

Exploring the Interplay Between the Right to a Fair Trial and Other Constitutional Rights in South African Criminal Proceedings

Dr. Madumetja Kate Malepe
University of Venda

Abstract

The right to a fair trial is dependent on language power in courtrooms. In the same breadth, the protection of other constitutional rights is premised on the right to a fair trial. Unfortunately, a non-English-speaking accused person cannot use his or her language because English is the language of court record; hence it is possible to produce a trial which is unfair to the accused person. Recently, heads of South African courts have reinforced the historical predominant use of English by declaring it the only official language of record in all courts, inconsiderate of the fact that language is instrumental to a fair trial and other constitutional rights. This article therefore seeks to determine the interplay between the right to a fair trial which may be tainted by language, and other constitutional rights. The article stems from its argument that language does not only affect the right to a fair trial, but also other rights of the accused person that may be safeguarded if the trial is conducted in his or her language. In the process of determination of this interplay, this article also highlights some of the legally enforceable mechanisms that prompt the unfairness of a trial.

Keywords: criminal proceedings, right to a fair trial, language, other constitutional rights.

Introduction and background

Language is instrumental to the right to a fair trial in criminal proceedings. However, the accused person is in practice compelled to listen to English during his or her trial as English is the only language of court notwithstanding the letter and spirit of the Constitution of the Republic of South Africa 108 of 1996 on the right to language and the right to be tried in the language of ones 'choice. This raises concern as to whether such use of language does not affect the fairness of the trial. 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 (Tallroth in Ervo and Rasia, 2012, 64). The subsequent result is that language implications do not infringe only the right to language and the right to a fair trial, but also other constitutional rights which are complimentary or inseparable to the right to a fair trial. It is therefore the aim of this article to explore the relationship between language and the right to a fair trial and their relation to other constitutional rights. This article argues that language plays a major role in the determination of a case and therefore the unfairness of a trial prompted by language use impacts negatively on other constitutional rights. It is acknowledged that language power manifests itself in the daily legal activities in the lawyers' office, police stations and courtrooms all over the country (Meizhen, 2004, 195-214). It is therefore possible that this powerplay of language may produce the trial that is unfavourable to the accused person.

The rights that are mostly related to a fair trial are the right to dignity, the right to life, the right liberty and security of the person, the right to language and culture, the right to administrative justice, the right to access to court and the right to equality. Iwara and Oni (2016, 108) are of the view that the most important basic human rights that may be deprived by lack of fair trial are the right to life and liberty of a person. In *S v Matomela* (1998) the court also reaffirmed the accused person's constitutional rights by stating that the language use and the subsequent unfair hearing as a result thereof have a negative impact on the welfare of the accused.

In this study, the qualitative research methods were used where two types of data were adopted to collect information. The literature review data is mainly sourced from media reports and letters to the editors in which public opinion and perceptions about the implications of the right to a fair trial on other constitutional rights are revealed. Case law, as another type of literature review, discloses the reality of this phenomenon in that the interpretation of the right to a fair trial as provided in the legislation exposes the influence of this right on other rights. The legal framework is as well phrased in such a way that court practices do not promote the constitutional right to a fair trial through language rights (National Language Policy Framework ("NLPF", 2003, p, 7) and other constitutional rights (Choshi, 2017, 194-202). On the other hand, data collected from semi-structural interviews on the experience and perceptions of participants reveals harsh consequences produced by unfair trial as result of language use.

The application/interpretation of legal instruments on the right to a fair hearing

Section 6 (1) of the Constitution provides that the official languages are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. In conformity with language provisions of the Constitution, 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. Despite the fact that a policy in terms of this Act was adopted in 2016, recently heads of courts have declared English as the only official language of record in all courts in the Republic of South Africa.

The fight for human rights in South Africa is informed by certain human rights instruments such as International Human Rights Instruments. Language use in court for the purpose of a fair hearing is provided in Universal Declaration of Human Rights. The relationship between language and the right to a fair trial is found within the ambit of Article 10 of this declaration. In order to achieve fairness of criminal proceedings an interpreter must be provided to an accused person who does not understand the language used. Accordingly, the parties to a criminal matter must either use the language which the individual understands, or hire an interpreter to translate the proceedings. In terms of Article 27 of the International Covenant on Civil and Political Rights minority shall not be denied the right to use their own language

In South African criminal justice system, 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, 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 so 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. Language and cultural rights are provided in terms of section 30 of the Constitution.

The application and/or interpretation of section 35 (3) (k) of the Constitution and section 6 (1) and (2) of the Magistrates' Court Act 1944 thereof has caused enormous injustices to the accused as it reveals that these sections are interpreted to mean the language the accused understands in the context of the provision of interpretation at the expense of the accused's own language in the entire trial, even when all the parties before the court speak the home language of the accused person and official language as provided in the Constitution.. Such examples are *S v Mthethwa* (1998), *S v Matomela* (1998), *S v Damoyi* (2003) and *S v Damani* (2014). In all the latter three cases, a fair trial as result of language was ensured. However, lack of fairness is hidden from judicial review. Review judges reversed the decisions on the basis that English was not used. In *Mthethwa v De Bruin N.O. and Another's* case (1998) 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, in Zulu. In the case of *S v Mafu* (1978) the court decided that one can be bilingual, but yet not sufficient enough to have the proceedings not being interpreted to him or her. This finding was based on section 6 (2) of the Magistrate's Court Act. 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.

In other words, the court acknowledged that interpretation is not always accurate. The comments by the court also confirm unfair hearing as well as encroachment of other constitutional rights as a result of language. Unfortunately, the unfairness of the trial manifested itself even after the constitutional dispensation where courts interpreted sections 25 (3) (i) and 35 (3) (k) of the Interim Constitution of the Republic of South Africa Act 200 of 1993 and of the Final Constitution respectively, to mean the provision of the interpreter in order to accord the accused with interpretation for the purposes of the right to a fair trial (*S v Mthethwa* (1998) on section 35 (3) (k)). The court in *Naidenove v Minister of Home Affairs and Others* (1995) 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 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* (1995) 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. In most instances such proceedings culminate in unfairness or a miscarriage of justice because trials are conducted in the language other than the language of the accused while interpretation is already proven not to be of standard (*S v Mpopo*, 1978). Department of Justice and Constitutional Development respondent referred to Chief Justice Mogoeng Mogoeng on his concerns about poor interpretation in South African criminal courts (Interview 20 March 2014). Pienar and Cornelius (2015, 186-206) also noted a newspaper article where this Chief Justice bewailed that bad interpreters ruin court cases. It is questionable that the declaration of English as the language of records by heads of courts as indicated earlier was implemented under the leadership of this Chief Justice (Nombembe, 2017). *S v Pistorius* (2014) is the most recent landmark case where issues of interpretation were well established. Interpretation throughout the trial was regarded as one of imperfection and was likely to mislead the judge (Abreu, 2014). A respondent convicted person lamented that she was told things by the presiding officer that she did not say during her evidence (Interview 04 February 2014).

The above scenarios reaffirms the findings that misinterpretation includes reaching to wrong conclusions; the court granting mistrial, that is, trial vitiated by error; dismissal of confessions; a trial being unfair; thereby defeating the very purpose of interpretation which is to afford the accused the right multilingual court hearing (Choshi, 1998, 15).

The court *S v Matomela* (1998) adopted a different interpretation of 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, though the court of review reversed this decision based on the fact that the proceedings should have been conducted in English as indicated earlier. 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. Currently, there are other courts that conduct proceedings in the language of the accused. In Limpopo Province, Tivani Magoro Magistrate's Court, the satellite magistrate's court of Hlanganani conducts criminal cases in Tshivenda, Xitsonga and Sepedi. This is in accordance with its language demographics where these languages are the predominantly used in accordance with the Use of Official Languages Act 12 of 2012 though this Act is silent on language in the criminal justice system as explained by a respondent on that magistrate's court (Interview 23 October 2014). The two accused persons at Khayelitsa magistrate's court, Western Cape Province (Interview 26 September 2013) indicate that their cases were conducted in isiXhosa, their mother-tongue. Senior prosecutor confirmed the use of isiXhosa in the entire trial for the purposes of a fair trial (Interview 26 September 2013).

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 criminal proceedings, particularly on the right to a fair trial. When people are subjected to unfair trials the cause of justice cannot be fulfilled and

the state would lose the emotional touch of its people (Iwara and Oni, 2016, 107). Policy Framework 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 (National Language Policy Framework "NLPF", 2003, 7).

Interplay between the right to a fair trial and other constitutional rights

As it has been acknowledged that language implications do not infringe only the right to language and the right to a fair trial, but also other constitutional rights which are complimentary or inseparable to the right to a fair trial, it is the aim of this article to establish which constitutional rights are affected thereof. The following are rights that are found to have been affected by communication which produces unfair hearing in criminal trials and that require protection from the use of one's language that accomplishes the right to a fair trial:

The right to dignity of a person

Section 10 of the Constitution guarantees everyone the right to dignity. To emphasis that dignity is an important precept of 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" while section 39 (1) (a) stipulates 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". Hughes (2014, 78) says the right to a fair trial is based on the dignity of a person. Reference to a case of *S v Basson* (2005) in which the court emphasised the right to dignity of the accused was made by this author. The court in case further stated that the right of the accused to a fair trial stems from the constitutional and humanitarian foundation, namely the need to uphold the rule of law and the basic principles of human dignity, equality and freedom. The importance of the right to a fair trial on the right to dignity is recognized by scholars such as Iwara and Oni (2016,106) who referred to the United Nations' Universal Declaration of Human rights (UDHR) which makes provisions for the right to fair trial as being elementary to human dignity. Also Gopaul (2015,98) referred to the case of *S v Williams* (1995) wherein the court stated that any punishment must respect the right to dignity and must respect the values that are enshrined in the Bill of Rights.

In the same breadth, language plays an important role in human existence, development and dignity. Human dignity is attached to language, dignity and self-respect and they are supposed to be protected through the right to fair trial. The accused person's right to dignity cannot be guaranteed if the accused person cannot follow the proceedings as a result of language use. A convicted person respondent who was sentenced to five years' imprisonment for violating the protection order was concerned that she lost her freedom and dignity due to interpretation problems that led to unfair trial (Interview 04 February 2014 as indicated earlier). She was surprised to hear the presiding officer asking her things that she did not say. She believed that it was due to the misinterpretation that she was convicted and as a result she felt

humiliated. In reality, human dignity is 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.

When one weighs the interests of justice against those of the individual who prefers English, justice dictates that everyone should be treated with dignity and the fact that most of the convicted person respondents were serving heavy sentences because of language vindicates the objectives of this article.

The right to language and culture

The Bill of Rights provisions relating to language and culture, 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 in terms of section 30. Language is considered as an integral element of identity; as a cultural symbol in an Irish nation (Donnacha, 2004, 165). The role of language as a symbol of culture is a crucial aspect of humankind and is inherent in communication. If rights such as language and culture are not respected and accorded to the accused, the right to a fair trial becomes obsolete. In addition, it amounts to absolute violation of these rights. Language and culture are inseparable entity and a symbol of who people really are. The exercise of these rights forms the basis of the right to a fair trial which includes the right to formulate defense and answers. An individual is able to express himself or herself where cultural concepts form part of speech. One may not be able to express his or her thoughts if he does not speak his or her own language. Convicted person respondent is a good example of the violation of the right to language and culture and the subsequent right to a fair trial (Interview 04 February 2014). The cultural concept "*o ndzhena mapaine anga*" instead of "*he penetrated me*", attracted her a heavy sentence of life imprisonment because the deceased, a rapists, was found on top of the blankets. The presiding officer found that the respondent was lying because the deceased was not found inside the blankets (the literal meaning of "*o ndzhena mapaine anga*"). The respondent's culture could not allow her to pronounce concepts such as "penetration" or "sexual intercourse". This respondent was adamant that her conviction and sentence were pursuant to cultural practice and language use in her trial because she was the first amongst the fifty one (51) interviewed convicted persons to volunteer to give information *viva-voce*. A court interpreter respondent was adamant that cultural concepts in either Tshivenda or Xitsonga or Sepedi are not 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" (Interview 23 October 2014). Due to the fact that proceedings are conducted in these three indigenous languages at this respondent's Tivani Magoro magistrate's court, Limpopo Province, the language spoken by all the parties involved in a criminal matter, it is easy to detect that such witness did not mean what they say. According to Dorais (2012, 299) all respondents consider the knowledge and use of Inuktitut as indispensable to Northern Native people.

The cultural background of the accused person determines his fate as language and culture are intertwined. Therefore, cultural consideration on the appointment of the judiciary will safeguard the right to a fair trial as it has been acknowledged that contextual decisions should be produced through fair procedures as a result of cultural reflections (Interview 26 September 2013). This respondent Senior Prosecutor sustains the argument that contextual misunderstanding arise as a result of language use. For the fact that the right to language and culture are intimately related to the right to a fair trial, they will be protected if the judiciary is transformed along language and cultural considerations.

The right to life, freedom 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. Section 35 (3) (k) of the Constitution must be applied or interpreted within the context of the respect for the right to life and freedom and security of a person as provided in terms of sections 11 and 12 respectively, of the Constitution.

Most convicted persons respondent (Interviews 04 February 2014) 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 because the language used would have guaranteed the right to a fair trial. The right to a fair trial emanates as a result the correct use of language.

Also respondent accused persons were of the view that the use of language may affect their right to life and freedom of a person (Interviews 05 February 2014). In conformity with this contention, a respondent convicted Tshivenda speaking person, who was in her 66 years, was serving a life imprisonment because of murder. This informant could not hear anything in court and had the following to say: "I did not know the language spoken in court because I am not educated, but it was not Tshivenda" (Interview 04 February 2014). 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 this respondent as she was a co-accused with the husband of the deceased. She said she was able to hear this statement because by then he was speaking in Tshivenda. Convicted person respondent on cultural concept is also a good example on how the right to a fair trial is so crucial to safeguard the right to life as shown earlier (Interview 04 February 2014).

One writer reported on a case in the United States of America 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 inadmissible the accused's confessional statement due to misunderstanding as a result of language (Fieldman, 1985). By contrast, a warning statement of one convicted person respondent in this study 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 despite the fact that the respondent contested the truthfulness of the contents thereof (Interview 04 February 2014).

The right to life in particular, is at stake where the accused is unable to receive statements in his own language. It is true that the court usually arrives at a wrong conclusion as a result of interpretation and consequently, the accused's other rights are intensively be affected. Had the defense lawyer not alerted the prosecutor the difference between "murder" and "killing", his client would have implicated himself and a conviction would have resulted from such misunderstanding. The accused could possibly have been hanged for the offence (Ailola and Montsi in Brock-Utne, 2002). In the analogy of Department of Justice and Constitutional Development (DJ&COND) policy maker respondent, had the accused who was conversant in English not contested against the interpretation of "sehlare" which meant "medicine" in Sepedi, he or she would have been subjected to dire consequences (Interview 13 February 2014). For an unrepresented accused, the courtroom is a hostile environment which can easily bring their freedom, or their lives, to an end.

As indicated earlier, the most important basic human rights of the individual that are being deprived by unfair trial are the right to life and liberty of a person (Iwara and Oni, 2016, 108). The court in *S v Matomela*, (1998) was also adamant that the language use and the subsequent unfair hearing as a result thereof, have a negative impact on the welfare of the accused. Language was said to have a central significance not only to individuals but also for the society itself (Ervo and Rasia, 2012, 62). The social media's comments on *S v Pistorius's* case [2014] included statements such as "the interpretation was regarded as one that is likely to mislead the judge" (Abreu, 2014). A respondent Senior Prosecutor admitted that contextual misunderstanding may of course take one's life (Interview 26 September 2013). The landmark case of *S v Makwanyane* (1995) on human rights decided to abolish capital punishment as it was inconsistent with the commitment to human rights enshrined in the Interim Constitution. The court went to hold that the right to life and dignity were the most important human rights and the source of all personal rights detailed in Chapter 3 of the Bill of Rights of the Interim Constitution.

This study presupposes that the right to a fair trial is fundamental to the right to life and freedom and security of a person hence this article is crucial to the majority of the vulnerable and poor accused person's community. Fair hearing is of paramount importance to safeguard these human rights.

The right to administrative justice

The use of any other language other than the accused's home language certainly infringes his or her right to administrative justice. The right to administrative justice is enshrined in section 33 of the Constitution. This section provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. In the interpretation of Klaaren (1999) the provision of just administrative action in this section connotes administrative justice in that administrative action should be carried out within the precepts of justice. Accordingly, the right to administrative justice must be considered in relation to other rights such as the right to access to court and the right to freedom and security of a person.

The respondents convicted persons and convicted persons (Interviews 04 February 2014 and 05 February 2014, respectively) 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 to the first DJ&COND participant who considers English as the only language to be used in court (Interview 13 March 2014) and also second DJ&COND participant (Interview 20 March 2014). According to these respondents, justice can be administered through the use of English only while the findings on this study are to the effect that justice can be seen to be done through the use of the accused's primary language throughout the entire trial. DJ&COND respondents are bestowed with the responsibility of ensuring that everyone is tried through fair processes. As Klaaren (1999) holds the view that the accomplishment of other constitutional rights as mentioned earlier, are dependent on the complete administrative justice. The Pan South African Language Board (PanSALB) through Nkosi (2017) is adamant that as a result of the declaration of English by the heads of courts in March 2017 as the only official language of court record in the whole country, the right of access to justice by South Africans in the language of their choice has been taken away. Their insistence of on the use of English is an indication that they do not regard language usage as violation of the right to administration of justice.

In other jurisdictions such as Finland, the purpose of 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 (Ervo and Rasia, 2012, 72). The South African constitutional provision on administrative justice imposes a duty on law enforcement, in this case, the DJ&COND act fairly towards the accused persons where the right or legitimate expectations are threatened or affected.

It must be 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* (1994) 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.

The right to 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 right proceedings. The right to access to court is provided under section 34 of the Constitution. In terms of this section 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 is intended to protect the fundamental rights in Chapter 2 of the Constitution, particularly the right to a fair trial in terms of this study so that other right are not impeded upon. According to Kaersvang (2008) the right to access to court facilitates access to and protection of other rights. Lack of this right deprives the society as a whole of the opportunity to benefit from judicial involvement in protecting the legal rights of the poor. Consequently, the dominance of English has far-reaching prejudicial effects on many indigenous language speakers in terms of communication and their access to justice. In the context of the right to a fair trial, the right to access to court is not achieved if language has affected this right to an extent that it becomes unfair.

Looking at the information provided by the participants convicted persons and accused persons 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 the right to administration of justice is incomplete. One respondent magistrate was adamant that justice is better served in one's mother-tongue (Interview 23 October 2014). After most of the participants agreed that the court may come to wrong conclusion due to interpretation, it was the view of most of them that if one is denied the right to use his or her language, it is tantamount to repudiation of justice by the custodians of the Bill of Rights, i.e. courts of law. They conceded that misinterpretation amounts to the denial of the right to access to justice. One of the purposes of the DJ&COND Pilot Project on indigenous languages in 2009 in court was to accelerate access to justice through the use of one's mother-tongue (Kriel,2009,2). The importance of a fair hearing and its relation to access to justice is evident from this project.

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. Access to justice is the cornerstones of the orderly co-existence of citizens of the country. In addition, 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 (2010).

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 in this regard as it guarantees equal use of languages. 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. The accused and the convicted person 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 (*Lourens v Government of South Africa and others*, 2013).

It is important, therefore, that in interpreting or attaching meaning to the constitutional provisions the numeral language requirements in the Constitution are to be taken into consideration. To maximise communication in criminal proceedings through the language of the accused accords the accused the right to equality. Amongst the accused persons interviewed, two of them confirmed that their trials were conducted in their mother-tongue, isiXhosa in the Magistrate's Court of Khayelitsha, Western Cape Province (Interview 26 September 2013). The achievement of communication on the same footing is evident in these two participants' proceedings. It is true as well that their trial ensured fair hearing and other rights that might have been affected thereof.

Conclusions

The main aim of this article was to investigate whether the right to a fair trial or otherwise the unfairness of the trial has some relationship with other fundamental rights of the accused person. The implications on these fundamental rights is also embedded in this relationship. This article has indeed revealed that the right to a fair trial has a significant role it plays on the preservation and protection of the right to dignity, the right to life, the right liberty and security of a person, the right to language and culture, the right to administrative justice, the right to access to court and the right to equality. It further revealed that the unfairness of the trial as a result of language use deprives the accused person these rights. The right to life is recognized as the most important fundamental right amongst them all, as it is inherent in human existence. It should be acknowledged that courts of law are the important fora where the Bill of Rights is preserved and respected. South African accused persons should feel the touch of the criminal justice system through its equal and open language policies. To experience that the Chief Justice Mogoeng Mogoeng is the author of the declaration of English as the only language of court in this constitutional era, is against the commitment of the constitutional precepts on the protection of fundamental human rights and consequently, it amounts to violation of these rights which is unacceptable to the human nature. This article concludes that English language use in criminal courts is a murderer of the South African accused person's welfare and the society as whole. It further concludes that if language issues are not well articulated in a criminal trials, the subsequent result is that a fair hearing is a distant dream for most accused. The consideration of the language and culture in the deployment of the judiciary would bring an interim solution to most accused persons as this judiciary would be able to recognize language discrepancies during the trial and thereby avoid encroachment of these fundamental human rights.

Notes

Mogoeng Thomas Reetsang Mogoeng, popularly known as Mogoeng Mogoeng was appointed as Chief Justice of South Africa in 2011.

Ethical considerations

The researcher adopted empirical study for data collection. The number of willing participants and whether such participants would be able to give information was a process that was crucial to this study. In this process, "Ethical Clearance Certificate" was important and therefore obtained from University of Venda Ethics Committee. Ethical considerations included written consent form and letters written to participants. In some instances access to participants was preceded by authorization by higher authorities. The researcher took precautions to protect the identity of participants in order to preserve their dignity and protect them against any kind of reprisal. For this purpose,

the researcher used a particular identifying method during data analysis and interpretation.

References

- Abreu, V. (2014), Oscar Trial Lost in Translation. www.iol.za. (Accessed 21 April 2014).
- Ailola, B.A. & Montsi, F. In Brock-Utne, B. (2002), 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 August 08, 2013).
- Brock-Utne, B. (2002), The Language Question in Africa in the Light of Globalisation, Social Justice and Democracy. *International Journal Peace Studies*, www.gmu.edu/programs/icar/ijps/vol8_2/Brock.htm. (Accessed 08 August 2013).
- Choshi, M.K. (1998), The Implications of Multilingualism on the Right to a Fair Trial in South African Criminal Trials. *Masters Mini-Dissertation*, University of Pretoria.
- Choshi, M.K. (2016), Exploring the Implications of Official Languages Act 12 of 2012 on the Establishment of the Indigenous Language Courts in the Vhembe District, Limpopo Province, South Africa. *PhD Thesis*, University of Venda.
- DOJ&CD: *Newsroom-Speeches*. (2010), <http://www.justice.gov.za>. (Accessed 15 December 2011).
- Donnacha, J.M. (2004), 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, 158-181.
- Dorais, I. J. (2012), Language, Culture and Identity: Some Inuit Examples. *International Journal of Law, Language & Discourse*, vol. 2. no.4, 293-308.
- Ervo, L. & Rasia, C. (2012), 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*, Volume.2.No.4, p. 62-98.
- Feldman, P. (1985), Society Increasingly Multilingual: LA Courtrooms: Judges, Jury and Interpreter. *LA Times*. http://articles.latimes.com/1985-05-05/news/mn-8446_I_court-interpreter. (Accessed 06 May 2010).
- Gopaul, A. (2015), The Impact and Constitutionality of Delayed Trials on the Rights to a Suspect or Accused Person During Criminal Proceedings. *Master Dissertation*, University of South Africa.
- Hughes, A. (2014), Human Dignity and Fundamental Rights in South Africa and Ireland. *Pretoria University Law Press (PULP) Pretoria*, p.78.
- Iwara, E.I. & Oni, S.O. (2016), Rights of Fair Trial and the Human Person in Nigeria's Political System: a Legal-Politico Perspective. *International Journal of Arts Humanities and Social Sciences (IJAHSS)*, Volume1, Issue4, 106-114.
- Kaersvang, D. (2008). Equality Courts in South Africa: Legal Access for the Poor. *The Africa Issue*, Volume15, Issue2. <http://quod.lib.umich.edu/j/jii/4750978.0015.203/--equality-courts-in-south-africa.leg...> (Accessed 17 April 2014)
- Klaaren, J. (Revision Service 5, 1999), Just Administrative Action and Administrative Justice. In Chaskalson, M.(ed), *The Constitutional Law of South Africa*,1996,p. 25-1.
- Kriel, M. (2009), Justice for All in Indigenous Language Courts. *South African Language Rights Bulletin*, Volume. 3, Issue 7, p.2.
- Lourens v Government of South Africa and others* 2013 (1) SA 499 (GNP).
- Meizhen, L. (2004), 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,195-214.
- Mthethwa v De Bruin N.O. and Another* (1998) (3) BCLR 336 (N).
- Naidenove v Minister of Home Affairs and Others* 1995 (7) BCLR 891 (T).

- Nkosi, S. (2017). Urgent Radical Legislative Intervention is Needed to Ensure Multilingualism within the Judiciary. *PanSALB Media Release, April 16*.
- Nombembe, P. (2017). Afrikaans Sentenced to Death: English now Sole Official Court Language. *Sunday Times, 16 April 2017*.
- Pienar, M. & Cornelius, E. (2015), Contemporary Perceptions of Interpreting in South Africa. *Nordic Journal of African Studies, Volume24. Issue2, 186-206*.
- Tallroth, P. in Ervo, L. & Rasia, C. (2012), 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, 63*.
- S v Basson* 2005 (1) SA 171 (CC) 126.
- S v Ngubane* 1995 (2) SA 811 (TPD).
- S v Mafu* 1978 (1) SA 454 (CPD).
- S v Makwanyane* 1995 (3) SA 391 (CC).
- S v Matomela* 1998 (3) BCLR 336 (N).
- S v Mpopo* 1978 (2) SA 424 (A).
- S v Pistorius* CC113/2013 ZAGPPHC 793, (2014).
- S v Williams* 1995 (7) BCLR 861.
- S v Zuma and Others* 1995 (4) 401 BCLR (CC).