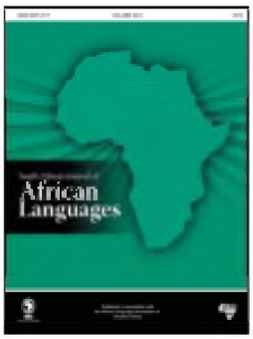

South African Journal of African Languages

ISSN: 0257-2117 (Print) 2305-1159 (Online) Journal homepage: http://www.tandfonline.com/loi/rjal20

Language rights, intercultural communication and the law in South Africa

Russell H Kaschula & Monwabisi K Ralarala

Language rights, intercultural communication and the law in South Africa*

Russell H Kaschula
School of Languages, African Language Studies: isiXhosa, P.O. Box 94, Rhodes University, Grahamstown, 6140
R.Kaschula@ru.ac.za

Monwabisi K Ralarala
Department of African Languages, University of Stellenbosch, Private Bag X1, Matieland, 7602
mrr@sun.ac.za

This article seeks to explore the present language scenario in courts of law. The article makes use of section 6 of the Constitution of the Republic of South Africa (1996), as a point of departure. At face value this section seems to entrench the language rights of individuals. This would mean that individuals could request trials to be held in their mother tongues, with fluent and competent speakers of that mother tongue sitting on the bench. However, this has not materialised. Contrary to popular opinion, the article argues that individual language rights are to some extent entrenched in the Constitution, but there are no mechanisms to secure such rights in the public domain. The article argues that it is often only language privileges that are preserved in institutions such as the justice system. Legally speaking, there is an obligation on the State to provide interpreters to facilitate access to all eleven official languages in courts of law. This in itself presents numerous challenges. The article argues further that the corollary to this is that there is very little space for intercultural communication in courts of law (as defined by Ting-Toomey, 1999, and Gibson, 2002). There has been little or no capacity building in this regard. It is English, to some extent Afrikaans, and the western cultural paradigm, which prevails. The result is further communication breakdown and language intolerance. In this article, the notion of language rights in courts of law is explored against the backdrop of existing theories of intercultural communication.

Introduction

In this article, the authors suggest that language rights as enshrined in the South African Constitution of 1996, really amount to nothing more than a variety of rights, which resemble privileges, rather than fundamental rights in the real sense of the word. This allows leaders to negate the indigenous languages if they wish to do so, which further entrenches the hegemony of English, at least in the public domain. Furthermore, there are no procedures whatsoever when it comes to enforcing or securing these so-called language rights. This is suggested against the backdrop of South African Law Courts, as well as intercultural communication and what has been taking place in these courts, at least from a linguistic point of view. According to Moeketsi (1999:127) 'English and Afrikaans are the sole languages used to hear trials and to keep the court record.' In a paper, Judge Hlophe (2003:2), the Judge President of the Cape High Court, stated that '...it is clear that at present in the courts two languages continue to dominate.' He continues to point out that there is a lack of '...clear policy or commitment to the language issue.'

The article begins by exploring an intercultural theoretical framework, which seeks to support and interpret the empirical data presented. The importance of communicative context, as well as the notion of 'mindfulness', in other words the necessity for awareness of the communication process by the interlocutors, especially those who control power in a court room situation, is emphasised. Thereafter, the relevant sections pertaining to language and the law in the Constitution are outlined and critiqued. From an empirical point of view, the opinions and comments of Judges Yekiso and Hlophe are presented, in conjunction with Constitutional interpretations, as well as comment on the existing case law relating to language issues. The article concludes by analysing language issues in relation to African Courts of Law in general.

---

* A version of this article to be published as a paper in Conference Proceedings (cf. Kaschula and Ralarala, 2005).

Intercultural communication: a theoretical framework

There are a number of approaches which can be applied to language-related aspects of intercultural communication. These include the contrastive approach, the interlanguage approach, the interactive-intercultural approach, pragmatic theories of intercultural communication, as well as sociolinguistic theories of intercultural communication (Ting-Toomey, 1999; Gudykunst and Lee, 2003). It is the latter approach, the study of language in relation to society, which is used as a point of departure in this article (Trudgill, 1983). Subsumed under this sociolinguistic approach is the ethnography of speaking, containing references to observations made in the court room, as well as interviews with respected judges. Saville-Troike (1982:2–3) supports this approach, saying that the ethnography of communication takes language first and foremost as a socially cultural form. This is also discussed in Kiesling and Paulston (2005:1–104). Here scholars such as Hymes and Gumperz discuss models of the interaction of language and social life.

To ignore social and cultural aspects of language would be reducing it and denying any possibility of how language lives '...in the minds and on the tongues of its users.' In identifying the need for effective intercultural communication, Ting-Toomey (1999:5) is of the opinion that, '[i]n order to communicate effectively with dissimilar others, every global citizen needs to learn the fundamental concepts and skills of mindful intercultural communication.' The term, 'mindful', is not a new one and was previously used by various authors, including Gudykunst in 1993. In essence, it requires that one concentrates on the 'process of communication' rather than the outcome thereof. 'In order to communicate effectively in nonscripted situations, we must become "mindful" of our thought processes' (Gudykunst, 1993:41). Langer (1989:69) is one of the first scholars to explore this idea in detail. She isolates three qualities of mindfulness: '(1) creation of new categories; (2) openness to new information; and (3) awareness of more than one perspective.' Arguably, in the South African legal context, it is still the monolithic western paradigm or category that rules. There is little awareness or openness to any other perspective or category. Majeke (2002:153) puts this rather strongly when he states that:

> We all know that no legal system will ever succeed in establishing itself as a social system efficiently if it is not founded on the fundamental cultural rhythms of the majority of the population in its borders. Yet we continue to teach young indigenous Africans how to be good Roman, Dutch, and English law specialists. They are becoming foreigners in their own land.

Langer continues to point out that human beings naturally create categories in order to make sense of the world around them. 'Any attempt to eliminate bias by attempting to eliminate perception of differences is doomed to failure' (Langer, 1989:154). From a comparative point of view, Eades (2005:304–314) supports this stance when analysing the Australian court system in relation to Aborigines and the use of their dialect of English within this system. The cultural differences embedded in Aboriginal English, 'the perception of differences', often contribute to miscommunication in the courts. She continues to point out that amongst Aborigines, direct questions are not important in information seeking, and that silence in an interaction is not an indication that communication has broken down (Eades, 2005:305). These cultural underpinnings run contrary to standard Australian English culture and can be problematic in courts of law. She also points out that a lawyer's handbook has been published in order to create awareness and 'mindfulness' (Eades, 2005:306).

This 'mindful' communication can be particularly complex when intercultural communication takes place, especially when the communicative event suffers from 'cultural noise'. Gibson (2002:9) states that,

> [i]ntercultural communication takes place when the sender and the receiver are from different cultures. Communication can be very difficult if there is a big difference between the two cultures; if there is too much "cultural noise", it can break down completely.

This article will show that this 'cultural noise' sometimes happens between mother tongue speakers of Xhosa themselves. This happens in situations where members of the bench, as well as the witnesses or accused are Xhosa mother tongue speaking, but the court makes use of English only, to the detriment of those Xhosa speakers who do not understand English. The participants are then differentiated by what Ting-Toomey (1999:6) refers to as 'secondary dimensions of diversity'. In other words, 'primary dimensions of diversity' would be those differences which are visible and unchangeable, such as race, whereas 'secondary' refers to aspects of socialisation, such as educational levels. South African court rooms contain both primary and secondary dimensions of diversity, depending on the participants

involved. Furthermore, Ting-Toomey (1999:22–24) presents certain assumptions which will increase an individual's understanding of the intercultural communication process. These assumptions include the fact that 'intercultural communication always takes place in a context' and within an 'embedded system'. It does not happen in a vacuum. For the sake of this research, the court room provides this context.

Donal Carbaugh (1990:151), from an intercultural perspective, sums up a multilingual scenario such as the one in South Africa, but where a selected language is emphasised to the detriment of the remaining languages, as follows:

> Whether, if, and how one can come to coordinate conduct in particular situations of intercultural contact is of course a fundamental practical problem. As is especially pronounced in some courtrooms and classrooms...cultural preferences for speaking do exist in contexts, where some patterns are valued, others are rendered somehow problematic...

Arguably, it is these very 'practical' problems as outlined by Carbaugh that are encapsulated in the term 'practicable' in section 6 of the Constitution, which have undermined indigenous language usage in courts of law. This has threatened not only the equality to speak, but also to be heard in one's own language, without the use of interpreters, or, alternatively, with the use of an effective and properly trained interpreting team.

The present language scenario in South African courts as outlined above, leads directly to asynchrony, where aspects of culture, for example, cultural voids, are completely ignored (Carbaugh, 1990:157). Cultural variability is not at all considered in court room interactions. This leads to misinterpretations in intercultural contact, misunderstandings as well as judgements which are based on cultural and linguistic misunderstandings. This will be explored later in this article.

The courtroom itself represents an environment which encourages low intercultural competence. It is an alien environment even for many English mother tongue speakers, making use of abstract legalese and Latin concepts which make little or no sense to people who have not been exposed to that particular register. The very notion of the term 'intercultural communication' in such a situation amounts to a misnomer.

Legally speaking: the judge's perspective

The importance of language issues has recently been recognised by contemporary South African judges themselves. Before outlining what the judges have said it is necessary to consider section 6 of the Constitution. This section emphasizes that all official languages '...must enjoy parity of esteem...' and be treated equitably, thereby enhancing the status and use of indigenous languages, with government taking '...legislative and other measures...' to regulate and monitor the use of disadvantaged languages.

Section 6 (2) requires mechanisms to be put in place to develop the indigenous languages. Sections 6 (3) and (4) contain language-related provisions for national and provincial governments, whereby government departments must use at least two of the official languages. This provision in itself could make it difficult for courts of law to opt for an English only approach: an approach which seems to have found favour with certain members of the legal fraternity.

Other relevant provisions pertaining to language matters are made elsewhere in the Constitution. Section 9 (3) protects against unfair discrimination on the grounds of language, whilst section 30 and 31 (1) refer to people's rights in terms of cultural, religious, and linguistic participation and enjoyment. Section 35 (3) and (4) refer to the language rights of the arrested, detained and accused persons, with a particular emphasis on the right to a fair trial with proceedings conducted or interpreted into the language of that individual's choice. This section remains contentious and the consequences thereof are discussed below.

Judge Yekiso (2004:3) states that:

> Law envelopes every facet of a person's life. Birth is regulated by law; living... is regulated by law, and death is regulated by law. This law is expressed and communicated by means of a language. Language and the law are not only inseparable, but are two phenomena that are indispensable of each other.

Notwithstanding sentiments such as these, more than ten years after democracy it is important to note that there is no clear policy regarding language use in courts of law. Yekiso continues to point out that sections 30 (5) and 31 (6) of the Constitution seek to protect language, cultural and religious communities, but that none of the sections is capable of entrenching the eleven official languages as a fundamental right. Section 6 could therefore be amended by

following the procedure as set out in section 74 (3) of the Constitution. Nevertheless, it is accepted that language is the fundamental element in the provision of legal justice as borne out by the provisions of section 35 (3) (K) of the Constitution, which provides that:

> Every accused person has a right to a fair trial, which includes the right to be tried in a language that the accused person understands, or if that is not practicable, to have the proceedings interpreted in that language.

Moeketsi (1999:127) argues that the present linguistic deficiencies in courts of law bar individuals '...from participating in their own trials and thus force them to relinquish whatever legal rights they ironically would have been entitled to.' She continues to point out that the above-mentioned section is well positioned to rectify this irregularity. However, this does not seem to have been the interpretation given to this section in South African courts. This has led to the use of interpreters, many of them not properly qualified and unable to facilitate a fair trial as suggested in section 35. This is an extensive topic which does not form part of this article and which is well documented (Moeketsi, 1999). In this regard, Judge President Hlophe (2003:89) concludes as follows:

> For all official languages to be promoted and used equitably a professional interpretation service must be provided by the Department of Justice for all courts. The ideal situation would be of course the provision of a simultaneous interpretation service...and should be investigated by the Department.

He continues to point out that the Department of Arts and Culture has recommended that by 2010:

> ...any accused person in criminal proceedings, applicant or respondent in civil proceedings, as well as any witness in court, shall have access to a professional accredited interpreter.

This is, then, set to be a long-term process. Nevertheless, at present, despite the linguistic and cultural diversity which exists in South Africa, Afrikaans and English remain the main languages used in trials and the sole languages in the keeping of records. Yekiso (2004:7) points out that, '[a] significant segment of the population still finds itself in the tentacles of a language barrier in as far as Court proceedings are concerned which, by their very nature, determine their lives.' He continues to question whether it is possible to attain 'parity of esteem' between the various South African languages in the courts of law.

It would seem that section 35 (3) entrenches the right to a fair trial. However, it does not seem that language use in court proceedings necessarily amounts to a language right as outlined in the Constitution, but it amounts to an aspect of a right to a fair trial. The recognition of eleven official languages does not imply the status of a fundamental right as envisaged in the Chapter on the Bill of Rights in the Constitution. According to Yekiso, (2004:9) 'A language, therefore, within the context of court proceedings, is not a right capable of enforcement through the enforcement mechanism provided in section 38 of the Constitution.' This section provides for the enforcement mechanism of a right in terms of the Bill of Rights provided for in Chapter 2 of the Constitution.

In order to understand the above more fully, let us consider the case of *Mthethwa versus De Bruyn NO* (1998). The applicant, an isiZulu mother tongue school teacher who is fluent in English, launched a challenge in the Natal Provincial Division of the High Court against the refusal by the lower court to grant his request that his trial be conducted in isiZulu. He sought a declaratory order that the decision of the lower court was unlawful and inconsistent with his right flowing from the provision of section 35 (3) (K) of the Constitution. The court held that this section does not grant an absolute right to be tried in one's mother tongue. It granted a right to be tried in a language that one understands and, if that is not practicable, to have the proceedings interpreted in the language the person understands. Even though the court accepted that the majority of people appearing in lower courts spoke an indigenous language, a language audit showed that few members of the prosecution personnel and presiding officers could speak an indigenous language. In rejecting the application, the court interpreted the provisions of section 35 (3) (K) of the Constitution as not conferring an untrammelled right to a mother tongue trial. The court held that:

> Section 35 (3) (K) does not give an accused the right to have a trial conducted in the language of his choice. Its provisions are perfectly plain, namely, that he has the right to be tried in a language, which he understands or, if that is not practicable, to have the proceedings interpreted in that language (1998: 338 D).

Judge President Hlophe (2003:9), with whom the authors concur, concludes as follows concerning this case:

> Howard JP's judgement in this case is, with respect, a low water mark on the question of use and promotion of indigenous languages in this country, which is an imperative in terms of s6 (2) of the Constitution. Not only was this a missed opportunity to promote the Zulu language but there was no attempt by the court to transform the constitutionally guaranteed right to have a trial conducted in a language that one understands into a *meaningful* right. (our emphasis).

Furthermore, Judge President Hlophe (2003:8) pointed out that the real issue was the fact that of the 37 Regional Court Magistrates in Kwazulu-Natal, only four had isiZulu as their home language, while 33 had English or Afrikaans as their home language with little or no knowledge of isiZulu. The same situation prevails with prosecutors where out of 256, only 81 had isiZulu as a home language, the rest being either English or Afrikaans mother tongue speakers with little or no knowledge of isiZulu.

In *State versus Matomela*, Judge Tshabalala upheld the validity of court proceedings conducted in isiXhosa, but stated that one language should be used as the language of record. This language, according to the Judge, should be the language that is understood by all court officials irrespective of mother tongue (1998: 342 G–H). In other words, Judge Tshabalala concurred with the views expressed in Mthethwa's case. However, the use of an indigenous language during the proceedings, without the use of an interpreter, was not altogether ruled out. Judge Tshabalala stated further that this issue would become more pronounced as more indigenous language mother tongue speakers found their way onto the bench. However, it is the view of the authors that this may not necessarily be the case, given the legal fraternity's capitulation to English usage in courts of law. This is supported by Judge President Kgomo's dissenting voice in the report on the usage of official languages in courts. This report is discussed later on in this article.

In another case, *Cape Killarney Property Investments (Pty) LTD versus Mahamba & Others* 2000 (2) SA 67 [c] it was argued that a notice of eviction should have been made available in isiXhosa and not only in English, as many of the informal settlers to whom the notice was directed, could not speak English. It was held by Judge Hlophe that since isiXhosa is one of the eleven official languages that it was imperative that the notice be communicated in the language of the respondents.

With the exception of the *Cape Killarney* case the issue that was raised by the Honourable Judges centred round 'practicality'. In other words, section 6 of the Constitution speaks of 'parity of esteem' only where it is 'practicable'. The authors suggest that what is practicable for one individual may not be practicable for another. In this lies the answer to the South Africa myth that language rights are in fact entrenched in the 1996 Constitution as basic and fundamental human rights. There may be language rights, but arguably, the Constitution does not regard them as 'fundamental' if they are to be entrenched only when it is 'practicable'.

Furthermore, to date, there is no clear language policy within the justice system, even though an official report on the language situation, written and presented by Judge President Hlophe and others, has been issued (Hlophe *et al*, 2003). No official decision has been made regarding language of record. This leads to conflicting case law as outlined above.

This is further supported by the then Secretary-General of the International Academy of Language Law, Joseph G Turi. With regard to language rights and courts of law, more generally throughout the world, he comments as follows:

> The right to 'the' language will become an effective fundamental right, like other fundamental rights, only to the extent that it is enshrined not simply in higher legal norms, but also in norms with mandatory provisions that identify as precisely as possible the holders and the beneficiaries of language rights and language obligations, and the legal sanctions that accompany them. Otherwise, the right to 'the' language will be but a theoretical fundamental right, like several fundamental rights, proclaimed in norms with directive provisions that cover language rights but have no real corresponding sanctions and obligations (Turi, 1993:16).

Arguably, this is indeed the case in South Africa today. Until provisions are put in place and the language issue is clearly spelt out, language will remain, in terms of the Constitution, '...but a theoretical fundamental right...'

Nevertheless, it makes no sense to pursue legal proceedings in English when everyone in the court room, is, for example, a mother tongue speaker of isiZulu. Furthermore, in terms of Government's Language Implementation Plan, which was accepted by Cabinet in 2004, at the highest level of politics, provision is to be made in every government department, both nationally and provisionally, for language practitioners such as translators and interpreters. This being the case, there would be no reason why judgements could not be provided in English as well as one other regional

language, the court proceedings could also be conducted in languages other than English, taking into account the mother tongue of the applicant or complainant, as well as that of the Judicial Officer. At the moment this would place great stress on indigenous language speakers who happen to be personnel in the justice system. There are not sufficient language practitioners available. However, with the increase in mother tongue speakers of African languages in the justice system, as well as government's Language Implementation Plan, from a language preservation point of view, there would be little room for the argument emanating from the term 'practicality'. However, this still does not mean that language rights are secured. It would indeed be ironic if democracy sounded the death knell to multilingualism in an institution as important as the justice system.

Judge Yekiso (2004:18) continues to point out that indigenous languages have in any event survived even before 1994 when they were recognised as official languages. The implication is that English only should then be the language of record and that there is no real threat to indigenous languages. However, in a country such as South Africa, which is multilingual, the authors would argue that there is an onus on government institutions to create awareness around intercultural communication and the visibility of all of our languages. We would argue that this is an attempt to raise the status of indigenous language use in South Africa, as well as to entrench the concept of a fair trial and to secure language rights. Kamwangamalu (2000:51) points out that language practices in virtually all the institutions of the country remain unchanged. There is a '...three-tier, triglossic system; one in which English is at the top, Afrikaans is in the middle, and the African languages are at the bottom.' There is a real onus on the justice system to change this perception in a country where approximately 40% of the people do not speak and make use of functional English (Kaschula, 2004:21).

Kathleen Heugh (1999:70) paints a rather bleak picture when she concludes that even though multilingualism is entrenched in the Constitution '...the promise of a vibrant and linguistically diverse country looks disappointing.' However, depending on political will, the Government's Language Implementation Plan may change this rather pessimistic point of view. This Plan still has to be accepted by Parliament prior to becoming legislated as a Bill.

Intercultural communication: myth or reality?

In previous research, Ralarala (2003) refers to the issue of 'individualism' versus 'collectivism' (Adler and Rodman, 1997; Mclaren, 1998:20–37). He analyses both verbal and non-verbal communication styles in order to show how judicial officers belittle their own cultural identity in favour of a foreign, western, individualistic identity. At one point, his research refers to a Xhosa woman who is brought before the isiXhosa-speaking magistrate and begins to talk in a confused manner about her ancestors. The magistrate as well as the interpreter laugh at the woman. At one point the interpreter and magistrate comment as follows:

Magistrate: 'What on earth is she saying?'

Interpreter (laughing): 'I am not really sure myself. I think it is something about her ancestors' voices. It sounds like very old tribal Xhosa that is not really spoken in cities today. She's saying something about the nightingales and owls...'

The magistrate then suggests that she be escorted to a mental hospital for 'proper' observation. In Carbaugh's terminology (*supra*), this amounts to a classic case of asynchrony in an obvious intercultural, or intracultural communicative event, which should have been made easier by the fact that all participants come from the same cultural and linguistic group. Ironically, it is what Gibson (2002:9) refers to as 'cultural noise' or interference, even between speakers of the same language, and coming from the same cultural group. It is indeed a classic example of Ting Toomey's 'secondary dimensions of diversity' (Ting-Toomey, 1999:6). The magistrate concludes by joking with the interpreter as follows:

'Thanks Rodney. Let's hope the spirits don't haunt you tonight.'

From a somewhat different perspective, another example is the case of *State versus Mpopo* 1978 (2) SA 424 where Judge Munnik concluded that a witness was lying. He said that he knew the language of the witness and further suggested that one of his assessor's was a fluent speaker of isiXhosa. The witness turned out to be seSotho-speaking. The Judge attempted to explain away this misunderstanding by pointing out that the witness came from an area where both isiXhosa and seSotho speaking people lived together. Corbett JA held that the interpretation procedure may not be entirely satisfactory but 'where evidence is interpreted the Court must have regard to what the interpreter tells the

court, not what the witness himself says in the language that is interpreted.' Not only does this highlight the need to proper interpreting (both within language clusters and across languages), but it also shows the total lack of linguistic and cultural awareness in the court.

This is shown further in the case of *Kewana versus Santam Insurance*, 1992. Arguably the entire case amounted to what Carbaugh refers to as 'asynchrony'. The decision was based on a cultural and linguistic misunderstanding (Kaschula and Anthonissen, 1995: 86–95). In this adoption case it was successfully argued by the monolingual defence lawyer that the Xhosa terms *ukondla* and *ukukhulisa*, loosely translated as 'to feed' or 'to cause to grow' indicated that an adoption had not taken place, but rather this process amounted to a fostering. The legal duties differ between these two concepts. The plaintiff, who was suing for damages on the basis that her daughter died due to an act of negligent driving whilst a passenger in a bus insured by Santam Insurance, lost the case and did not receive damages for the adoptive child. The child had been adopted by the plaintiff's daughter. The daughter had since been killed in the accident. The fact that there is no equivalent in isiXhosa for the English term 'adoption' does not mean that the concept does not exist in Xhosa society. The Chief had been called and a ceremony had been held during which a goat was slaughtered. The community accepted that this child had been 'adopted' by the deceased. Nevertheless, the way in which the defence argued the case made nonsense of the recognised concept of raising a child other than your own in Xhosa society (Kaschula and Anthonissen, 1995). The process of *ukukhulisa* or *ukondla* was totally negated. Effectively the court concluded that there is no adoption in Xhosa society as there is no equivalent word to describe such a process.

African courts in general

African courts, with the exception of traditional customary law courts conducted by chiefs, in general seem to operate through the medium of exoglossic languages such as French, English or Portuguese. This is true of, for example, Ghana, Nigeria and Lesotho. The list is endless. Even where an indigenous language is recognised, for example siSwati in Swaziland, in reality it is English that dominates. Mkhonza (1993:219–235) quotes an example where one Sam Simelane, a wealthy business-person, demanded that his industrial court case be heard in siSwati, in line with the Constitution of Swaziland. His statement that he spoke siSwati, the language of Swaziland, drew laughter from the people in the gallery. It was almost inconceivable that a wealthy business-person could not speak English. Even though Simelane was, according to Mkhonza (1993:223), '...claiming his individual rights...', this was not at all explored in the media articles which emanated form the case. He was simply portrayed as an ignorant old man.

Kishindo (2001:14), in an article referring to the situation in Malawi, where English is used in courts of law, and where the majority of the population speak languages other than English, concludes as follows: '...English hinders rather than serves justice in Malawian courts. There are no compelling reasons for using English as the language of the court when the bench and the feuding parties understand local languages.' He continues to point out that:

> There are no cogent reasons for the maintenance of English as the language of the judiciary, or even as the main language in the whole administrative structure in general. It only succeeds in creating self-serving and self-perpetuating modern elites.... It is rather ironic that the African ruling elite finds it much easier to speak English, French or Portuguese than they do their own mother-tongues. (Kishindo, 2001:14)

Chimhundu (1997:7), a Zimbabwean scholar, poses the following pertinent questions as far as language policy in Africa is concerned. It is these very questions, which the South African Government's new Language Implementation Plan seeks to address:

> How can you guarantee democracy where the law of the country is not understood in the language of the people? How do you abide by what you do not know? How can you use information to which you have only limited access? How can you fully participate in anything, or compete, or learn effectively or be creative in a language you are not fully proficient or literate in? Above all, how can a country develop its human resource base to full potential without the language of the people?

These sentiments are again echoed by Ogechi (2003:284) where he poses the following question regarding indigenous language speakers in Kenya who do not have access to English in the courts: 'Isn't there a danger that a majority of the speakers of these languages are uninformed and therefore cannot effectively exercise their democratic

rights?' Ogechi continues to point out that the language rights of these individuals are being 'trampled upon.' (Ogechi, 2003:284). When referring to the draft constitution of Kenya in relation to the judiciary, Ogechi (2003:291) aptly comments as follows:

> The draft of the proposed constitution is silent on the language(s) to be used in law... This implies that indigenous languages including Kiswahili have not been accorded their rightful place in the law... So is justice being done to our language rights?

Although one can draw parallels between Kenya and South Africa, in the sense that English remains the dominant language of prestige in courts and elsewhere in the public domain, there are certain encouraging moves taking place in South Africa. A number of initiatives have been taken by the Department of Arts and Culture, including the 'Advancing Multilingualism in a Democratic South Africa' Conference, which was held in March 2004. Here a National Bursary Scheme for the study of indigenous languages was announced, as well as a human language technology programme to ensure technological advancement of indigenous languages in such fields as law and medicine. Finally, language research and development centres were established to ensure the equitable use of indigenous languages throughout the country, thereby also opening up further career opportunities. The implementation of this plan would have direct implications for language usage within courts of law. In the long term, this can only help in procuring language rights. There would be sufficiently trained individuals within the system to allow for mother tongue trials to take root. In terms of the plan all government departments, both national and provincial will need properly staffed language units, overseen by provincial language committees.

In 2003, a committee of the Judge Presidents was formed in order to look into the issue of language usage in courts. Their recommendations seem to be in line with the Government's Implementation Plan. This plan is fully explored in a recent article (Kaschula, 2004). In their wide-ranging report, the Honourable Judge Presidents recommend, *inter alia*, as follows: that in Civil matters, a person should be allowed to issue summons in the language of their choice; the state must provide an appropriate translator/interpreter where necessary; the language of record should be the language of the Judge or magistrate who hears the case; in a court of first instance the language of the magistrate or presiding officer can be used; where all the parties and the magistrate or Judge speak a particular official language, that official language may — not must — be used to conduct the trial or the hearing; judgements can be delivered in any language (accompanied by appropriate translation where the parties do not understand that language). Furthermore, in criminal matters any language can be used in court and the state must make provision for a suitable interpreter, and wherever practicable, judgement should be given in a language the accused understands.

This report also contained a dissenting voice by Judge President Kgomo, JP of the Northern Cape Division, in which he outlined the need to take an English only approach in courts of law, with the necessary interpreting and translation facilities. As pointed out earlier in the article, to date, the recommendations in the report have not been implemented.

Conclusion

It is indeed difficult to suggest that effective intercultural communication is taking place in South Africa's courts of law, and that language rights, at least in the public domain, including courts, amount to any fundamental rights. At the heart of the discussion should be section 35 of the Constitution, which seeks to create a trial, which is 'fair'. Today, this concept remains lost to many legal practitioners. There is no doubt that if one cannot express one's point of view effectively in one's mother tongue within courts of law, the mother tongue which is the language of one's culture, the language which remains the vehicle of one's world view, then there can be no concept of a fair trial. Ogechi (2003:291) makes this point clear when stating that: '...it has been shown that a society that guarantees language rights stands a better chance of expanding democratic governance as more and more people participate effectively in political debates and decision-making.'

Firstly, this article suggests that this can only take place once the Government's Language Implementation Plan has been passed and implemented, in conjunction with the effective implementation of the recommendations made in the 2003 Judge President's Report. This would mean that properly trained personnel, including interpreters and translators, would facilitate communication in courts of law. Secondly, the languages of the accused, the witnesses and so on, need to be taken into account. Courts should operate in indigenous languages where they can, in other words where the bench and everyone in the courtroom speaks a specific language. The proceedings could them be recorded in that

language, and also translated into English. The onus is on the Pan South African Language Board to investigate and rectify any abuse of language rights in this regard.

The whole question of Carbaugh's asynchrony as discussed in this article also needs to be considered. Legal personnel need to be sent on courses, which would increase their linguistic and cultural awareness, focussing on the process of communication rather than the legal outcome. The Australian system, where a lawyer's handbook for awareness has been created, could serve as an example in this regard (Eades, 2005). The whole notion of linguistic 'mindfulness', as explored in this article, needs to be emphasised in legal training, especially given the inextricable link between language (persuasive and effective communication or oratory) and success in the legal paradigm. At present, the idea of effective intercultural communication in South Africa's courts of law, and the notion of language as a fundamental right, remains but a myth.

References

Adler, R. & Rodman, G. 1997. *Understanding human communications.* New York: Hartcourt Brace College Publishers.

Cape Killarney Property Investments (Pty) Ltd versus Mahamba & Others. 2000 (2) SA 67 (c) at 76 F–G.

Carbaugh, R. (ed.). 1990. *Cultural communication and intercultural contact.* New Jersey: Lawrence Erlbaum & Associates Publishers.

Chimhundu, H. 1997. Keynote address at the Meeting of the Intergovernmental Conference on African language Policies. Unpublished Paper presented at PRAESA, University of Cape Town.

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

Eades, D. 2005. Beyond difference and domination? Intercultural communication in legal contexts, in *Intercultural discourse and communication. The essential readings*, edited by S.F. Kiesling & C.B. Paulston. Oxford: Blackwell Publishing:304–316.

Gibson, R. 2002. *Intercultural business communication.* Oxford: Oxford University Press.

Gudykunst, W. 1993. Toward a theory of effective interpersonal and intergroup communication, in *Intercultural communication competence*, edited by R. Wiseman & J. Koester. Newbury Park. London: Sage Publications: 33–71.

Gudykunst, W., & Lee, C. 2003. Cross-cultural communication theories, in *Cross-cultural and intercultural communication*, edited by W. Gudykunst. London: Sage Publications: 7–34.

Heugh, K. 1999. The promise of multilingualism and education in South Africa: Mirage or reality?, in *Alizes: revue angliciste de la Reunion. Language and Education: Parameters for a multicultural South Africa*, edited by C. Feral. Saint Denis: Universite de la Reunion (France): 64–82.

Hlophe, J.M. 2003. Receiving justice in your own language — the need for effective court interpreting in our multilingual society. Unpublished Paper. CALSSA: Cape Town: University of Cape Town.

Hlophe, J.M., Kgomo, F.D., Malherbe, J.P. & Zondo, R.M.M. 2003. Report on the usage of official languages in courts. Pretoria: The Committee of Heads of Superior Courts on the Usage of Official Languages in Courts ('the Committee').

Kamwangamalu, N. M. 2000. A new language policy, old language practices: status planning for African Languages in a multilingual South Africa. *South African Journal of African Languages* 20(1):50–60.

Kaschula, R.H. & Anthonissen, C. 1995. *Communicating across cultures in South Africa. Toward a critical language awareness.* Johannesburg: Wits Press/Hodder & Stoughton.

Kaschula, R.H. 2004. South Africa's national language policy revisited: The challenge of implementation. *Alternation* 11(2):10–25.

Kaschula, R.H. & Ralarala, M.K. 2005. Language rights, intercultural communication and the law in South Africa. Pending publication in Conference Proceedings: Conference on Intercultural Communication: The linguistic challenges of cultural diversity, Department of General Linguistics, University of Stellenbosch, 6–8 September 2004.

Kewana versus Santam Insurance Company. 1992. Case No. 112/88. On Appeal.

Kiesling, S. & Paulston, C. (eds.). 2005. *Intercultural discourse and communication. The essential readings.* Oxford: Blackwell Publishing.

Kishindo, P. 2001. Language and the law in Malawi: A case for the use of indigenous languages in the legal system. *Language Matters* 33:1–23.

Langer, E. 1989. *Mindfulness.* Reading, MA: Addison-Wesley.

Majeke, A. 2002. Towards a culture-based foundation for indigenous knowledge systems in the field of custom and law, in *Indigenous knowledge and the integration of knowledge systems. Towards a philosophy of articulation*, edited by C.A. Odora Hoppers. Claremont: New Africa Books: 141–157.

McLaren, M. 1998. *Interpreting cultural differences. The challenge of intercultural communication.* Dereham: Peter Francis Publications.

Mkhonza, S.T. 1993. "I speak siSwati", Bhozongo explodes: language rights and the individual in a Swazi court, in *Language, law and equality*, edited by K. Prinsloo, Y. Peeters, J. Turi & C. van Rensburg. Pretoria: University of South Africa: 219–235.

Moeketsi, R.M.H. 1999. *Discourse in a multilingual and multicultural courtroom.* Pretoria: JL van Schaik Publishers.

Mthethwa versus De Bruyn NO and another. 1998 (1) BCLR 336 (N) at 338D.

Ogechi, N. 2003. On language rights in Kenya. *Nordic Journal of African Studies* 12(3): 227–295.

Ralarala, M. 2003. Inherited intercultural dimensions: The judicial official's dilemma in a rural setting. Unpublished Paper. Stellenbosch: University of Stellenbosch.

Saville-Troike, M. 1982. *The ethnography of communication. An introduction.* Oxford: Basil Blackwell Ltd.

State versus Matomela. 1998 (1) BCLR 339 (Ck) at 341J.

State versus Mpopo. 1978 (2) SA 424 (A) at 426G.

Ting-Toomey, S. 1999. *Communicating across cultures.* New York, N.Y.: Guilford Press.

Trudgill, P. 1983. *Sociolinguistics. An introduction to language and society.* Harmondsworth: Penguin Books.

Turi, J.G. 1993. The importance of the conference theme: "language and equality", in *Language, law and equality*, edited by K. Prinsloo, Y. Peeters, J. Turi, & C. van Rensburg. Pretoria: University of South Africa: 5–24.

Yekiso, N.J. 2004. The African Languages and the law: Challenges & responses. Unpublished ALASA conference paper. Stellenbosch: University of Stellenbosch.