts demanding Tamil to be used in the high court in addition to English, which is the language of all higher courts in India. While Tamil has been declared the official language in lower courts for the purpose of filling petitions, recording evidence, oral arguments and writing of judgments, it was established that only ten (10) percent of the proceedings are in Tamil.⁴⁵¹ It was also found that the legal equality is the practical tool to realise the right to linguistic equality in practice.⁴⁵²

⁴⁴⁷ De Vos, P, 'All languages Equal but English and (Afrikaans?) more Equal? *Constitutionally Speaking.co.za*, 30 April 2008, (accessed 08 August 2013).

⁴⁴⁸ *Mthethwa v De Bruin N.O. and another* 1998 (3) BCLR 336 (N) at 338D.

⁴⁴⁹ Mashatile, P. cited in Sennitt, A, "South Africa Seeks to Shore up Indigenous Languages", shares the sentiment, 13 March 2012, <http://blogs.rnm.nl/medianetwork/>, (accessed 27 March 2012).

⁴⁵⁰ Hlophe, J.M, "Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society", *A Paper delivered at the University of Cape Town on 17 September 2003, Forum*, 2004, 42.

⁴⁵¹ Timesofindia.Indiantimes.com/city/madurai/advocates-boycott-courts-demanding.Tamil-as-court-language/articlesshow/22310199.cms.

⁴⁵² Rasia, C, & Ervo, L, "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p .71.

The court in *Matomela*⁴⁵³ pronounced that the review process on the basis of language does not promote equitable use of all 11 official languages. Contrary to this decision, the court in *Mthethwa's case*⁴⁵⁴ perpetrated discrimination of the accused's language, i.e. isiZulu by refusing to conduct the proceedings in the language of the accused. In all the two categories, the accused persons and the convicts, English took preference over other languages.

If we approach the use of languages from the perspective of the FW de Klerk Foundation⁴⁵⁵ which recommended English to be the first preferred language and that the third language should be chosen based on local demographics with preference given to “diminishing” languages, the likelihood is that English and Afrikaans will still be promoted over other languages, thereby negating the very same spirit of section 6 (4) of the Constitution on parity of esteem and “equitable use” of all official languages and also the object of the Act of 2012.

Some authorities argue that inequitable use of other languages emanates as a result of a strong *lingua franca* which can prevent other languages being spoken. Joseph-G-Turi therefore recommended promulgation of an imperative legislation that must establish a legally equitable treatment between languages coexisting in a given political context.⁴⁵⁶

De Klerk's Foundation was wary of the fact that other languages in the region, particularly indigenous languages would not be afforded a right to be heard, despite its unacceptable choice of languages. The Use of Official Languages Act will therefore become obsolete. The Vhembe District should use Tshivenda, Xitsonga and Sepedi and treat them equitably.

⁴⁵³ *S v Matomela* 1998 (3) BCLR 336 (N) at 342H.

⁴⁵⁴ *Mthethwa v De Bruin N.O. and Another* 1998 (3) BCLR 336 (N) at 338D.

⁴⁵⁵ du Preez, J, “The Language of Our Choice- Concerns arising from the Language Bill”, <http://www.fwdeklerk.org>, Centre for Constitutional Rights Berg, N, “Language Bill must Treat all Official Languages Equitably”, 02 March 2012, www.politicsweb.co.za/politicsweb/view/page, (accessed 27 March 2012).

⁴⁵⁶ Joseph-G-Turi, “Language Law and Language Rights”, *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, pp. 8, 15 and 16. See also du Plessis, T, “Language Facilitation and Development in South Africa”: *Papers read at an International Forum for Language Workers on 6-7 June, 1997*.”

The CONPI respondents were convicted and attracted heavy sentences because of the preferential treatment of English in which all their trials were conducted.

This Act, by recognising equitable use of three indigenous languages, accords the accused with the right of protection of the law thereby conforming to the provisions of section 9(1) of the Constitution. While in terms of notice 282 of 2015⁴⁵⁷ of Government Gazette, a notice for the proposed language policy in terms of Use of Official Languages Act 12 of 2012 was pronounced, it is hoped that it will address a discontent that is at the heart of the debates about exclusions, marginalisation, discrimination and many other prejudices that manifest in the public space based on language usage.

4.3 CONCLUSION

Lessons from other jurisdictions and the empirical study played an important role in addressing the hypotheses of this research, in particular that the establishment of Indigenous Language Courts in the Vhembe District, in terms of the Use of Official Languages Act of 2012, which will enhance the use of one's mother-tongue in criminal trials. The ultimate goal is the accomplishment of the right to a fair trial.

The reader is reminded at this juncture that it was not the aim of this study to establish the accuracy or inaccuracy of interpretation in court, but to determine the impact of its accuracy on the outcome of case to strengthen the study's annunciation that the use of mother-tongue will alleviate these problems. The determination to that effect, was to answer research questions in order give the reader more insight into the phenomenon under investigation and to arrive at the objective of this study. Furthermore, these legally- recognized tools negate the right of the accused person to language which would otherwise afford him or her right to participate fully in the proceedings. By contrast, it was found that the use of mother-tongue affords the accused the right to a fair trial more efficiently than these tools because he or she is able to formulate defence and answer to

⁴⁵⁷ *Government Gazette*, vol. 597 Pretoria, 30 March 2015, No. 38646, Notice 282 of 2015.

the charges levelled against him or her. The instrument of language was also found to have either (a). enhanced other rights such the right to dignity, the right to equality, the right to security of person and the right to life which might be taken away or (b). invalidate them.

The next Chapter, summarises the previous chapters in order to give the reader a brief understanding of what this study has achieved and what contribution it has made to knowledge. The researcher in this chapter will also make inferences and assumptions to put the participant's perspectives, experiences, attitudes and opinion with regard to the phenomenon as investigated, into a more understandable and comprehensive meaning.

CHAPTER FIVE

DISCUSSIONS

5.1 INTRODUCTION

After having presented the facts and figures for the collected data in Chapter four, the study now makes an inquiry into the data. This chapter analyses the data through interpretation thereof. Most researchers too often believe that after having presented the facts and figures, they have done all that needs to be done, ignorant of the fact that interpretation of the data is the essence of research.⁴⁵⁸ This chapter presents a summary of results and integration of the data. The researcher made inferences and assumptions through the organisation of the findings into small segments for the reader to understand the nature of the problem and how it was approached. The researcher further stated whether the problem statement was answered or not through reiterating the hypothesis and the data presented. As mentioned at the beginning, this research is a phenomenological one; it incorporated grounded theory whereby two theories were developed. These two competing theories were integrated in the interpretation of the data to put the right to a fair trial within the context of a language policy into perspective. The theories also assisted the researcher to put the problem statement into a meaningful conclusion.

The purpose of this study was to explore the implications of the Use of Official Languages Act of 2012 on the establishment of Indigenous Language Courts in the Vhembe District. This investigation was premised on the problem statement that English and Afrikaans continue to be the only dominant languages in the Vhembe District criminal trials notwithstanding the letter and spirit of section 6 of the Constitution of South Africa and the object of the Use of Official Languages Act of 2012, thereby denying the accused person his or her right to a fair trial through the use of mother-tongue.⁴⁵⁹ Its sub-problems that built up to the main problem are integrated in these discussions.

⁴⁵⁸Leedy, P.D. & Ormrod, J.E., "Practical Research: Planning and Design", 9th edn, 2010, p.295.

⁴⁵⁹ See also Gutto, S.B.O, "Plain Language and the Law in the Context of Cultural and Legal Pluralism", *SAJHR* vol.11, 1995, p. 311, where he referred to the undertaking by ANC that this government / organization identified the

The researcher developed a hypothesis of this study that indigenous language courts established in terms of the Use of Official Languages Act will accord the accused person the right to a fair trial through the use his or her mother-tongue in criminal proceedings better than the use of other languages foreign to him or her. This study is significant in the Vhembe District as it will be possible to use indigenous languages predominantly spoken in this district, which are Tshivenda, Xitsonga and Sepedi.

5.2 SUMMARY OF RESULTS, INFERENCES AND ASSUMPTIONS

5.2.1 Summary of results

5.2.1.1 The following is the phenomenon under investigation:

Existing legally enforceable mechanisms perpetuate the use of English and Afrikaans only thereby denying the accused the right to a fair trial as opposed to the use of the accused's mother-tongue in the entire trial in indigenous language courts as implied by the Use of Official Languages Act of 2012 and provided by the Constitution of the Republic of South Africa, in the District of Vhembe.

5.2.1.2 The main objective of this study is:

- ❖ Establishment of indigenous language courts
- ❖ through implications of the Use of Official Languages Act 12 of 2012
- ❖ in order to use predominantly spoken languages in the District of Vhembe: Tshivenda, Xitsonga and Sepedi
- ❖ as mother-tongue of the accused in the entire trial in these courts
- ❖ so that any resultant prejudice due to language usage in criminal proceedings

problem of complicated language in the administration of justice as a target for reform and transformation. See also comments in *S v Pistorius* [2014] CC113/2013 ZAGPPHC 793 (12 September 2014) in *SowetanLIVE* (<http://.sowetanlive.co.za/anger-over-pirtorius-trial-interpreters>, 14 March 2014).

- ❖ that was perpetuated by the use of language
- ❖ particularly the negation of right to a fair trial
- ❖ will be eliminated through these courts.
- ❖ NB Make this ONE sentence!

5.2.1.3 Study tested the following the hypothetical positions:

- ❖ The existing legal tools are instrumental to the continuation of the use of English and Afrikaans languages of criminal courts thereby negating the right to a fair trial.
 - Legal mechanisms that lead to the preservation of English and Afrikaans as languages of criminal courts are:
 - Legislative provisions
 - Constitutional shadow
 - Legislative interpretation
 - Inaccurate interpretation and its impact on the right to a fair trial
 - The use of interpretation in criminal proceedings as a result of English usage only
 - Inaccurate interpretation
 - The impact of the inaccurate interpretation on the right to a fair trial.
 - Culture is revealed as a tool for English use only
 - Culture is instrumental to unfair trial
 - Culture realises the right to a fair trial.
- ❖ The establishment of Indigenous Language Courts in terms of The Use of Official Languages Act of 2012 to safeguard the right to a fair trial
 - The right to a fair trial through the use language
 - Common Law right to a fair hearing
 - Legislation
 - Human rights instruments

- Establishment of Indigenous Language Courts
 - Creation of courts of law to give the right to a fair trial its efficacy.
 - The use of the accused's mother-tongue in the entire criminal proceedings
 - The implications of the use of language on other constitutional rights
 - Territorial use of a language.

- Legal teeth: linguistic legislation with legal remedies is imperative
 - Lack of legal teeth
 - Judicial Skills
 - Lack of legal terminology in indigenous languages
 - Practicality
 - Mindset
 - Appeals and Reviews
 - Legal power that manifests itself in courtrooms
 - Inequitable use of languages

5.2.1.4. *The following are concepts that formed part of this study in relation to problem statement, data collection and interpretation:*

- ❖ criminal court proceedings;
- ❖ language of the court;
- ❖ language of court record;
- ❖ interpretation;
- ❖ language policy;
- ❖ dominantly used languages: English and Afrikaans;
- ❖ letter and spirit of the Constitution of South Africa;
- ❖ object of the Use of Official Languages Act 12 of 2012;
- ❖ the right to a fair trial;
- ❖ indigenous languages;
- ❖ indigenous courts;
- ❖ mother –tongue;

- ❖ Tshivenda, Xitsonga and Sepedi languages;
- ❖ Vhembe District.

It is hoped that the provision of the above scenarios would help to remind the reader of the issues involved in this phenomenon, so as to encapsulate them in the inferences and assumptions herein made.

5.2.2 Inferences and assumptions

Problems emanating from the legislative provisions and the subsequent interpretation of section 35 (3) (k) of the Constitution and section 6(1) and (2) of the Magistrates' Court Act were identified and interpreted in this chapter. It was inferred from this contention that these problems became a barrier for the accused persons to receive information that would enable them to answer to the allegations levelled against them. Subsequently, they were deprived of their right to access to justice through the right to a fair hearing.

This inference speaks to the research hypothesis that *“existing legally–recognised methods that perpetuate the use of English and Afrikaans only in criminal court proceedings are not giving effect to the right to a fair trial”*.

As already mentioned in Chapter three that the researcher developed theories that helped her to address the phenomenon under investigation, therefore, the first theory that was incorporated in this study is *“the use of language the accused understands, or if that is practicable, to have the proceedings interpreted into that language”*

This theory is premised on the argument that the right to a language as provided for in the Constitution does not necessarily mean that the accused has an absolute right to use his or her own language in court. Joseph-G-Turi contented that according to legislation on language no one is obliged to use one or more languages in absolute terms.⁴⁶⁰ This author referred to the Canadian

⁴⁶⁰ Joseph-G-Turi, “Language Law and Language Rights”, *International Journal of Law, Language & Discourse*, vol.2.no 4, 2012, p 7, appeal court overturned this judgment and reaffirmed the use of mother language.

case of *Forget*, 1988 where the court said the concept of language is not limited to the mother language but also includes the language of use or habitual communication. He went to say that there is no need to take a narrow approach to language rights. Similarly, in the analogy of Currie, the provisions of section 25(3) (i) or section 35(3) (k) of the Interim and final Constitution respectively are not violated if proceedings are not conducted in the language of the accused's choice as long as they were interpreted to the accused.⁴⁶¹

Court cases such as *S v Naidenove*⁴⁶² and *S v Ohannessian*⁴⁶³ advocate for this approach. Participants such as CIPI/1 confirmed this argument and indicated that the court usually embarks on inquiry to establish the proficiency of the accused with the language of the court, English or Afrikaans, while from participants such as APPI and CONPI respondents it was discovered that there was no such an inquiry as to the preferred language. From this emanates an inference that these respondents would prefer the entire proceedings to be conducted in their indigenous languages in order to avoid these injustices caused by the provisions and interpretation of these legislations and to be placed at the equal footing and for the protection of other constitutional rights. It is further inferred that administrators of justice are not honest when executing their duties because they consistently use English without finding out the preferred language of the accused except when interpretation has to be provided in the language of the accused.

An inference is further made that the use of English and Afrikaans benefits only those whose mother-tongues are English or Afrikaans and in very limited circumstances those who understand them, as it was the case in *Ohannessian's* matter. The decision by the court confirms an outcry that those who understand and speak the language of the court, "sophisticated people", get acquittals, but those who cannot speak the language of the court are vulnerable and susceptible to heavy sentences.⁴⁶⁴ Another inference from this scenario is that it causes confusion in courtrooms

⁴⁶¹ Currie, I, "Minority rights: Language, Education and culture" in Chaskalson, M (ed), *Constitutional Law of South Africa*, 1996, p. 35-10.

⁴⁶² *Naidenove v Minister of Home Affairs and Others*, 1995 (7) BCLR 891 (T) at 8981I-J.

⁴⁶³ *Ohannessian v Koen, N.O and Another* 1964 (1) SA 663 (TPD) at 664E.

⁴⁶⁴ See CONPI's information.

in the analogy of one author who said that language policies in African countries complicate language usage and implementation due to their avoidance, vagueness, and many other factors.⁴⁶⁵

This scenario was observed by the researcher during the *Pistorius case*⁴⁶⁶ when the judge asked the witness as to whether she wanted to give evidence in English or Afrikaans. Ultimately, APPI and CONPI respondents were found not to have benefited from the use of these languages.

This approach is capable of legal inappropriateness as the accused is not allowed to use his or her own language in the entire proceedings due to the policy on English and Afrikaans as languages of court records. It is inconceivable that courts consider the second leg of the provision of section 6(1) of the Magistrate's Court Act, "the provision of an interpreter" and ignore the first leg of the provision on the "use of either of the official languages that may be used in the entire trial". The latter leg is consistent with the constitutional clause 6(1) on official languages. This study argues that it should take preference over any other provision that has the inclination of negating the accused's right to a fair trial. It is further inconceivable that courts prefer the second leg of the provision of section 35 (3) (k) on the provision of interpretation, where impracticable rather than the first leg on the language the accused understands. It is clear that courts use this provision on "impracticability" elusively merely because it is provided in the Constitution as there seems to be no concrete factors that support the finding on "impracticability". By the same token, courts have not clearly shown what would make these languages practical. The case of *Mthethwa*⁴⁶⁷ and many such cases as elaborated in Chapter two of this study are good examples of this approach. Based on this scenario, the contention that our Constitution is as clear as mud on the issue of language rights⁴⁶⁸ in as far as the administration of justice is concerned, is assumed to be correct in this study.

⁴⁶⁵ Bangbose, 1991 cited in Rikhotso, A. M, "Language Policy and Language use in South African Social Security Agency (ASSA), Limpopo Province, a *Mini-Dissertation* for Masters degree, University of Limpopo, Turfloop Campus, 2014, p. 17.

⁴⁶⁶ *S v Pistorius* [2014] CC113/2013 ZAGPPHC 793, September 12, (2014),ETV, February 26, (2014) at around 10 am.

⁴⁶⁷ *Mthethwa v De Bruin N.O. and Another*, 1998 (3) BCLR 336 (N) at 338D. See also the recent case of *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014) at para.13.

⁴⁶⁸ De Vos, P, "All Languages Equal but English (and Afrikaans?) More Equal? *Constitutionally Speaking.co.za*, 30 April 2008, (accessed 08 August 2013).

Where the proceedings were conducted in the language of the accused, this right was subsequently encroached upon by the reviewing judge.⁴⁶⁹ This contention gives rise to a further inference that cases in which the language of the accused in the entire proceedings are an indication that it is possible to conduct the entire trial in the accused's language.

It is argued that the failure of this theory is further compounded by other factors such as inaccurate interpretation of the proceedings. While interpretation is bound to exist for a long period for the society's claim for multilingualism,⁴⁷⁰ it is assumed that it does not afford the accused the right to a fair trial due to problems exposed in Chapter four.

Factually, it is correct for the respondents in the categories of the accused and convicted persons to have said that their trials were conducted in English and that interpretation was used. While some of them might not have been aware that there was misinterpretation in their trial but have commented on the imperfection of the interpretation in anyway, it is assumed it was probable that it was imperfect because it is also accepted that interpretation in South African justice system and elsewhere is not up to standard as shown in Chapter two of this study.

This exposition also speaks to the research question as to "*whether interpretation is accurate*" and confirms the assumption by the study that "English and Afrikaans continue to be the languages of court record in criminal court proceedings despite the existence of predominantly spoken languages in this district, i.e. Tshivenda or Xitsonga or Sepedi, mother-tongue and indigenous languages of most accused persons." It also confirms the assumption by the researcher that the current position perpetuates the nullification of the

⁴⁶⁹ See *S v Matomela* 1998 (3) BCLR 336 (N) at 342H and *S v Damoyi* 2003 JOL 12306 (C) 3 at par. 4, of [2003] JOL 12306 (C) where the reviewing judges criticised the use of mother-tongue.

⁴⁷⁰ Rasia, C, & Ervo, L, "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012 ,p.92. Though interpretation and translation can be used as practical tools to make it possible to communicate in multi-lingualistic situations at the courts; the demands for a fair trial through the use of language and the significance of authentic communication mean big challenges for linguistic professionals. See also responses by the two DJ&COND respondents.

right to a fair trial. This is one of the different phenomena that assisted the researcher to arrive at her conclusions in relation to the problem statement of this research.

Another factor that adds up to this hypothetical situation is “*the impact of inaccurate interpretation on the outcome of the case*”. Respondents in the categories of the accused persons and the convicts assumed that had their trial been conducted in their mother-tongue, the court would have come to a different conclusion. The perception established the impact of inaccurate interpretation on the outcome of the case. It is therefore inferred that this assumption has a legal basis due to possible wrong conclusions that emanated in most court cases. For example, most CONPI respondents are cases in point. A further example is found from the *Pistorius*⁴⁷¹ case which also confirms this inference in that one of the criticism leveled against this case was the nature of interpretation that might have led the presiding officer to arrive at a wrong decision. CTOPI/7 respondent’s response on the impact of misinterpretation on the right to a fair trial is that its inaccuracy may of course in one way or the other affect the decision of the court. Therefore, the question as to “*whether the inaccuracy of the interpretation impacts negatively on the right to a fair trial*” was addressed. While DJ&COND respondents acknowledge that interpretation is not accurate, they still recommend the use of English only. Their mind-set for English ascendancy confirms the assumption that policy makers are ignorant of the injustices caused by language use in court and the assumption that their ignorance on the provisions of the Act of 2012 disadvantages the majority of the population.

Now that the interpretation was found not to be accurate and consequently impeding on the accused’s right to a fair trial, the establishment of Indigenous Language Courts is inevitable to address injustices endured by indigent people for decades. On a further assumption that the use of the indigenous language as the language of the accused person will elevate problems created by interpretation for the benefit of the accused person and consequently of the convict, the study seems to be correct.

⁴⁷¹ *S v Pistorius* [2014] CC113/2013 ZAGPPHC 793, (12 September 2014).

Culture was also found to be another factor that was manipulated either to accord the accused his or her right to language or to deny him or her this right. It was assumed that without taking into consideration the cultural background of the accused, mistrials will continue to dominate the justice system. After having been informed by some of the CIPI respondents that culture plays a vital role on the behaviour of witnesses and on the outcome of the case itself, the study assumed that, in the analogy of CONPI/1 respondent's use of cultural concept "*o ndzhena mapaini anga*" meaning "*he raped me*", language use is disadvantaging the broader masses of the community due to their exercise of culture. Based on this, the researcher further assumed that the use of culture was instrumental to discriminate against people due to their cultural background. Hence some commentators are advocates of the right to culture as an element of language rights and calls for a judiciary which is culturally diverse.⁴⁷²

With reference to this respondent who was sentenced to life imprisonment because of using cultural concepts, one may ask a question: why should this respondent be deprived of her life for exercising her culture? This study further inferred that had it been a Tshivenda speaking presiding officer, though this question was not put to the respondent during the contact with her, he or she would have understood it in its cultural context. Should such contextual decisions be produced through fair procedures as pronounced by other authors,⁴⁷³ this would have elevated the problems created by legislative provisions from which parties had a feeling of unfairness through their formulation or application. An inference is further made that PanSALB should have considered cultural connotations in the processes of executing its duties on the promotion of languages.

In conformity with the constitutional provisions on languages and how linguistic communities perceive language and culture, this study inferred that the object of the Act of 2012 on languages would require the use of indigenous languages in criminal trials for the purpose of a fair hearing and protection of culture through the use of the accused's own language. It is therefore true that

⁴⁷² De Vos, P, 'All languages Equal but English and (Afrikaans?) more Equal? *Constitutionally Speaking.co.za*, 30 April 2008, (accessed 8 august 2013).

⁴⁷³ Rasia, C, & Ervo, L, "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p. 64.

linguistic rights should be seen as practical instruments to realize other human rights, like the right to fair trial, and as a tool to guarantee the best possible communication during the proceedings.

This study designates indigenous languages, mother-tongue of most of the indigent people to the right of a fair hearing in this district. The establishment of Indigenous Language Courts in the Vhembe District was premised on the right of the indigent people to exercise their language and to freely enhance their cultural life using their own language.

It is inferred that it is due to the legislative and legal instructions that are not complete and perfect that we have so many challenges in passing fair judgments. Therefore, the use of language in court produces decisions blended with unfairness. Actually, respondent CONP/1 was dissatisfied with the justice system arguing that it denied her participation in fair procedures through her culture. She was convinced that the indispensable relationship between language and culture were not considered in her criminal trial.

When one looks at the provisions of the law⁴⁷⁴ the application of the law by the courts;⁴⁷⁵ the approach taken by some authors⁴⁷⁶ on legislative and constitutional provisions; and the attitude from DJ&COND and some CTOQI respondents⁴⁷⁷ on the use of languages in court, one wonders if consideration was ever given to the implications these approaches have on the accused's rights to dignity, security of a person and the right to life.⁴⁷⁸ The right to

⁴⁷⁴ In Ireland some pieces of legislation appear to place a real responsibility on a public body to act in a way that promotes the Irish Language, but the wording of the relevant provisions is such that in reality the provision is purely aspirational and symbolic by Donnacha, J.M, "Language Legislation Mechanism of Language Planning", *Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September, 2004, pp. 167-168. See also Magistrate' Court Act 32 of 1944 sections 6 (1) and (2).

⁴⁷⁵ In *S v Mafu* 1978 (1) SA 454 (CPD) at 459B-C the court decided that one can be bilingual, but yet not sufficient enough to have the proceedings not being interpreted to him or her.

⁴⁷⁶ See for example Joseph-G-Turi, "Language Law and Language Rights", *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p 7, Appeal court overturned this judgment and reaffirmed the use of mother language in *Forget's case*, and Currie, I, "Minority Rights: Language, Education and Culture", in Chaskalson, M (ed), *Constitutional Law of South Africa*, 1996, p. 35-10.

⁴⁷⁷ The responses from these respondents were of such a nature that they would prefer English over any other language despite the provisions of this Act.

⁴⁷⁸ This is true from the responses by CONPI's on the question of rights been taken away.

equality before the law cannot be carried out in any way from the application of the law as found in *Lourens v Speaker of the National Assembly of Parliament*.⁴⁷⁹

The study further inferred, based on these arguments, that the change in policy pursuant of this Act of 2012 for the inclusion of the indigenous languages, particularly as the mother-tongue of the accused will be far-fetched for the majority of the Vhembe District, hence this study is significant. The researcher observed the following important aspects of this study:

- The researcher reached the conclusion that courts, which are the custodians of the Constitution, distance themselves from language provisions as provided by the Constitution and the Use of Official Languages Act 12 of 2012.
- It is the question of irregularity with regard to the question whether an interpreter was called or not and not the inquiry into whether the accused's language could be used throughout the entire trial.
- It is regrettable that this research found that most accused persons are either Tshivenda or Xitsonga or Sepedi speakers.
- It is further regrettable that most personnel working in the Vhembe District criminal courts and lawyers are speakers of these languages, but that much of the population is still subjected to injustices caused by English language usage.
- Some of the assumptions were narrated at the beginning of the study and they were found to be substantiated by this study.

⁴⁷⁹ See *Lourens v Speaker of the National Assembly of Parliament* (20827/2014) [2016] ZASCA 11 (10 March 2016) 12 at pars. 30-31, <http://www.saflii.org/za/cases/ZAEQC/2014/2.html>, (accessed 22 March 2016).

Accordingly, this approach was found to be unhelpful because it does not achieve the objectives of this study which is affording the accused the right to a fair trial through the use of their own language,⁴⁸⁰ on the ground that a common law right to a fair hearing including the right to be informed of the case one meets and the right to make full answers and defense is violated. It is also instrumental to the perpetuation of the legally-enforced mechanisms that promote the use of English in criminal courts.

The biggest challenge is to place languages on equal footing in terms of the Use of official Languages Act of 2012 as postulated in this study.⁴⁸¹ To answer the question as to “*the implications of this Act on the use of these two languages i.e. English and Afrikaans in our multilingual criminal courtrooms*”, the discussion above voiced this scenario. It is therefore implied that the implementation of this Act will eliminate these problems. Thus, these findings successfully addressed the main phenomenon as well.

After having elaborated and successfully tested the first hypothesis of this study, the researcher considered it prudent to determine whether the data collected tested the second research hypothesis i.e. “*Indigenous Language Courts established in terms of the Use of Official Languages Act of 2012 will accord the accused person in the Vhembe District the right to use his or her mother-tongue in criminal proceedings in order to give effect to the right to a fair trial better than the use of English and Afrikaans*”.

Though the operation of the first theory indirectly dictates the feasibility of this hypothesis due to the fact that it does not take the language rights further, the second theory advocates for this supposition more eloquently than the first one. The second theory integrated in these discussions

⁴⁸⁰ See *Ohannessian v Koen, N.O and Another* 1964 (1) SA 663 (TPD) at 664E. Similarly, in cases such as *S v Matomela* 1998 (3) BCLR 336 (N) at 342H and *S v Damoyi* 2003 JOL 12306 (C) 3 at parg. 4 proceedings were conducted in the accused language but not because the accused requested the use of his language but that there were no interpreters. In contrast to the findings of this case, the court in a Canadian case of *Reference re use of French in Criminal Proceedings in Saskatchewan* (1987) 36 C C C (3d) 353, the court indicated that the accused, regardless of his or her facility in English has the right to use French through the entire trial.

⁴⁸¹ This is as well maintained by Joseph-G-Turi, “Language Law and Language Rights”, *International Journal of Law, Language & Discourse*, vol.2 no.4, 2012, p 7, when he said “these languages co-exist often in uneasily dominant-dominated relationships”. See also DJ&COND/1 who insisted on the dominant language, i.e. English.

that enhanced this phenomenological investigation is the “*use of the accused’s mother-tongue approach*”.

While there is a popular belief that English and Afrikaans make the job easier for the courts as shown in Chapter four, the provisions of the Use of Official Languages Act of 2012 and the letter and spirit of the Constitution entitle every accused person the use of mother-tongue for the purpose of the right to a fair trial. By the same token, it is inferred that the use of the mother-tongue of the accused person will make the job easier. As already announced earlier that the majority of the court officials and accused persons in this district speak the identified languages, this objective will be sustainable.

This theory was found in many commentaries including, but not limited to: speaking your mother-tongue can help you track back who you are;⁴⁸² the land mark case of *Pistorius*⁴⁸³ on language usage in court; Landman who maintained that language makes us what we are;⁴⁸⁴ Holmes who viewed language as the blood of the soul into which thoughts run and out of which they grow;⁴⁸⁵ Brock-Utne who was adamant that life of human being may be taken away if language issues are not adequately addressed,⁴⁸⁶ Hlophe who believes in constitutionalism and lamented that it is through language that we are able to form concepts, to structure and order the world around us;⁴⁸⁷ Zwane, The Chief executive Officer of PanSALB who vowed to enable us to communicate internationally through our mother-tongue as a result of PanSALB’s constitutional mandate to do

⁴⁸² Tolika in Translators for South African Languages, <http://www.tolika.co.za>, (accessed 10 March 2016)

⁴⁸³ *S v Pistorius* [2014] CC113/2013 ZAGPPHC 793, (17 September 2014).

⁴⁸⁴ Landman, C, “Can Justice be Embodied in Sexist Language? A challenge to the confession of Belhar”, *Ned Geref Teologiese Tydskrif*, 47, 283-290, www.christina-landman.co.za/belhar.htm, p. 3, (accessed 04 July 2011).

⁴⁸⁵ Holmes, O. W, in www.pansalb.org.za

⁴⁸⁶ See Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm, (accessed 8 august 2013) and also CONQI respondents on this issue.

⁴⁸⁷ Hlophe, J.M, “Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society”, *A Paper delivered at the University of Cape Town on 17 September 2003, Forum*, 2004, p. 42.

so;⁴⁸⁸ Pilot Study;⁴⁸⁹ some of the reported⁴⁹⁰ and unreported⁴⁹¹ cases; OBS on the Pilot Project by the Department of Justice and Constitutional Development⁴⁹² and findings on empirical research on mother-tongue as per Chapter four of this study.⁴⁹³

It is not in the interest of justice that the accused person be subjected to unfair court processes whereby his or her right to dignity is taken away by the use of language. This is based on the assumption that negation of the right to a fair trial through the use of language and also the annulment of other constitutional rights such as the right to life, which should otherwise be guaranteed if the right to a fair trial is maintained, will be addressed through the Use of Official Languages Act of 2012.

The absolute use of mother-tongue is the main aim of this study within the letter and spirit of section 6 of the Constitution and the object of the Use of Official Languages Act of 2012 as opposed to the argument for non-obligatory legislative provision to use language in absolute terms as postulated earlier in this study. The common law right to make full answers is guaranteed by the use of one's language and it finds its bases in the assumption that should the entire trial be conducted in the mother-tongue of the accused person, this will accord the Vhembe District community their constitutional right to a fair trial in the context of their common law and the constitutional⁴⁹⁴ right to fully be answerable to the offence they are charged with.⁴⁹⁵ The researcher further concluded that the constitutional guarantee to language accords the right to a fair trial and therefore the government is bound by the Constitution to guarantee language rights and the right to a fair trial, which is the cornerstone to a fair hearing.

⁴⁸⁸ PanSALB Media Release, "World Focus on Language Rights", *Regional Language Colloquium*, 2013, www.panslab.org.za/news.html, (accessed 26 January 2012).

⁴⁸⁹ See comments by CTOPI/12 and 13 on this project.

⁴⁹⁰ See *S v Damoyi* 2003 JOL 12306 (C).3 at par. 4 and *S v Matomela* 1998 (3) BCLR 336 (N) at 342H.

⁴⁹¹ *The State v Tonic Ngoveni* HL223/2014 (03 July 2014).

⁴⁹² See OBS in Chapter three.

⁴⁹³ Under the heading "The use of the accused's mother-tongue in the entire criminal proceedings".

⁴⁹⁴ See how du Toit, E, " Criminal Procedure " in Chaskalson,M (ed), *Constitutional Law of South Africa*, 1996 p. 27-18 attached constitutional definition to the right to a fair trial in Chapter four of this study.

⁴⁹⁵ See also the outcry by most CONPI and APQI respondent on their right to a fair trial in Chapter four of this study.

The researcher further concluded that the constitutional guarantee to language accords the right to a fair trial and therefore the government is bound by the Constitution to guarantee language rights and the right to a fair trial, which is a cornerstone to a fair hearing.

It is the aim of section 4 (2) of the Use of Official Languages Act to guarantee the right to follow criminal charges by the accused through providing for three languages in the Vhembe District. The Department of Justice and Constitutional Development is enjoined by this provision to ensure access to justice through the establishment of indigenous language courts to enable the accused to use mother-tongue that will guarantee the right to a fair trial in this district.

The right to a language is underpinned by the provisions of section 4 (3) of the Use of Official Languages Act on the identification of three languages in conformity with the Constitution. After thorough consideration by the researcher of these provisions, this study inferred that the implications of this Act on the right to use mother-tongue in criminal proceedings for the purposes of fair trial require law makers to accord the accused his or her right to use his or her own language in the entire trial, hence the objectives of this study in Chapter one. Unfortunately, this study is concerned that the attitude of the policymakers towards indigenous languages in terms of the Use of Official Languages Act 12 of 2012, the phenomenon under investigation, and the Constitution in a particular province or district will jeopardise the policy development. In particular, their consideration of English language as the language of sophistication threatens access to justice through the use of such language. All these obstacles, including appeals and reviews, judicial skills, legal power, practicality, etc., exposed as substantial barriers for the use of indigenous languages, were assumed to have been extinguished through linguistic legislation which is in terms of the purpose of this Act of 2012. Other legislations that might strengthen the legal teeth are embedded in this study.

The researcher was privy of the fact that the respondents might have misrepresented their responses or might have been influenced by their past experience to answer the questions in a certain manner. This conclusion is inferred from the observation made by the researcher on questions answered by one CTOQI respondent who mentioned that

proceedings conducted in the language other than the language of the accused do not afford the accused the right to a fair trial. But when answering a question on the fact that interpretation may lead to wrong conclusions, this respondent “strongly disagreed”. Similarly, while the researcher acknowledged the fact that some of the categories of participants such as the accused persons and the convicted persons might not have understood the implications of the use of Official Languages Act of 2012 in their interaction with the justice system, the researcher inferred that the implementations of this Act, based on the use of their mother-tongue would change their lives on the ground.

The researcher also inferred from their experiences and perceptions the fact that had their cases been conducted in their own mother-tongue/ indigenous languages their right to a fair trial would have been guaranteed. It was against this backdrop that the researcher assumed that due to the attitude of policy-makers and custodians of the Bill of Rights i.e. courts, towards indigenous languages, the implementation of this Use of Official Languages Act of 2012 will take some time to be realized. In the light of these factors the researcher drew conclusions that the use of English and Afrikaans only does not accord the accused the right to a fair trial and that the implementation of this Act as suggested by this study will assure the right to a fair trial.

Informed by the reality of language usage in Ireland,⁴⁹⁶ where the Irish language was spoken by a small population and also by the data on the elevation of historically diminished use of indigenous languages in terms of the section 6 (2) of the Constitution especially those identified for use in the Vhembe District, it is feasible that the same language system in the Vhembe District with regard to Sepedi which is spoken by 1.6% of the population in terms of census 2011 censuses as enunciated earlier in this study could be implemented in this District. It is therefore inferred that the provision of the Constitution would require that Sepedi be recognized and be used in court as it is one of the “*historically diminished use and status of the indigenous languages*”. Further that section 6 (3) (b) of this Constitution would dictate that this language be documented and conferred this status due to the fact that it is the language used and preferred by the residence of this District. According to

⁴⁹⁶ Donnacha, J.M, “Language Legislation Mechanism of Language Planning”, *Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September 2004, pp. 167-168.

Buttler,⁴⁹⁷ in South Africa around 1923, this English ascendancy was not the result of English being the language of the majority of the population. The decision to privilege English was political.

The overwhelming findings on the same language that minimises the problems created by misinterpretation, vindicated the proposition that “*the language of the accused will accord him or her right to a fair trial more effectively than English or Afrikaans*”.

The sustainability of the element of “mind-set” on the use of English only as revealed in this study⁴⁹⁸ would be minimal. Hence the researcher premised this hypothesis on factors such as that it is due to “mind-set” by many court officials that the mother-tongue is not used. Mind-set is also obvious in the case of *S v Damani*⁴⁹⁹ when the presiding judge stated that the use of 11 languages is likely to have administrative and budgetary implications on the part of the Government or the Office of the Chief Justice without any evidence to this effect. This is proof of mind-set with reasons that seem to be good at face value while they are meant to detract people’s positive perceptions about their own languages. This case was met with tremendous amount of criticism from the linguistic community. One commentator noted with dismay the remarks made by a judge of the High Court that giving indigenous languages equal status will be a distant dream.⁵⁰⁰ Sibiya⁵⁰¹ also levelled some critics against this judgement when he pointed out that achieving the constitutional ideal of parity of esteem of all languages poses a significant practical problem of implementation, particularly in the context of criminal court proceedings as he was analysing the statement made by the judge that “it is undesirable to achieve the constitutional theoretical ideal

⁴⁹⁷ Buttler, J, “Afrikaner Woman and the Creation of Ethnicity in a Small South African Town ,1902-1950”, in Vail, L (ed) *The Creation of Tribalism in South Africa*, (1989), p. 59.

⁴⁹⁸ See Hlophe, J.M, “Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society”, *A Paper delivered at the University of Cape Town on 17 September 2003, Forum*, 2004, p. 42, who insisted on a change of mind-set that cannot happen if there is a reluctance to participate in on-going sensitivity training, De Vos, P, ‘All languages Equal but English and (Afrikaans?) more Equal? *Constitutionally Speaking.co.za*, 30 April 2008, (accessed 8 august 2013) and CTOPI/8’s response on predetermined use of English only.

⁴⁹⁹ *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014) at parg.22.

⁵⁰⁰ “Language equality in courts unrealistic-judge” in Legalbrief Today, legalbrief@lagalbrief.co.za.

⁵⁰¹ Sibiya, Z, “From *Damoyi* to *Damani* :Critical reflection on the use of indigenous languages in the magistrate’s courts”, *a Paper read at the Society of Teachers of Southern Africa Conference*, Durban, July 6-8, 2015, p.2.

of parity of esteem between all official languages”. One commentator bewails the fact that every person must enjoy the right to use an official language of his or her choice in all court proceedings of the first instance and that records for the purpose of appeals and reviews against the findings of the court *aquo* must be in English.⁵⁰² This study argues differently with regard to the language of court record in Chapter one under the description of the research problem. In addition, this argument does no longer hold water when one takes into account the findings of this study on appeals and reviews and judicial skills as postulated in Chapter four. There was abundant information on the fact that judges of appeal no longer impose language threat because people who speak indigenous languages are on the bench.

With regard to this judgement, this study’s approach is whether the court weighed the injustices perpetrated by the use of English only as a result of interpretation⁵⁰³ against the little that might have been caused by the delay in the transcription of records from an indigenous language into English. In addition, if the judge viewed three months for transcription in this case⁵⁰⁴ as a “delay” that would have dire and prejudicial consequences to the accused person⁵⁰⁵, did he provide the time frame on transcription of record where the case was heard in English? In the absence of such evidence from the judgement, through the researcher’s practical experience as an advocate of the High Court, appeal cases were in most instances placed on the roll of appeal after two to three years based on the delay in transcription of record where cases were heard in English. Hence the submission that “nothing is owed by English. African languages can do it all”⁵⁰⁶ is appropriate in this regard.

Findings on the use of the mother-tongue⁵⁰⁷ overwhelmingly addressed the question on “*whether the establishment of indigenous language courts for the purpose of using mother–tongue in terms of the 2012 Act is inevitable in order to afford the accused the right to affair trial*”.

⁵⁰² “The essence of the transformation of the judiciary in South Africa”, *Address to the Black management Forum Annul conference*, 17 October 2008, p. 9.

⁵⁰³ See these findings in Chapter Four of this study.

⁵⁰⁴ *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014) at parg.3.

⁵⁰⁵ *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014) at parg.20.

⁵⁰⁶ Dowling, T, “Stop holding your tongue, seriyas!” in *Media on African Languages, University of Cape Town, African Languages*, 21 February 2014, (accessed 11 December 2015).

⁵⁰⁷ See tables 10, 11,12,13,15 and 16 in Chapter four of this study.

From the information provided by the CONPI/4 respondent whose statement indicated time that she did not mention to the police official who was taking the statement, and the subsequent misunderstanding implicated her unnecessarily where she ended up in prison; the two APPI respondents from Khayelitsha who indicated that they were comfortable when their cases were heard in isiXhosa, their mother-tongue; some CTOPI respondents who also affirmed that proceedings entirely conducted in mother-tongue of the accused is beneficial to everyone in court; and also the contention that speak to the people in language they understand,⁵⁰⁸ it is inferred that mother-tongue can accord the accused his or her right to a fair trial more than any other language.

The information provided by the DJ&COND/2 respondent who highlighted that it is not necessarily that there is a language policy on isiXhosa for the court in Khayelitsha Magistrate's Court to conduct proceedings in isiXhosa was valuable. The study therefore inferred that with or without a clear policy, the Vhembe District should be able to implement the three indigenous languages despite the fact that this Act already dictates such a policy. This inference is also based on the fact that there is evidence of reluctance on the policy makers to implement official languages. This is vindicated by an article on the extension of due date for language policy in terms of this Act.⁵⁰⁹

The DJ&COND/2 respondent further congratulated the promulgation of the South African Languages Practitioners Council Bill, 2013 which is aimed at improving interpretation in court. A comment that is far from recommending is the use of indigenous languages in court or the development of language policy for the implementation of at least three languages in a particular geographical area, of which this study argues for the choice of "historical diminished use and status of indigenous languages of our people" in a particular district. The materiality of the envisaged language legislation as postulated by DJ&COND/3 is also questionable, when one looks at this attitude.

⁵⁰⁸ Dowling, T, "Stop holding your tongue, seriyas!" in *Media on African Languages*, University of Cape Town, *African Languages*, 12 February 2014, (accessed 11 December 2015).

⁵⁰⁹ "Extension of the Due Date for Adopting Language Policies", *Sunday Times*, 07 December 2014.

After having interrogated the data in this manner, the researcher therefore wondered whether the Department of Justice and Constitutional Development will ever develop language policy as mandated by section 4(1) of this Act and subsequently ensuring that indigenous languages in courts are used in conformity with this Act in terms of section 4(3) of the same Act. The outcome on the accused's mother-tongue as one of the official languages in terms of section 6 of the Constitution as postulated in this study⁵¹⁰ justified this argument.

The reasoning by the presiding judge in the case of *S v Damani*⁵¹¹ also prompted the researcher to infer that this judgment strengthened the establishment of these courts. An exposition by the judge of the recommendations by the Chief Magistrates Forum also added value to this study in many ways. Firstly, in terms of the directive from the Director of the District Courts Efficiency, for the resuscitation of the indigenous language courts in all the provinces as per 21 April 2014 legal instruction to this effect, was an indication of the necessity to use indigenous languages in court. In terms of this directive, in the Vhembe District, certain Magistrates' Courts were designated to introduce this project as stated earlier in this study. Secondly, in terms of this directive, legislation on Indigenous Language Courts emerged as a priority for the implementation of these languages in court. The sentiment that was echoed by DJ&COND/3 was that the DJ&COND envisaged language legislation on Languages in Court towards March 2016. This study hoped that this Chief Magistrate's Forum would collaborate with this department to come to a meaningful solution to the problem of language use in court. It was further hoped that this study's report would influence this process. Thirdly, the presiding judge indicated how the indigenous language courts flounder as a result of lack of proper planning on the logistics and practicalities. This statement is inconsistent with the fact that the court of first instance which was on review succeeded in conducting the entire trial in an indigenous language, i.e. isiZulu. In addition, this study established, through the category of CTOPI that the failure of the indigenous language courts in 2009 was as a result of trivial factors such as mind-set on the use of English, stereotype and sophistication on the use of English language, etc. Further than that the presiding judge did not elaborate on what constituted "lack of planning on logistics and practicality". This study is of the

⁵¹⁰ See table 10 in this chapter.

⁵¹¹ *S v Damani* (DR224/14) (2014) ZAKZPHC 60 (9 December 2014) at pargs.18-19.

view that the three months period for transcription of the courts records for the purposes of review cannot be regarded as sufficient reasoning for discarding the indigenous languages in court taking into consideration the findings of this study on judges of appeal and review speaking indigenous languages.

While there is argument for reiteration of the old apartheid segregation policies should languages be used territorially, particularly from the respondent DJ&COND/1, it is inferred in this study that territorial use⁵¹² of the these indigenous languages will enhance their usage and implementation as they are spoken by most accused persons⁵¹³ as required by section 6 (3) (b) of the Constitution. Furthermore, it would have addressed the constitutional provision on “taking practical and positive measures to elevate the status and advance use of indigenous languages” in terms of section 6 (2) of the Constitution. The proposition by this respondent perpetuates nullification of the right to a fair trial and can no longer pass the constitutional test. The European Charter for Regional or Minority Languages (1992) Charter is mainly based on the idea of the protection of linguistic rights as cultural and territorial rights.⁵¹⁴ Sections 6 (3) (b) and 30 of the Constitution of South Africa carry similar protection on linguistic rights and culture, respectively.

It was found that in Canadian Eastern Arctic only English is rather seen as a tool necessary to compete efficiently in the modern world but not good enough for the adequate expression of one’s inner feelings.⁵¹⁵ Can one emphatically say that the accused person’s entire criminal trial in the Vhembe District does not necessarily have to be conducted in English in order for the broader communities to gain access to court but rather the accused person’s mother-tongue which ultimately accomplishes the objectives of this study? Surely, one cannot be a real indigent accused person without speaking his or her own indigenous language. This is supported by the Supreme Court of Canada, in the case of *Forget* who declared that “language is so intimately related to the

⁵¹² See Chapter four of this study on this subject.

⁵¹³ Statistics on the demographics of the spoken languages is shown in this study.

⁵¹⁴ Dorais, I. J. “Language, Culture and Identity: Some Inuit Examples”, *International Journal of Law, Language & Discourse*, volume 2.no.4, 2012, p. 293.

⁵¹⁵ See also how the APQI and CONQI respondents express their dissatisfactions about the consequences caused by the use of the language, they could not eloquently respond to questions and answers.

form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice".⁵¹⁶ [This is an appeal case from the one already discussed earlier in this study on the fact that language right is not absolute]. The respondents from the APPI and CONPI groups were adamant that the use of their language in court would have guaranteed their right to a fair trial. This right can be carried out if these languages are used territorially.

As already shown above, the South African Language Act is silent on language of the court. Inference is drawn from the provision of the Act on three languages for a particular department to be implemented in the Vhembe District. The implications of such a provision for the purpose of this study is that the three official languages should be drawn from "diminished use" of indigenous African languages and from section 6 (3) (b) of the Constitution on language usage and preferences of the Municipal residents. As shown earlier in this study⁵¹⁷ that for example, delivery is best carried out in mother-tongue; that culture and tradition are built on African languages; that mother-tongue proceedings eliminates human errors emanating from translation and interpretation of the legislation; that it is practical to use mother-tongue like in Khayelitsha; and that the majority of respondents in this study view mother-tongue as instrumental to a fair trial; it is therefore submitted that the Department of Justice and Constitutional Development is enjoined by the object of the 2012 Act to comply and also strengthen the aims of this theory.

Most APQI and CONQI respondents insisted on the use of their own languages in court to enable them to access justice freely. The stories of the CONPI respondents should be a wake-up call for the DJ&CONDI respondents to make a shift from the English syndrome to mother-tongue. More so, South Africans are making strides in their mother-tongue usage.

For the reasons annunciated in this study, it is ideal that Indigenous Language Courts be established to give the right to a fair trial its efficacy through the use of mother-tongue. The role of Pan South African Language Board on ensuring that indigenous languages are promoted through the impact

⁵¹⁶ Joseph-G-Turi, "Language Law and Language Rights", *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p. 8.

⁵¹⁷ See Chapter four of this study.

assessment of The Department of Justice and Constitutional Development Pilot Project of 2009 was scrutinised. The breadth of its participation was minimal to an extent that the respondent identified for participation in this study did not provide a clear exposition of how this project was implemented and how it ended. The only area that he remembered is that a tender was awarded to his counter-part at the University of Limpopo, Turfloop Campus, to ascertain its success at the implementation time. Besides this, there is no other information he offered to this end.

The researcher assumed that the board would have played an active role in overseeing the success of this project. The researcher also infers that had this board been serious about the promotion and use of indigenous languages in court, it would have grabbed that opportunity and made sure that courts use indigenous languages indefinitely. When one listened to the respondents, in the categories of the court officials and policy makers in the Department of Justice and Constitutional Development, who experienced the project, particularly with regard to the reasons for its discontinuity, this study further infers that someone who is bestowed with the powers to promote indigenous languages was irresponsible [NB Do you mean “responsible”?] in making sure that these languages are being used in court.

These arguments also point to the question as to “*whether the Use of Official Languages Act 12 of 2012 necessitates the establishment of the Indigenous Language Courts in order to minimize human errors created by interpretation and translation*”. It is against this background that the researcher pre-supposed that the development on the implementation of indigenous languages in court will continue to eliminate the use of English and Afrikaans only as languages of court proceedings and consequently eliminate wrong conclusions resulting from interpretation as revealed by this study.

This theory is further sustained by the findings on equitable use of language. Though there is poor case law report in South African legal jurisprudence where language provisions were declared discriminatory, except the case of *Laurens v The Government of South Africa*,⁵¹⁸ the

⁵¹⁸ *Laurens v Government of South Africa and others* 2013 (1) SA 499 (GNP). See also Lourens, C’s call for service delivery in mother-tongue cited in Segar, S, “Parliament may Face Court Challenge if it Delays Language Bill”, *Daily News*, www.iol.co.za, 19 January 2012), (accessed 27 March 2012).

implementation of mother-tongue as one of the official languages as entrenched in the Constitution and provided by the Act of 2012, speaks to this theoretical perspective. Equitable use of languages is advocated in human rights instrument⁵¹⁹ and by some commentators.⁵²⁰ The importance of this study is also premised on such discovery.

The development of legal terminology as part of the mandate of the board was also crucial for it has been established in this study that legal terminology is provided as one of the reasons for not using indigenous languages in court. The development of a legal dictionary by this board is being recognized by this study. One CTOPI/12 insisted that it was embarrassing for them as court officials not to know an English legal concept in their indigenous language during court processes.

This study has seen how other institutions of higher learning are committed to language issues by developing *legal terminology short courses*;⁵²¹ how people made strides in making sure that their languages are recognised and used; hence the study inferred that this Board should have been more proactive in seeing to it that the Pilot Project on Indigenous Languages in court was a success.

While the first theory confirms the avoidance and vagueness of the legislative provisions on language rights, which ultimately led to the feeling of unfair treatment by the society, this second one proved to have assisted this study to come to the conclusion that Indigenous Language Courts be established in the District of Vhembe

These entire discussions also collaborate the question on “*whether the treated data said something about the research hypothesis*” which was therefore answered in the affirmative.

⁵¹⁹ S 6 (4) Constitution provides for “equitable treatment” of all official languages.

⁵²⁰ See De Vos, P, ‘All languages Equal but English and (Afrikaans?) more Equal?’, *Constitutionally Speaking.co.za*, 30 April 30 2008, (accessed 8 august 2013) who said the problem is that our Constitution is as clear as mud on the issue of language rights. Trying to strike a compromise between what is practical and what is ethnically demanded, it contains a rather muddled provision that in effect allows for English to be treated as more equal than the other ten official languages. See Hlophe, J.M, “Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society”, *A Paper delivered at the University of Cape Town on 17 September 2003, Forum*, 2004, p. 43, on mother –tongue as shown earlier, is of the view that it is clear that, at present in the courts, two languages continue to dominate. One of the reasons for this is lack of clear policy or commitment to the language issue.

⁵²¹ See the University of Cape Town Centre for African Languages as one of the *sample* in this study.

5.3 CONCLUSION

The data was limited to the research problem and sub-problems identified at the beginning of the study. The data collected was interpreted to find a general view that confirmed or negated the problem statement i.e. the use of English and Afrikaans in criminal proceedings notwithstanding the letter and spirit of the Constitution and the object of the Use of Official Languages Act of 2102. Now that the data confirmed the existence of the problem and its sub-problems, the objective of this study i.e. the establishment of the indigenous language courts in terms of this Act of 2012, is necessary to alleviate current problems. It is hoped that the data were arranged and separated according to their correspondence with the sub-problems. Finally that the treated data answered the research questions.

This critique of the data in the form of interpretation, assisted the researcher to conclude that most factors adding up to the problem statement can be lessened by insisting on the formulation of a policy on indigenous languages in terms of this Act.

The next and concluding chapter focuses primarily on the conclusions and recommendations of the study.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 INTRODCUTION

In this Chapter, the researcher reconciled her findings with the problem and sub-problems and came to a meaningful conclusion. She also narrated the weaknesses and/or limitations in the study as it was designed and carried out. The researcher identified the practical importance and implications of the findings. Finally, the researcher also concluded her study in this chapter while acknowledging that more studies will have to be conducted to address the problem statement, particularly for further research as a follow-up to her research.

The researcher had consistently provided a brief conclusion on every Chapter for the reader to have a better grounding of the subject matter of the topic under investigation. In doing so, the researcher is attempting to put thoughts into perspective for the final report.

6.2 STUDY LIMITATIONS/WEAKNESSES

The findings of this study offer solutions to the literature and case law review such as the fact that the accused person should be tried in the language he or she understands. This is not the case in practice at the present moment. In practice, the accused is provided with interpretation from a foreign language. This study successfully addressed this problem but acknowledged weaknesses thereof.

6.2.1 *First limitation/weakness*: One of the limitations of this study was the fact that the sampling was broad and there was therefore a need to be cautious about distortion on any of the subject matters.

6.2.2 *Second limitation/weakness:* The Department of Justice and Constitutional Development reinstated the Pilot Project on indigenous languages in court during this study. This was to the advantage of the study to observe these cases in court. Unfortunately, in other courts designated for this project such as Malamulele, cases were not heard in the designated language, Xitsonga. In courts such as Mutale where the project had started, the main predicament was that cases were heard once a month and would be postponed several times. A further disadvantage of this study was the cases previously heard in indigenous languages under the same project in 2009. The researcher could not get hold of transcripts as they were not transcribed. In some cases it was only a charge sheet that was written in the indigenous language. According to the information obtained by the researcher, magistrates' cases are transcribed only when parties to the case seek review. Besides this, there was no transcription.

6.2.3 *Third limitation/weakness:* The third limitation to this study is the data of the pilot study which was incorporated in the main study. The data from the pilot study was useful to the main study but for the fact that some of the information was gathered from the participants outside the geographic area of the main study, the bulk of the information was excluded so that the researcher confined herself to the geographic area of the research, District of Vhembe. The fact that the study was meant for this District, meant that the researcher had to be cautious about its significance for the whole country. Better design would have been to scrutinise the significance of the study and determine its importance in the whole country because this phenomenon exists in the entire South Africa. This study would have been better positioned itself in the whole country so that its results are beneficial to every person in the country. The breadth of its sample and the Pilot Study vindicate this limitation.

6.2.4 *Forth limitation/weakness:* A forth limitation that was detected in this study was lack of honesty or understanding from participants. A question as to whether the COTQI respondents ever conduct criminal proceedings in any of the indigenous languages was met with devious responses. Where the respondents had disagreed for not having used indigenous languages in their courts, they should not have commented on a follow up question on the reasons for not using these languages because it was not necessary. This misunderstanding led the researcher not to have been

proximate on her findings as to whether indigenous languages will be received with warm hands by these respondents because they are the sole custodians of language use in courts. The researcher was assisted by respondents CTOPI/17 and CTOPI/18 who assured her that indigenous language courts will be warmly received by most court officials in this District. The study was assisted by the finding on the “mind-set” by language users in court that most of them are reluctant to use indigenous languages, hence such answers. A better future strategy would be to reserve such questions for oral interviews.

6.2.5 Fifth limitation/weakness: This study observed that the researcher could not go beyond identified methods for data collection and analysis as one of the limitations of this study. The methods used were the most common in qualitative research and in particular, for the present phenomenon under investigation. For these reasons, the researcher could not develop methods that could facilitate filling of questionnaires more efficiently than the adopted strategies as explained in Chapter three of this study. The attitude of the respondents towards filling of questionnaires resulted in most questionnaires being left in the field at the time when the researcher left the field. Despite this shortcoming, the researcher was able to meet her target for representativity of this study and was able to generalise the findings to answer the research questions. This is premised on a research principle that should another study be conducted by a different researcher on the same phenomenon, such research would yield the same results as that of the current study.

6.2.6 Sixth limitation/weakness: Ex-convicts would have added value to the research findings. Their identification and locality was a far-fetched approach in this study. This is another weakness.

6.2.7 Seventh limitation/weakness: Another limitation is the use of self-report data only which may be fraught with problems derived from memory restrictions and participants’ interpretation of their experience with the phenomenon. In Chapter Three of this study the researcher acknowledged the fact that some of the answers by respondents such as the “Convicts” may be blended with forgetfulness and distortion taking into account their personal conditions. The fact that they are serving their prison terms might have vitiated how they perceived the problem under

investigation. The best method would have been to interview them before sentencing, the process which was going to be cumbersome to the researcher when one takes into account the number of participants involved in this study. It was easier for the researcher to interview them in focus-group than to interview them individually. This method would as well have required a great deal of time and effort. Another best method would have been to observe their proceedings and determine the extent to which language use other than their mother-tongue would have affected the outcome of their trials rather than to hear from them. This processes would as well have required more time when one looks at the *sample* number. In addition, had this group been interviewed before conviction, the disadvantage would have been that the study was not going to be able to determine their constitutional rights that are affected by language as announced in Chapter four of this study.

6.2.8 *Eighth limitation/weakness: limitation/weakness: Lourens v Speaker of the National Assembly of Parliament*⁵²² was the most recent case on the language front in South Africa immediately before the researcher left the field and therefore a comprehensive contrast of this judgment with this study would have been crucial. This judgment carries the main theme of this study in that it made reference to the Use of Official Languages Act of 2012 in terms of section 4 which requires every national government to adopt a language policy and identified three official languages that will be used for government purpose. Due to these sentiments it was not possible to completely contrast this judgment, despite the fact that the applicant argued for equal treatment of languages at national level while this study argued for it at Municipal or territorial level. This study acknowledged the fact that courts still dwell much on the “practicality” for the implementation of 11 languages which renders the provision of the Constitution on languages obsolete, read with equality clause in terms of section 9 (1) and (3). Based on equitable treatment of languages in the entire country, this study was limited to section 4 of the Act of 2012.

⁵²² *Lourens v Speaker of the National Assembly of Parliament*⁵²² (20827/2014) [2016] ZASCA 11 (10 March 2016) 12 at pars. 30-31, <http://www.saflii.org/za/cases/ZAEQC/2014/2.html>, (accessed 22 March 2016).

6.2.9 Ninth limitation/weakness:

Finally, it appears from the findings of this study that it limited itself to two theories, i.e. *“the language the accused understands and the provision of interpretation”* and *“the use of the accused’s mother-tongue”* in order to accomplish its objectives. A more well thought design would have developed a theory around the grounds for not using indigenous languages such as “mind-set”, “appeals and reviews” “legal terminology”, etc. A theory around these impediments would have given the researcher the opportunity to be in touch with the real problems on the ground. Theories such as *“awareness on the obstacles to use indigenous languages in court”* and *“integrity of judgments based on misinterpretation”* would have added value to this study. The development of such theories might as well have taken the researcher more time and money as she would have been compelled to test their viability on the problem statement. It is hoped further research would take such issues to their end. But despite these weaknesses, the study produced significant results which will be useful to those saddled with the responsibility to change the current status quo.

6.3 PRACTICAL IMPORTANCE AND IMPLICATIONS OF THE FINDINGS

Hopefully, the researcher has succeeded in giving an overview of the attitudes the law makers have towards issues of language that lead to lack of legal framework. This study will enable the development of a policy on the implementation of indigenous languages in our criminal courts for the benefit of language users. The use of the accused’s language in the entire trial will avoid wrong conclusions that were historically perpetrated by the use of interpretation. This will subsequently guarantee the accused constitutional rights as enshrined in the Bill of Rights. As the adage goes, “Justice delayed is justice denied”. This notion will disappear due to unavailability of interpreters, interpretation accorded to legislative provisions by courts and authors and interpretation of the proceedings *per se*. It is certain that it is practical to use these languages in court in view of identified obstacles for their non-usage and also for the fact that most court officials are indigenous language speakers. It also opened doors for further research in this area of language.

The implications of the findings included:

- ✚ policy makers being accountable to the society they serve;
- ✚ the Department of Justice and Constitutional Development ensuring judicial skills in all respect including language and culture.
- ✚ the discontinuation of the use of English and Afrikaans as languages of court records only, particularly English which is treated as a supernatural language over all other languages;
- ✚ courts of law undertaking their constitutional mandate on the respect for human rights, particularly the right to language and the right to a fair trial;
- ✚ communication being placed on an equal footing;
- ✚ minimization of the use of interpretation;
- ✚ recognising and affording indigenous languages in this District equal status;
- ✚ the right to a fair trial not being nullified through the use of language foreign to the accused;
- ✚ constitutional rights annunciated in this study being safeguarded through fair trial;
- ✚ PanSALB being seen as an effective body that ensures that communication is in the mother-tongue of the accused in criminal proceedings;
- ✚ linguists' institutions making sure that legal language is developed for its full use in criminal trials.
- ✚ This research project will become an outreach program that will create an awareness of the implications of Use of Official Languages Act 12 of 2012 to the state law making officials on language usage in criminal court proceedings, possibly in the whole country.

6.4 CONCLUSIONS

This study discovered several conclusions. It was concluded firstly, in conformity with the theory which says that “*the use of language the accused understands and the provision of interpretation.*” Moreover, all arguments in support of the view that the determination on whether or not the accused person needs an interpreter are part of the broader problem on the provisions of the law and its application to the extent that the right to a fair trial in encroached upon. The consistent relationship found in this study

between these provisions and/or their application with the problems created by interpretation of the court proceedings as well as between interpretation and cultural connotations during trial revealed the existence of unfairness of the processes that produce unfair results. In addition, the fact that courts rely on the interpretation than on what the accused has said,⁵²³ especially where the presiding officer understands or speaks the language of the accused; the fact that judges and magistrates do not control the accuracy of interpretation which they rely on to come to their conclusions; lead to a question on the integrity of the judgments. On the other hand, the community has interest in seeing that persons are not convicted of crimes and committed to heavy penalties, which would cause them to forfeit their lives and liberty, dignity, except through proper processes of law.

Secondly, lack of constitutional supremacy in relation to the creation of the law and/or application of the law by courts, leaves the population with a strong sense of justice. The right to language and culture, the right to a fair trial and all other constitutional rights including but not limited to the right to life and security of a person that might be affected by unfair trial, lead to the conclusion that speakers are not placed on the same footing. This conclusion is based on the principle that speakers of indigenous languages are discriminated against as a result of a language. It is also premised on the quest for the language as a means of communication, self-fulfillment and as the bases upon which minorities find expression and domination.⁵²⁴ Lack of linguistic equalities in this regard will always cause inconveniences and be inconsistent with the expectations of the broad masses of the society. CTOPI/1 conceded that the constitutional right to language should be respected despite the fact that they were bound by policy to use English and Afrikaans as languages of court record. It was important to determine, as this study attempted to do, how language affects interaction between speakers of minority languages and courtroom professionals.⁵²⁵

⁵²³ See DJ&COND/2 respondents and *S v Mpopo* 1978 (2) SA 424 (A) at 426G on this issue.

⁵²⁴ See Gutto, S.B.O, “Plain Language and the Law in the Context of Cultural and Legal Pluralism”, *SAJHR* vol.11, 1995, p. 311.

⁵²⁵ See Beaudoin, L, “Systematic and Linguistic Specificities of Legal Language (s): A case in Point-Legal Translation in Canada”, *Law, Language and Linguistic Diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September 2004, p.3.

Thirdly, lack of legal frameworks on languages in court was found to be the main obstacle for seeking justice, thereby nullifying the possibility of fair trial. This conclusion was met with critics such as the legal sphere which is characterized by an institutional bias towards monolinguals.⁵²⁶ CTOPI/17 indicated, with dismay that even when there is policy such as the Act of 2012, its implementation never materialises. This contention is confirmed by newspaper clips on the development of policy in terms of section 3 of this Act of 2012. Furthermore, officers who are responsible for policy framework are oblivious to the injustices caused to the population by the use of language. Undoubtedly, justice is complete when one is heard in his or her own language.

Fourthly, whereas English and Afrikaans, which are not spoken by the majority of the inhabitants in the District of Vhembe continue to be imposed on indigenous language speakers; as long as the Language Act of 2012 is not understood in the context of this study, that is, being implied to refer to languages in a particular territory such as Vhembe District; whereas the constitutional provisions on language rights and the right to a fair trial are not conformed with or interpreted to the comfort of the minority; our courts will continually deliver wrong judgments due to language use and thereby nullify the very same spirit of the Constitution which is to affirm the democratic values of human dignity and freedom in terms of the provisions on language rights.

Fifthly, the development of a relationship between the mother-tongue and the production of a fair trial as well as the relationship between mother-tongue and indigenous languages revealed communication on the same footing in court in terms of “*the use of the accused’s mother-tongue theory*”. This conclusion is supported by critics on language within the context of expression and communication and the right to a fair trial throughout this study.

See also Meizhen, L, “Legal Language and Power: Research on the Phenomenon of Interactive Interruption in Court Session”, *Law, Language and Linguistic diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, September, 2004, p.199.

⁵²⁶ Gibson, K, “The Myths of Language Use and the Homogenization of Bilingual workers’ Identities”, *Second Language Studies*, 22(2), (2004) p. 1-60. See also de Vos, P, ‘All languages Equal but English and (Afrikaans?) more Equal?’, *Constitutionally Speaking.co.za*, 30 April 2008, (accessed 08 august 2013)

Sixthly, the common law right to a fair hearing, constitutional right to a fair trial in terms of section 6, 30 and 35 (3) (k) and the right to a fair trial in terms of section 6 (1) and (2) of the Magistrate's Court Act which is premised on the ability to answer charges against the accused is accomplished within the context of the implications of the Use of Official Languages Act of 2012 as argued in this study.

Seventhly, the correlation between indigenous languages and the right to fair trial as well as the relationship between the creation of indigenous courts of law and the right to a fair trial disclosed access to justice to the beneficiaries of the Constitution. It is further concluded that the use of indigenous languages in court will promote equal justice thereby safeguarding the right to equality in terms of section 9 of the Constitution for the speakers of indigenous languages. The use of these languages will as well make court processes more accessible and understandable to ordinary citizens with particular focus on the poor and the vulnerable. The accused persons will not be compelled to have legal representative for the purposes of communication.

Eighthly, the strengthening of the legal teeth on factors that are found to be obstacles to the right to use mother-tongue in court such as practicality, mind-set, appeals and reviews, lack of legal terminology in indigenous languages, lack of legal teeth, etc., may produce a justice system that embraces the right to a fair trial through the use of language in conformity with the Act of 2012.

Ninthly, the relationship between the responsibilities of PanSALB on the promotion of the use of official languages, particularly "historically diminished indigenous languages", and the right to a fair trial may address the by-passing of the implementation of indigenous languages.

Tenthly, without communication and language, justice is flawed. Language defines the fate of a person in court proceedings. In particular, the accused has the right to a fair hearing that includes the right to understand what is going on in court. The Constitution should not end up being a mere paper and not a human rights instrument that safeguards linguistic rights in the quest of the objectives of this study. The Constitution will only be regarded as the supreme law of the country in relation to language in court if courts that hear cases in indigenous languages are established

and become custodians of indigenous language rights. It is well concluded that policy on the three suggested indigenous languages is inevitable in order to give this Act of 2012 its efficacy. Implementing indigenous languages of the majority of indigenous inhabitants of this District will be in conformity with the spirit of the Constitution and the object of the Act of 2002 and therefore benefit the vast population of the district who, for decades encountered the unfairness and inequalities as a result of the provisions and the application of the law. There is a dire need to take steps to meet the language demands of the vast majority of the South African citizens.

Finally, it is the researcher's belief that her overriding aim of this study, which is the establishment of Indigenous Language Courts in the Vhembe District for the purpose of affording the accused person the right to a fair trial, has been achieved. It is her conviction that she has also managed to answer the central research question of this study and sub-problems. Sub-problems were crucial to answer the main phenomenon. For the researcher to have been able to investigate these questions and provided answers to that effect, this goal is hoped to have been achieved.

The researcher is however, not oblivious to the fact that this study would generate a very serious debate for or against the position that she has taken. It is important to note that the researcher is an expert on language and legal issues. She conducted her Masters mini-dissertation on interpretation in court and presented conference papers, both nationally and internationally, on legal language issues. As such, she is well-grounded. However, as with any other study, there is room for improvement on this study. Similarly, the researcher is also open to persuasion through other studies that will be conducted in future on the theme of this research.

6.5 SUGGESTIONS AND RECOMMENDATIONS

After the researcher established the impediments for the broader masses of indigenous people in the Vhembe District to use their mother-tongue, i.e. Tshivenda, Xitsonga and Sepedi, in criminal proceedings, and having established that most court officials in this district speak these languages, the researcher now focuses on solutions that would facilitate the use of these languages. The suggestions or recommendations that are tabulated hereunder are embedded within the

establishment of Indigenous Language Courts and will assist policy makers to make a shift in language use in criminal courts to that end if adopted and implemented.

The aim of this section of the chapter is to focus on solutions to the use of English and Afrikaans in the Vhembe District where courts conduct criminal proceedings in these two languages regardless of the language of the accused who speak indigenous languages i.e. Tshivenda, Xitsonga and Sepedi. The recommendations emanate from the findings of this study on mother-tongue use which received enormous support from both empirical research⁵²⁷ and literature and case law review⁵²⁸ as it is not possible to live with the help of interceded communication alone in the long run. Most respondents in all categories also supported this shift. This study recommends Indigenous Language Courts in the Vhembe District for the implementation of these three indigenous languages in criminal trials.

The main purpose of this study is to establish Indigenous Language Courts in the Vhembe District in terms of Act 12 of 2012, as elaborated above. In order to accomplish this goal, this study is of the view that the government should take practical steps in terms of the following:

6.5.1 Diversification of the judiciary linguistically and culturally

One of the reasons for not using the accused's language in court is that judges of appeals and reviews cannot speak African languages.⁵²⁹ Appointment of African judges to appeal courts is a solution to the problem. This sentiment was sometimes ago echoed by the court in the case of *Matomela*.⁵³⁰

The composition of the judiciary must accommodate and reflect all the official languages. Thus, the appointment of judicial officers fluent in indigenous languages would allow for recognition of

⁵²⁷ See Chapter Three of this study.

⁵²⁸ See Chapter Two of this study.

⁵²⁹ See Chapter Four of this study.

⁵³⁰ *S v Matomela* 1998 (3) BCLR 336 (N) at 342H.

the country's linguistic diversity.⁵³¹ When transforming the judiciary, factors such as language commonly spoken in that area and their cultural heritage should be taken into consideration.⁵³²

The idea that government at all levels should provide incentives for bilingual officials is in line with the recommendation of this study to the effect that law enforcement agencies must have bilingual personnel. This is in line with PanSALB on incentives for language capacitation of court officials. This happened in Ireland and it is possible here as well. If this recommendation succeeds, no judge, magistrate or prosecutor will be appointed in the Vhembe District Courts if he or she cannot speak one of the identified languages for the purpose of court processes.

The problems of appeals and review based on the language spoken by the judges will no longer be an impediment for using the accused's indigenous languages, i.e. mother-tongue.

6.5.2 Accord PanSALB more powers to tackle language use in court

This Board has commented that the enabling legislation, i.e. Pan South African Act 59 of 1995, does not give it more powers to deal with transgressors. It is envisaged that the Board will be free to excise its powers in terms of the Use of Official Languages Act 12 of 2012 as postulated in this study.

6.5.3 Development of legal terminology in indigenous languages

In addition to the issue of appeals and reviews as being obstacles for using indigenous languages was lack of legal terminology. If court officials are compelled to speak the language of a particular area on appointment, legal terminology will as well be addressed. Similarly, Language Board and other institutions of higher learning such as the University

⁵³¹ Hlophe, JM, Judge President, Cape High Court, "Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society", *A Paper delivered at the University of Cape Town on 17 September 2003, Forum*, 2004, p. 43.

⁵³² de Vos,P, 'All languages Equal but English and (Afrikaans?) more Equal?', *Constitutionally Speaking.co.za*, April 30, (2008),(accessed 08 august 2013).

of Cape Town are making strides in the development of legal terminology and legal communication in indigenous languages for the purpose indigenous language courts. Schools as well are starting to teach children in their mother–tongue. It is further suggested that the government should choose one or two universities for the purpose of introducing the law degrees in indigenous languages. Also, translation dictionaries for the purpose of court proceedings are being developed around the country.⁵³³

Should this be done, the DJ&COND/1 respondent, and certain CTOQI respondents will not have a leg to stand on. Perhaps the DJ&COND respondents will start thinking about language policy that will clear up the mist in the justice system on language usage.

6.5.4 Give Languages territorial promotion and protection

Giving preference to the three designated indigenous languages in this district through legal language obligation, the Use of Official Languages Act and language rights in terms of the Constitution, section 6 (3) (b), will facilitate the use of these languages in this district and subsequently ensure the right to a fair trial in criminal courts.

If there is a concerted effort to increase the use and visibility of Tshivenda, Xitsonga and Sepedi at the territorial level, then these indigenous languages should regain some measure of social power, and, become a “means for making money” in the analogy of Dorais.⁵³⁴ de Vos⁵³⁵ also shared the same sentiment when he lamented on English being the language of money and aspirational to many judges, magistrates and prosecutors.⁵³⁶ Should these three indigenous languages become languages of money in the form of appointments as proposed in this study, they

⁵³³ South African Translators’ Institute, “SATI-Bringing language barriers”, awarded its 2015 Prizes for Outstanding Translation and dictionaries to winners including Prinsloo, M, Alberts, M, & Mollema, N, who received this price as editors of *Legal Terminology: Criminal Law, Procedure and Evidence at International Translation Day*, 1 October 2015, (accessed 10 March 2016).

⁵³⁴ Dorais, I. J. “Language, Culture and Identity: Some Inuit Examples”, *International Journal of Law, Language & Discourse*, volume 2.no.4, 2012, p. 293.

⁵³⁵ de Vos,P, ‘All languages Equal but English and (Afrikaans?) more Equal?, *Constitutionally Speaking.co.za*, April 30, (2008) (accessed 08 august 2013).

⁵³⁶ See this attitude from DJ&COND/1 on this aspect in this study.

will be elevated to the status of use at territorial level that is in the Vhembe district where they are predominantly spoken.

Most CONQI respondents and APQI respondents were agreeable that they would have been accorded their right to a fair trial, had the proceedings been conducted in their own mother-tongue in this district where they believe most court officials speak their mother tongue.

The suggestion on language widely used in a specific area will carry out the letter and spirit of section 6 (3) (a) and (b) of the Constitution, as well as the object of the Use of Official Languages Act of 2012, particularly the provisions of section 4 (3).

6.5.5 Promulgation of legislation for the purpose of court proceedings

While this study has established and acknowledged that the Use of Official Languages Act of 2012 has some implications on the use of indigenous language in court, the promulgation of the legislation specifically to that end will address the problems of language use in criminal courts more efficiently without hesitation from language users. The researcher also established that without legal teeth, the use of indigenous languages may become a pipe dream in South African courts and consequently in the Vhembe District where the objectives of this study are meant when one looks at the factors advanced such as practicality, mind-set and legal power, for not implementing indigenous languages in criminal courts. For the purpose of further clarity on this matter, the DJ&COND respondents' attitude towards language rights in criminal courts should be looked into.

The promulgation of a legislation on language use in court in terms of the Act of 2012, as anticipated by the department in the analogy of DJ&COND/3 respondent in Chapter four of this study would serve this purpose. It is hoped that this study will have influence on the use of indigenous languages as languages of the court record in terms of this anticipated legislation.

Also, lessons from Ireland⁵³⁷ can add value to our situation. It is highly important that the DJ&COND also complies with this Act of 2012.

6.5.6 Monolingual educational institutions

One of the reasons for continuing with this procedure is that law is studied in English at tertiary institutions. DJ&COND/1 respondent took advantage of this situation and did not want to move from traditional use of English or “stereotype” as indicated by one CTOPI/1. Therefore, the possibility of addressing language issues from this respondent is zero.

This study revealed that once a law degree is studied in indigenous languages, once we diversify the judiciary and develop indigenous languages’ legal terminology, monolingual courts will be possible.⁵³⁸ It was possible in Portugal⁵³⁹ and it is feasible in our situation. During a conference in Portugal attended by the researcher in Lisbon in July 16-19, 2008, the audience were told, in passing, that the University of Portugal offered degrees in Portuguese and any student who could not speak this language should bring his or her interpreter. The University of Venda should be able to offer degrees in Tshivenda, Xitsonga and Sepedi. More so, students speaking these languages dominate this university.

⁵³⁷ Lessons from Ireland where the Courts Justice Act 1924-1936 (section 44) and Legal Practitioners (Qualifications) Act, 1929 (Section 3) and as amended by the Solicitors Acts, 1954-1994 compel judges appointed to courts serving Irish-speaking areas to have sufficient Irish to conduct their duties through the medium of Irish without the assistance of an interpreter as affirmed by Donnacha, J.M, “Language Legislation Mechanism of Language Planning”, *Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September 2004, p. 171.

⁵³⁸ See Brock-Utne, B, “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm ,(accessed 08 august 2013) on choosing language –a indigenous language people speak, are familiar with, and which belongs to their cultural heritage-would distribute power from the privileged few to the masses. The transition from English to the national languages as the medium of instruction helped to destroy the great barrier that existed between the privileged English educated classes and the ordinary people.

⁵³⁹ See Portugal position by Pinto, P. F. “Law and Language Diversity in Portugal”, *Law, Language and Linguistic Diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September, 2004, p. 259.

6.5.7 Know who you are serving approach.

Almost all the APQI and CONQI respondents support the establishment of Indigenous Language Courts for the purpose of speaking in their own languages. They as well suppose that these courts will accord them their right to a fair trial which will consequently safeguard their other constitutional right such as the right to dignity and life. Some CONPI respondents who were sentenced to life imprisonment feel that language use in court deprived them of their right to life and security of a person.

The researcher therefore submits that should the Department of Justice and Constitutional Development know who resides in the Vhembe District, it would ensure that the criminal hearings of these respondents are in their mother-tongue.

It is therefore recommended that information on the language spoken at home and the education level of the people the department is serving in the area will assist law makers, DJ&COND respondents in the implementation of languages. Information about residents' characteristics and the languages they speak, as conferred by section 6 (3) (b) of the Constitution, can help the Department of Justice and Constitutional Development make more informed decisions about allocating resources. Law makers need to understand the changing demographics of the communities in their jurisdiction and recruiting and deploying staff, as suggested above on the appointment of the judiciary and other court officials.

6.5.8 Monolingual courtrooms

It should be remembered that the researcher established interpretation as one of the legal tools that prevent courts from entirely conducting criminal proceedings in the language of the accused.

Monolingual court proceedings are considered to be the most recognised alternative method *to* translation problems.

In *S v Matomela*⁵⁴⁰ the court succeed in conducting the whole proceedings in the language of the accused. Both the Pilot Study and the Department of Justice Pilot Project as well as empirical study proved that monolingual court proceedings in the language of the accused person in the Vhembe District is feasible.

6.5.9 Public education on language access.

Public awareness campaigns on language access and language assistance services such as PanSALB established in terms of the Language Board Act and language units in term of the Use of Officials Languages Act of 2012 is another important solution to language problems in court.

6.5.10 An adequate network of accessible and orientated court.

Respect for one's language of choice or mother-tongue ensures access to court. Undoubtedly the denial of one's language infringes his or her right to access to court. A culture of courts that respects the rights of the accused will accord effective communication in court proceedings. This is regarded as a solution as opposed to the ordeal that befell one CONQI respondent whose statement was recorded in English while she was speaking Xitsonga and the police official who was taking the statement was speaking Sepedi. The post-modern court culture in civil litigation is based on communication and interaction between the parties and the judge. In this kind of procedure, the judge is seen more as a helper of the parties than the actor who is using his public power to make final decisions. There has even been a change from formal justice towards a perceived procedural justice and from the judicial power towards court service. In achieving these aims, communication and interaction of judges and parties are the most important tools.⁵⁴¹ This system is confirmed by one CTOPI/13 respondent who mentioned that when one language is used everyone is comfortable. She went on to say that as the presiding officer who knows the language of the accused, she was able to interrupt proceedings for inaccurate interpretation.

⁵⁴⁰ *S v Matomela* 1998 (3) BCLR 336 (N) at 342H. See also *S v Damoyi* 2003 JOL 12306 (C).

⁵⁴¹ Rasia, C, & Ervo,L, "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2.no.4, 2012, p. 62.

6.5.11 An integrated and coherent system that is expeditious, effective inexpensive and responsive to the needs of the users.

The legal system that respects the rule of law will always ensure administration of justice. By exploring the implications of the Act of 2012 on the use of indigenous languages in criminal courts in this District, the researcher intended to ensure access to justice through less expensive remedies such as language units and remedial measures taken by the Minister against the aggressors of this Act of 2012. The PanSALB as well is another inexpensive method to enforce language rights in terms of this Act.

6.5.12 An independent judiciary and personnel who are professional, representative and sensitive to especially, race, gender and children's issues.

The judiciary is the important forum where the reality of language rights or absence thereof are put on display. It is expected that through this method an independent judiciary will ensure that language rights are exercised and respected by everyone. This was evident in *Lourens*' case.⁵⁴²

6.7.13 Equitable use of languages, a legal tool to realise the right to a fair trial

Equity is the key word to find acceptable solutions in linguistic comparative law. All languages and dialects are equally dignified. Therefore Vhembe District is obliged to respect the demographics of the indigenous languages in this District. This has to be done in an equitable way. In terms of section 9 (1) of the Constitution everyone is equal before the law and has the right to equal protection and benefit of the law.

6.7.14 Develop language policies.

There is no clear policy on language use in court hence English and Afrikaans still dominate our criminal court processes.⁵⁴³ It is the submission of this study that for court recording purposes, a

⁵⁴² See *Lourens v Government of South Africa and others*, 2013 (1) SA 499 (GNP).

⁵⁴³ See respondents in the categories of DJ&COND and CTOPI.

policy on the use of languages, Tshivenda, Xitsonga and Sepedi be designated as languages in which criminal court proceedings must be recorded or other communiqués in the Vhembe District in terms of the Use of Official Languages Act of 2012 as already narrated in this study.

It is recommended that the Department of Justice and Constitutional Development operates within a culture of policies and procedures for the purposes of implementing indigenous languages criminal hearings. A written language policy can guide officers and civilian staff on how and when to use language services. These are some of the key recommendations which have the potential to take the discussion further and produce tangible results in the short, medium and long terms. All that is need is the political will as well as resources to put these ideas into practice.

BIBLIOGRAPHY

- Abreu,V., “ Oscar Trial Lost in Translation”, www.iol.za, 14 March 2014, (accessed 21 April 2014).
- Alberts, M. & Mollema, N., “Developing Legal Terminology in African Languages as Aid to the Court.
“APPI”
“APQI”
- Beaudoin, L. Sherbrooke, L.L.L., “Systematic and Linguistic Specificities of Legal Language (s): A case in Point-Legal Translation in Canada”, in *Law, Language and Linguistic Diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law, Beijing, China*, September, 2004, p.3.
- Berg, N., “Language Bill must Treat all Official Languages Equitably”, 02 March 2012.
Available at: www.politicsweb.co.za/politicsweb/view/page, (accessed 27 March 2012).
- Billé, R., “Action without change? On the Use and Usefulness of Pilot Experiments in Environmental Management,” *S.A.P.I.E.N.S.*,vol.3.no.1, 2010. Available at:
<https://sapiens.revues.org/979.html>, (accessed 22 March 2016).
- Bourg, A., “Walker withdraws English language Bill from council”. Available at:
(accessed 27 March 2012).
- Buttler, J, “Afrikaner Woman and the Creation of Ethnicity in a Small South African Town, 1902-1950”, in Vail, (L ed.), *The Creation of Tribalism in South Africa*, 1989, p. 55.
- Brock-Utne, B., “The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy”, *International Journal of Peace Studies*,
www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm, (accessed 08 August 2013).
- “ Capacity needed for all official languages in court-experts” in Legalbrief Today,
legalbrief@lagalbrief.co.za
- Cassard, A., “A Sherpa Leadership Model: A Leadership Model of Disempowerment”:
Doctoral Thesis, University of....., 2007, p.12.
- “CIPI”

“CIPQ”

“*Conducting a Pilot Study*”. National Centre for the Replacement Refinement and Reduction of Animals in Research, <https://www.nc3rs.org.uk/conducting-pilot-study>, (accessed 23 October 2014).

Choshi, M.K., “The Implications of Multi-Lingualism on the Right to a Fair Trial in South African Criminal Trials”, Master’s Mini-Dissertation, University of Pretoria, 1998.

“CONPI”

“CONQI”

Cook, D.J. *et al.*, “Prophylaxis of Thromboembolism in Critical Care (PROTECT) Trial: a Pilot Study”, available from *J Crit care*, 2005, pp.20:364-372.

Creswell, J.W., “Qualitative Inquiry and research Design: *Choosing Among Five Approaches*”, 3rd ed, 2007, p. 20. NB Incomplete source!

“CTOPI”

“CTOQI”

Currie, I., “Minority Rights: Language, education and Culture”, in Chaskalson, M.(ed.), *Constitutional Law of South Africa*, 1996, p. 35-10.

Den Hartigh, W., “African Languages in SA Courts”, 12 March 2009. Available at: www.mediaclubsouthafrica.com (accessed 15 December 2011).

De Lange, D., “Sparks fly in Debate on Language Parity”, *IOL news.co.za*, (accessed 19 January 2012).

De Vos, P., “All languages Equal but English and (Afrikaans?) more Equal?”, *Constitutionally Speaking.co.za*, 30 April 2008, (accessed 08 August 2013).

“DJ&COND”

DOJ&CD: Newsroom-Speeches, 2010. Available at: <http://www.justice.gov.za>, (accessed 15 December 2011).

Donnacha, J.M., “Language Legislation Mechanism of Language Planning”, *Law, Language and Linguistic Diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September, 2004, p.158.

Dorais, I.J., “Language, Culture and Identity: Some Inuit Examples”, *International Journal of Law, Language & Discourse*, vol. 2. no. 4, 2012, p. 293.

- Dowling, T., “Stop holding your tongue, seriyas!”, available from *Media on African Languages, University of Cape Town, African Languages*, (accessed 12 February, 2014).
- Du Plessis, T., “Language Facilitation and Development in South Africa”: *Papers read at an International Forum for Language Workers on 6-7 June, 1997* *Interpreting at the Hearing of the Truth and Reconciliation Commission: April 1996 to February 1997*
- Du Preeze, J., “The Language of our Choice- Concerns a Language Bill”, *FW de Klerk Foundation-Center for Constitutional Rights*. Available at: www.fwdeklerk.org, (accessed 27 March 2012).
- Du Toit, E, “ Criminal Procedure “ in Chaskalson,M. (ed), *Constitutional Law of South Africa*, 1996 pp. 27-18.
- South African Translators’ Institute, “SATI-Bringing language barriers”, International Translation Day, 1 October 2015*, (accessed 10 March 2016).
- “*Extension of the Due Date for Adopting Language Policies*”, *Sunday Times*, 07 December 2014.
- Feldman, P., “Society Increasingly Multilingual: LA Courtrooms: Judges, Jury and Interpreter”, *LA Times*, 05 May 985, (accessed 06 June 2010).
- Fischler, A.S., “ From Problem Statement to Research Questions”, *NOVA Southeast University, Department of Education*.
- Frankland, J. *et al.*, “Some Issues Arising in the Systematic Analysis of Focus Group Material”, available from *Barbour, R and Kitzing, J (eds) Developing Focus Group Research*, 1999, p.154.
- Gibson, K., “The Myths of Language Use and the Homogenization of Bilingual workers’, *Identities, Second Language Studies*, University of Hawai, 22(2),Spring 2004, pp.1-60.
- Government Gazette, vol. 597 Pretoria, 30 March, 2015, No. 38646, Notice 282 of 2015.*
- Government Gazette No. 387788 dated May 11, 2015.*
- Government Gazette, vol. 597 Pretoria, 30 March 2015, No. 38646.*
- Grossfeld B.,” Literature, Language and Law” *De Jure* 1989 vol. 2. p.217
- Gryling, L., “On Relevance in Interpreting: Practical Guidelines”, *Interpreting at the Hearing of the Truth and Reconciliation Commission: April 1996 to February 1997, Papers read at an International Forum for Language Workers on 6-7 June, 1997*

- Gutto, S.B.O., “Language and the Law in the Context of Cultural and Legal Pluralism”, *SAJHR*, vol.11, 1995, p. 311.
- Halala, P., “A Critical Historical Study of the Response of the Vatsonga to Swiss Christian Missionary Activities: The Example of Valdezia, Elim, Kurulen and the Surrounding Areas, 1873-1994”, *PhD Thesis*, University of Limpopo, Turfloop Campus, 2011, p.70.
- Harries, P., “Exclusion, Classification and Internal Colonialism: The Emergence of Ethnicity Among the Tsonga-Speakers of South Africa”, in Vail, L, (ed.) *The Creation of Tribalism in South Africa*, (1989), p. 82.
- Hartle, R., “Government guilty of failing to train court interpreters” available from *Media on African Languages*, University of Cape Town, *African Languages*. Available at: <http://www.afri-lang.uct.ac.za>. (accessed2014).
- Hoepfl, M.C., “Choosing Qualitative research: A Primer for Technology education researchers”, *Journal of Technology Education*, vol. 9, no. 1, 1997. Available at: <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html>, (accessed 12 October 2014).
- Hlophe, J.M., “Receiving Justice in Your Own Language-the Need for Effective Court Interpreting in our Multilingual Society”, *A Paper delivered at the University of Cape Town*, 17 September 2003, Forum, 2004, p. 42
- Holmes, O.W., “Pan South African Language Board”: *Annual Report*, 2005-2006. Available at: www.pansalb.org.za.
<http://www.us.english.org/view/19>; <http://blogs.uj.ac.za/languagesmatter//2014/08/07/official-language-status-in-the-us/>
<http://www.afri-lang.uct.ac.za/news.html>, (accessed 09 March 2011).
<http://census2011.adrianfrith.cm/place/934>, (accessed 23 February 2016).
- Hulley, Stephen B., “*Designing Clinical Research*”, available from *Williams, L. & Wilkins*, 2007, pp. 168-169, in Wikipedia, the free encyclopedia, <http://en.wikipedia.org/wiki/pilot-experimentn>, (accessed 23 October 2014).
- Interpreters: A South African perspective”, Available at: <http://lexikos.journals.ac.za/pub/article/view/1203>, (accessed 10 March 2016).
- Joseph-G-Turi., “Language Law and Language Rights”, *International Journal of Law, Language and Discourse*, vol. 2, no.4, 2012, p.1.

- Kriel, M., “Justice for All in Indigenous Language Courts”, *South African Language Rights Bulletin*, vol.3.issue 7, March 2009, p.2.
- Laerd: Masters Dissertation, “*Research strategy and research ethics*”/Laerd Dissertation, <http://dissertation.laerd.com/research-strategy-and-research-ethics>, (accessed 12 October 2014).
- “*Language equality in courts unrealistic*”, available from Legalbrief Today, 11 December 2014, <http://legalbrief.co.za>, (accessed 18 November 2011)
- Landman, C., “Can Justice be Embodied in Sexist Language? A challenge to the confession of Belhar”, *Ned Geref Teologiese Tydskrif*, 47, 283-290,p.3, www.christina-landman.co.za/belhar.htm, (accessed 04 July 2011).
- “*Languages as school subject: problems in KwaZulu-Natal*”, *The South African Language Rights Bulletin*, vol. 3, Issue 11, July 2009.
- Le Cheng (ed.), *Multicultural Association of Law and Language (MALL), Forewords*”, in *International Journal of Law, Language and Discourse*, vol. 2. no. 4, 2012, www.ijlld.com.
- Leedy, P.D. & Ormrod, J.E., “*Practical Research: Planning and Design*”, 9th edn, 2010.
- Legalbrief Today, legalbrief@legalbrief.co.za , 12 December 2014, available from *The Mercury*.
- legalbrief@legalbrief.co.za (accessed 12 November 2014)
- Lourens v Government of South Africa and others* 2013 (1) SA 499 (GNP).
- Lourens v Speaker of the National Assembly of Parliament and Others* (EC08/12) [2014] ZAEQC 2; 2015 (1) SA 618 (EqC) (17 September 2014) and *Lourens v Speaker of the National Assembly of Parliament* (20827/2014) [2016] ZASCA 11 (10 March 2016), <http://www.saflii.org/za/cases/ZAEQC/2014/2.html>, (accessed 22 March 2016).
- Louw, P., “Court Interpreters lost in translation”, in *Interpreters undermining justice system-study*, available from *The Herald*, June 08, 2015.
- “*Low Production and Consumption of African –language books- a Lack of Incentives*”, *The South African Language Rights Bulletin*, vol. 3, Issue11, July 2009.
- Maake, N., “To Teach Your Children Well, Do so in Their Own Language”: International Mother Language Day, *Sunday Times*, 16 February 2014, p. 21.
- Magistrates’ Court Act 32 of 1944*.

Mahé v Alberta, [1990] 1 S C R p. 342.

Marjorie, L., “Language Policy and Oppression in South Africa-Cultural Survival”, 08 February 2010, <http://www.culturalsurvival.org/publications/south-africa/langua>, (accessed 08 August 2013).

“Marketing research and Information system” <http://www.fao.org/docrep/w3241e05.htm>, (accessed 12 February 2015).

Mbati,P., Vice-Chancellor and Principal, University of Venda.” Building the engaged University, Moving Beyond the Ivory Tower”, in Talloires Network Leaders Conference, in Spain, June 14-16, (2011), www.tattoires2011.org.

Meizhen, L., “Legal Language and Power: Research on the Phenomenon of Interactive Interruption in Court Session”, *Law, Language and Linguistic diversity, Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijin, September, 2004, 195.

“*Minister pushes for African Language in LLB*”, available from Legalbrief/your legal news pub, 23 November 2015.

Moeketsi, R.H., “Redefining the Role of the South African Court Interpreters”, *National Association of Judiciary Interpreters and Translators Newsletter*, vol.8 Nos. 3-4, www.najit.org/memembrsonly, (accessed 23 February 2016)

Monnakgotla, M., “Johannesburg Courts Face Foreign Languages Problems”, *Sowetan*, March 27 2012, p.7.

Mthethwa v De Bruin N.O. and Another, 1998 (3) BCLR 336 (N).

Multichoice (Proprietary) Limited and Others v The national Prosecuting Authority and Oscar Pistorius (case no: 10193.2014) In Re: The State v Oscar Pistorius (case no: 13/25513) and In Re: Media 24 and Others and Director of Public Prosecution North Gauteng , Oscar Pistorius (case no: 10378/14).

“*Multilingualism in South Africa with Focus on Language Usage*”. Available at: <http://www.pansalb.org.za/news.html>, (accessed 09 August 2013).

Musehane, N.M., “The Tshivenda Language and the Law of Defamation” *Law, Language and Linguistic Diversity, Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September 2004, p. 217.

- Naidenove v Minister of Home Affairs and Others* 1995 (7) BCLR 891 (T). Available at: <http://appliedjournals.org/content/28/1/87.abstract>, (accessed 08 August 2011).
- National Language Policy Framework "NLPF", 2003.*
- Nakane, I., "Problems in communicating the Suspect's Rights in interpreted Police Interviews", *Oxford Journals, Applied Linguistics*, vol.28, Issue 1, 2007, pp. 87-112,
- Ndawonde, "Government Continue Bringing Justice Facilities Closer to the Poor", *DOJ&CD: Newsroom*, <http://www.justice.gov.za>, available from *Cape Argus*, March 23, 2009, (accessed 15 March 2011).
- Ohannessian v Koen, N.O and another* 1964 (1) SA 663 (TPD).
- PanSALB Media Release, "PanSALB celebrates International Mother Language Day". Available at: <http://www.pansalb.org.za/news.html>, (accessed 17 April 2014).
- PanSALB News, 2011 issue, www.panslab.org.za/news, (accessed 26 January 2012).
- PanSALB Media Release, "World Focus on Language Rights", *Regional Language Colloquium, 2013*, www.panslab.org.za/news.html, (accessed 17 April 2014).
- "PanSALB respondent"
- 'Parliament this week passes a new Law to regulate language practitioners in South Africa'. Available at: <http://www.timeslive.co.za>, (accessed 17 April 2014).
- Pinto, P. F., "Law and Language Diversity in Portugal", *Law, Language and Linguistic Diversity: Proceedings of the Ninth International Conference of the International Academy of Linguistic Law*, Beijing, China, September, 2004, p. 259.
- Rainhof, A., "Rosa Lopez Testimony and Misdeeds of the Press", 1997, www.electricti.com.
- Olivier, C.J., "South African Languages", 2009, [Http://salanguages.com/english/index.htm](http://salanguages.com/english/index.htm), (accessed 08 August 2013).
- Rasia, C. & Ervo, L., "Legal Bilingualisation and the Factual Multilingualisation: A comparative study of the protection of linguistic minorities in civil proceedings between Finland and Italy", *International Journal of Law, Language & Discourse*, vol.2, no.4, 2012, p. 62.
- Reference re use of French in Criminal Proceedings in Saskatchewan*, (1987) 36 C C (3d) 353.
- Rikhotso, A. M., "Language Policy and Language use in South African Social Security

- Agency (ASSA), Limpopo Province, *Master's Mini-Dissertation*, University of Limpopo, Turfloop Campus, 2014.
- R v Tran* (1994), 92 C C C (3d) 218.
- SA Language Rights Bulletin*, vol. 1, issue 05, January 2007, p.11, Prepared for Pan South African Language Board by the Unit for Language Management, University of Free State.
- Segar, S., "Parliament may Face Court Challenge if it Delays Language Bill" *Daily News*, www.iol.co.za, (accessed 19 January 2012).
- Sennitt, A., "South Africa Seeks to Shore up Indigenous Languages", *Media Network*, 13 March 2012, (accessed 27 March 2012).
- Shabalala, B., "KZN promotes use of indigenous languages in courts", available from *DOJ & CD :Newsroom*, www.justice.gov.za/m_statements/2009/20090203_inclang.html, (accessed 20 March 2012)
- Schafer, D., "Poor Quality of Translation in Oscar Pistorius Trial a Concern", 04 March 2014, www.politicsweb.co.za, (accessed 21 April 2014).
- Sibiya, Z., "From *Damoyi* to *Damani* :Critical reflection on the use of indigenous languages in the magistrate's courts", by, *a Paper read at the Society of Teachers of Southern Africa Conference, Durban, July 6-8, 2015*.
- Siseka Siyotula v The State* (CA247/2001) [2002] ZAECHC 9 April 24 (2002), <http://www.saflii.org/za.cases/ZAWCHC/2002/9.html>, (accessed 11 June 2015).
- Smit, B., "Can Qualitative research Inform policy Implementation and Arguments from a Developing Country Context" in *Forum: Qualitative Social Research*, vol. no. 3. art.6, September 2003.
- Smith, D., "Oscar Pistorius: a runaway interpreter, then the trial of the century begins", *The Guardian*, Monday 3 2012, 21.37 GMT Available at: <http://www.theguardian.com/world/2014/mar/03/oscar-pistorius.reeva.steenkamp>, (accessed 21 April 2014).
- SowetanLIVE*, "Anger over Pistorius Trial Interpreters". Available at: <http://www.sowetan.co.za/news/2014/03/14/anger-over-pistorius-trial-interpreters>, (accessed 21 April 2014).
- Staff Reporter., "Regional Court Breaks Language Barrier", available from *Cape Argus*,

- March, 2009, www.africanvoice.co.za, (accessed 16 March 2012).
- Supreme Court of Canada in <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/580/index.do>, (accessed 10 August 2013).
- S v Damani* (DR224/14) (2014) ZAKZPHC 60, 9 December 2014
<http://www.saflii.org/za/cases/ZAKZPHC/2014/60.html>, (accessed 11 December 2015).
- S v Damoyi*, 2003 JOL 12306 (C).
- S v Mafu* 1978 (1) SA 454 (CPD).
- S v Matomela* 1998 (3) BCLR 336 (N).
- S v Mbezi* (WS04/2004)ZAWCH , 26 March 2010,
<http://www.saflii.org/za.cases/ZAWCHC/2010/59.html>. (accessed 21 April 2014).
- S v Mpopo* 1978 (2) SA 424 (A).
- S v Ndala* 1996 (3) ALL SA 65 (C).
- S v Ngubane* 1995 (2) SA 811 (TPD).
- S v Pistorius* [2014] CC113/2013 ZAGPPHC 793, 12 September 2014, in *SowetanLIVE*,
<http://.sowetanlive.co.za/anger-over-pirtorius-trial-interpretreer>, (accessed 21 April 2014).
- S v Zuma and Others* 1995 (4) 401 BCLR (CC).
- Thabane, L. *et la.*, “A Tutorial on Pilot Studies: the what, why, how”. *Medical Research Methodology*, 2010. <http://www.biomedcentral.com/1471-2288/10/1>, (accessed 23 October 2014).
- The Constitution of the Republic of South Africa Act 108 of 1996.*
- “*The essence of the transformation of the judiciary in South Africa*”, Address to the Black Management Forum Annul Conference, 17 October 2008, p.1.
- The South African Language Practioners’ Council Bill of 2013.*
- The State v Tonic Ngoveni* (HL223/2014, 03 July 2014).
- The Republic of South Africa Interim Constitution 200 of 1993.*
- The Use of Official Languages Act 12 of 2012.*
- Tolika in Translators for South African Languages, <http://www.tolika.co.za>, (accessed 10 March 2016).
- “*Transforming the Judiciary*” available in Justice and Correctional Services- South Africa Yearbook, 2010/2011, p. 344, <http://www.gov.za/about.sa-yearbook/2010-adminjustice>

“UCT Centre for African Languages Diversity respondent”

Valle, R.S., “Phenomenological Research Methods”, <http://link.springer.com/chapter>, available from *Existential- Phenomenological Perspectives in Psychology*, 1989, p. 41-60 (accessed 12 October 2014).

Van Teijlingen, E.R. & Hundley, V., “The Importance of Pilot Studies” in *Social research Update*, Issue 35, 2001, [http://sru.soc.survey.ac.uk/SRU 35](http://sru.soc.survey.ac.uk/SRU_35), html, (accessed 21 October 2014).

Vijoen , F.,” Look who is talking in the courtroom *too!*”,*SALJ*, vol.109, 1992, p.64.

“Zulu magistrate sparks debate over language of courts”, in *Legalbrief Today*, issue number 2018, February 28, 2015, <http://legalbrief.co.za>