

UNIVERSITY OF KWAZULU-NATAL

SCHOOL OF LAW, HOWARD COLLEGE

**Exploring the Regulation of Specialised Court Interpretation for Children in the  
Children's Courts of South Africa in Light of Children's Rights to Access to Justice,  
Participation, Language and Best Interests**

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Date: 28/10/2021

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‘I can do all things through Christ who strengthens me’ Philippians 4: 13

Thank you, Almighty God, for giving me the strength and courage to undertake this research. Your grace is sufficient for me. To God be all the Praise and Glory!

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## DEDICATION

This study is dedicated to my husband and parents.

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## ACRONYMS AND ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
Communities Commission	Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
CRC	United Nations' Convention on the Rights of the Child
ECOSOC Guidelines	UN Economic and Social Council Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime
LSSA	Law Society of South Africa
PanSALB	Pan South African Language Board
POCSOA	Protection of Children from Sexual Offences Act 32 of 2012
SAHRC	South African Human Rights Commission
SALPC Act	South African Language Practitioners' Council Act
SORMA	Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

# CHAPTER ONE

## INTRODUCTION

### I INTRODUCTION

This study investigates the regulation of specialised court interpretation for children in the Children's Courts of South Africa in light of children's rights to access to justice, participation, language and best interests.

### II BACKGROUND AND OUTLINE OF THE RESEARCH PROBLEM

South Africa has eleven official languages. Section 6 of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides for these as follows: "Afrikaans, English, isiNdebele, isiXhosa, isiZulu, Sepedi, Sesotho, Setswana, siSwati, Tshivenda and Xitsonga". Provision is also made to promote Khoi, Nama and San languages and sign language (Moyo, 2016). Accommodating a multi-linguistic society can bring many challenges. Pienaar & Cornelius(2015:190) highlights that the focus on the quality of interpretation services became apparent in South Africa during the late Nelson Mandela's memorial service, when the fake sign language interpreter, Thamsanqa Jantjie appeared in public. Three months after the incident that left South Africa in total embarrassment, the trial of the Paralympian Oscar Pistorius, yet again, it was the poor performance of the interpreters that got people talking (Pienaar & Cornelius, 2015). The above-mentioned instances are just two of many such incidents in which the performance of court interpreters have been questioned in South Africa. Pienaar and Cornelius (2015: 186) explain that interpretation became contentious after these public events to the extent that the reputation of the interpreting profession was severely compromised.

In the past, interpreting was placed under the umbrella term of translation but has progressed since then. Lebesse (2018:3), citing Pöchhacker and Shlesinger (2002:3), explains that the meaning of 'translation' changed later to

*"defin[ing] interpreting as an inter-lingual, inter-cultural oral or signed mediation, enabling communication between individuals or a group of people who do not share, or choose not to use, the same language".*

Section 1 of the South African Language Practitioners' Council Act 8 of 2014 (SALPC Act) defines "interpreting" as meaning "*the act of transposing an utterance from a source language to a target language in spoken or signed form*". Interpretation can happen in a number of contexts, one of which is use in courts. Lebesse (2015: 70), citing Lee (2009: 36), explains that an interpreter is seen as a language facilitator whose involvement allows for participation of a person who is unable to speak the language of the proceedings.

Children are permitted to enjoy the rights captured in the Constitution of the Republic of South Africa, 1996, which includes language rights, in the same way as any other citizen. Child-specific rights are set out in section 28 of the Constitution. Robinson (2003) explains that children are also eligible to the protection afforded by other provisions of the Constitution. For example, section 30 of the Constitution states that "everyone has the right to use the language and participate in the cultural life of their choice", provided that they do not exercise these rights in a manner inconsistent with any provision of the Bill of Rights. This applies to children as well. Section 6, one of the founding provisions of the Constitution, states the eleven official languages and calls upon the state to take practical and positive measures to advance the use of the languages. According to section 6(5)(a)(iii) of the Constitution, sign language must also be promoted.

The Constitution highlights the protection of our language diversity. However, in most courtrooms, English and Afrikaans continue to be the means of communication that prevails (Cote, 2005). Cote (2005: 12) elaborates by explaining that these two languages "*are the only two languages of record in South African courts*". Cote (2005: 12) further states that despite the fact that courts are aware of the right for litigants to conduct trials in all indigenous languages, to reduce impracticalities, legal professionals advocate for a sole language of record. In the courtroom we often experience communication with people from different linguistic backgrounds; hence there is a need for competent interpreters.

It is submitted that justice is compromised should our courts not have highly-skilled court interpreters to accommodate our multilingual society. Hlophe (2004: 43) asserts that African indigenous languages are predominantly spoken in lower courts. Children should feel comfortable to speak in a language of their choice without being seen as a burden to the justice system. In view of this, the government needs to make provision to accommodate language barriers and promote the use of indigenous languages in courts, as set out in the Constitution.

In many instances, the use of an interpreter is a challenge as they are seen as a scarce commodity. Powell, Mangera, Dion and Sharma (2017: 91), citing Morris (2008), state that research on the use of interpreters revealed challenges, one of which relates to the limited availability of interpreters, especially for minority language groups, and limited resources allocated towards interpreting. As a result, this usually results in the adjournment of cases until a suitable interpreter can be hired. Having worked with the Verulam Magistrates' Court, the researcher often found herself waiting for an interpreter to arrive as he/she was rendering services in another section of the court. This was inconvenient and unfair at the time, as the child I had brought to court also had to wait for a long period of time or the case had to be adjourned.

When cases are adjourned because of the lack of an interpreter, it negatively impacts on the child and is detrimental to the case. Children may not remember the details of the case due to the long wait and would be exposed to secondary trauma, as attending court can be stressful on children Jonker & Swanzen, 2007: 92), citing Coughlan and Jarman (2002), explain that literature shows that as a result of physiological and emotional factors, giving evidence is difficult for children as they are unable to remember details over a long time and struggle to handle the complicated justice system.

Work with children requires much sensitivity as any type of trauma inflicted on a child can have a harmful effect on the child. A skilled court interpreter is therefore required. Hollely (2002: 14) highlights that a child can be severely traumatised by an abusive experience, and the way in which a support person responds to the child can impact on the child's recovery and perception of the justice process.

Limited research has been conducted in respect of court interpreters and children during Children's Court proceedings in South Africa, with authors agreeing with regard to the gap in interpretation, particularly for children (Matthias & Zaal, 2002; Moeketsi, 1999); Nilsen, 2015:122).

Access to justice for parties to court proceedings may be hampered by the lack of a court interpreter, or poor interpretation services rendered. The inaccurate or incomplete interpretation of a child's testimony could result in a guilty person walking free and injustice for the child complainant or witness. The dignity of the child can also be affected as communication goes to the heart of dignified treatment.

Nilsen (2015: 123), citing Nilsen (2000, 2005 and 2011), explains that an unskilled interpreter can result in the deprivation of the rights of an individual as the interpreter has the potential to misinterpret what is being said. Mpahlwa (2015: 27) highlights the fact that the frequency of misinterpretation at courts in the Eastern Cape province, identified in cases studied, showed that many cases after automatic review were overruled or referred back to trial court. These incidents hinder the justice process.

The need for court interpreters to be child friendly, able to understand the vocabulary of children and to be adequately trained in all aspects of interpretation for children is a necessity. Powell et al. (2017: 97) express the need for better training on interpretation in sexual offences cases and child protection generally. In their study, participants identified that training is also needed on professional demeanour which can aid in gaining a child's trust. One participant explained that an interpreter in a case of child abuse appeared to be frightening as she wore strange make up. This example indicates that it is essential that court interpreters take cognisance of the fact that their demeanour plays a vital role in building rapport with children.

Interpreters need to be patient with children; they cannot resort to speeding up the proceedings by speaking on the child's behalf in such a way that they misinterpret what the child is saying. According to Matthias and Zaal (2002: 356) in their study, participants perceived that interpreters "shorten and simplify what they translate" in order to complete the case, either because of "laziness" or "the pressures imposed by heavy court rolls".

Since interpretation is very complex and can have an impact on the rights of all the parties involved in a court case, the question as to whether interpreters are adequately trained to provide services to children is of concern. How the training or lack thereof have an impact on the performance of the interpreter is an important aspect to explore.

Quality training enhances an interpreter's performance and leads to more effective interpretation. Powell *et al.*'s review of literature (2017), citing Gallai (2013), Hale (2011), Hale and Gibbons (1999), Wakefield, Kebbell, Moston and Westera (2015), identifies challenges such as an examination of the incompetency of interpreters and the lack of training. Powell *et al.* also refer to the finding of Hale (2011) that a "minimum standard qualification" is lacking for interpreters. Powell et al assert that training does occur but is limited in "quality and quantity".

The Children's Act 38 of 2005 highlights in section 52(2)(b) the fact that adversarial procedures must be avoided by the use of a qualified or trained interpreter. This raises the question of what constitutes a trained or qualified interpreter. Further, should the interpreter trained in child development, working with children who are vulnerable or abused, be fluent in sign language? It is submitted that interpreters working with children need to undergo specialised training in respect of children in civil proceedings. Children are vulnerable and sometimes have trouble expressing themselves; therefore, special attention needs to be given when interpreting for them.

There are no formal norms and standards for court interpreters to serve as a guide for interpretation that exists. However, there is a code of conduct embedded in the regulations made in terms of the Language Practitioners Council Act, 2014. Having no formal norms and standards can cause interpreters to struggle in the field as language dynamics are complex.

In terms of legislation, chapter one of the South African Language Practitioners' Council Act, 2014 ('the SALPC Act') defines "language practitioner" as

*"a paid occupation which involves the work that is done by language practitioners including, but not limited to, translators, interpreters, language planners, terminologists, lexicographers, text editors and any other person conducting language-related work, registered as such under this Act".*

The Act refers to an interpreter as a language practitioner. In essence, this is a broad term which is used. The Act does not single out interpreters but rather places them under the umbrella term in the Act, which in turn can inhibit professionalisation in the field of interpreting. This gap could therefore be one of the reasons for the lack of performance by interpreters being highlighted in the literature reviewed.

The problem at hand is that there seem to be gaps in the services of court interpreters for children. Inaccurate and poor interpretations and non-child friendly attitudes of court interpreters have a bearing on cases and on the lives of children, which results in justice not being served (Matthias & Zaal, 2002; Nilsen, 2015).

The limited availability of interpreters is also a contributory factor to ineffective court interpretation services delivered to children. Considering the above, the purpose of the study is to explore the regulation of court interpreters in respect of interpretation services rendered to children.

### III RATIONALE

In view of the above, there is a need for extensive research and exploration of possible solutions to the above-mentioned challenges. This study therefore seeks to explore this aspect in order to advocate on behalf of children in respect of court interpretation services.

Personal experience and observation in court has given the writer a perspective on court interpreters and has therefore incited her interest in respect of the above-mentioned topic.

In addition, the behaviour of the interpreters at the court sometimes left much to be desired. For example, frequently the interpreter did not introduce him-/herself and often it felt as though he/she was in a hurry to proceed to another case. Little research exists in respect of court interpreters' attitudes and behaviours with matters that involve children, the views of a child and interaction with the child. The accuracy of the translation is often not recorded. This is supported by Nilsen (2015: 121) who refers to the dearth of literature on interpretation for children citing (Gotaas (2007); Hitching & Nilsen (2010); Nilsen (2013); Schoor (2013)) and asserts that we have limited insight into the nature of work with children and interpreters in the public sector such as who is interviewed and what happens during the interpreting occurrences.

It is for the above-mentioned reasons that the researcher has chosen to undertake the study.

The literature review in chapter 2 will discuss the following themes: interpretation for children in South Africa, domestic; regional and international laws on interpretation for children; and best practices from other jurisdictions. India is a good comparator to consider for best practices from other countries. The domestic laws that will be considered include: the Constitution of the Republic of South Africa, 1996 ('the Constitution'); the Children's Act 38 of 2005 and its regulations; the South African Language Practitioners Council Act 8 of 2014 and its regulations; the memorandum on objects of the draft Children's Court Rules, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA); Regulations relating to Sexual Offences Courts; the Child Justice Act 75 of 2008 and its regulations; the Uniform Rules for Courts (2009), the Amendment of Rules Regulating the Conduct of Court Proceedings of the Magistrates' Courts of South Africa (2020); law reform on official languages; and the Language Policy of the Department of Justice and Constitutional Development (2019).

The regional and international laws that will be considered include: The United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC).

In India, the Protection of Children from Sexual Offences Act 32 of 2012 (POCSOA) makes provision for children who are sexually abused. Section 19(4) of the POCSOA speaks to reporting of offences, and that a translator or an interpreter should be provided. Section 26(2) makes provision for an interpreter when a magistrate or police officer is taking down the statement of the child, while section 38 caters for the use of an interpreter or expert while recording evidence of a child. To supplement the POCSOA, the government of India, Ministry of Women and Child Development made a notification which is to be published in the gazette of India Extraordinary Part II Section 3(i). The rules in the notifications unpack the use of interpreters for children in great detail, referring to their qualifications; capturing their details on a register; their familiarity with the child's language and the state's languages; payments for interpreters; the child's preference of interpreter, impartiality of the interpreter; accuracy of the interpreter; the familiarity of the manner in which the child speaks; confidentiality; and the qualification of registered sign language interpreters.

In view of the above, we see how other countries have supplemented their legislation with guidelines that aid the work of interpreters. The guidelines help interpreters to provide more effective services. South Africa lacks such guidelines and policies which can facilitate and strengthen a child's access to justice and court interpretation services.

#### IV THEORETICAL FRAMEWORK

A human rights-based approach explained by Dinbabo (2013: 273), citing Piron (2004), states that this approach is a framework based on human rights standards which guides social development and aims to uphold human rights.

This study is based, more specifically, on a children's rights approach. In applying a rights-based approach to children, we recognise that children are eligible to enjoy human rights and are bearers of rights. It is the government's responsibility to safeguard a child's right and to take measures to ensure that children are involved on all levels of policy making which affect them. Each child must be seen as an individual worthy of all the rights embedded in the Constitution. The laws that give effect to and regulate the provision of



specialised court interpretation services to children by practitioners should therefore be in line with relevant human rights of children.

The Children's Act and the Constitution make provision for the best interests of the child to be of paramount importance in all matters concerning the child. Embedded in the Children's Act and Constitution as well as international treaties is the right to child participation and access to justice. Promoting and facilitating child participation means that in order for a child to participate in matters concerning him or her, a child's voice needs to be allowed to be heard, which is pertinent in our society that upholds the rights of children. Children are entitled to access to justice. All barriers must be removed so that children have a sensitive and child-friendly justice system available to them. Sections 10 and 14 of the Children's Act work hand in hand. Section 10 is realised by the implementation of section 14 thus allowing for a child to be heard by means of participation in court. The manner in which the child participates is by speaking, and if a child cannot understand what is being said or is not understood by the court it results in the child not participating. The child's language barriers need to be addressed so that the child can actively participate. This is supported by Boezaart and Bruin (2011), who highlight that participatory rights are reinforced further when a child has access to courts and is assisted. The service that the court renders should at all times uphold the rights set out in the South African Constitution and the best interests of a child in all matters. In saying this, effective court interpretation services need to facilitate the preservation of children's rights. There needs to be more focus on child participation in all areas of a child's life and this can become a reality only by holding government accountable for introducing and applying the relevant legislation that will enable children to participate (Percy-Smith and Nigel, 2010).

Moyo (2015) highlights that the Children's Act states that children should "participate in an appropriate way" and that this holds the government accountable in ensuring that the process is child friendly to the extent that language and cultural barriers are broken down, thereby enabling a child to participate. Discovering the gaps in the services rendered would assist in motivating for policy enhancement, promoting, protecting and fulfilling of children's rights.

## V RESEARCH QUESTIONS

The main research question considers whether or not the regulation of specialised court interpretation for children in the Children's Courts of South Africa is in line with children's rights to access to justice, participation and best interests.

The study aims to look at uncovering the answers to the below-mentioned questions:

1. What are the main components of the specialised nature of court interpretation for children in civil matters, particularly in the children's courts, evident from literature?
2. How does international, regional and domestic law express itself on the obligations on the state for provision of specialised court interpretation for children?
3. What measures are put in place in current regulation of court interpretation in South Africa to combat secondary victimisation of children during court interpretation and to promote children's rights to access to justice, participation and best interests?
4. What best practices from foreign jurisdictions on specialised court interpretation for children can be implemented in the South African context?

## VI RESEARCH METHODOLOGY

A sociolegal methodology will be applied. Using this methodology, we look at law in a social context. O'Donovan (2016) explains "sociolegal studies involve law as a social institution with social effects of law, legal processes, institutions and services and the influence of social, political and economic factors on the law and legal societies."

The regulation of children's rights concerning court interpretation is a phenomenon that involves both legal and social aspects in relation to a child's right to participation, access to justice and the best interests of the child and how these affect the child and the judicial proceedings. Social aspects of language rights, such as secondary victimisation, will be considered in light of the legal framework that ostensibly protects and promotes children's rights (taking into account the impact of the regulation and the practice of interpretation of children's rights). The study is desk-top based. Existing electronic secondary data such as journal articles, chapters in books and policy documents are reviewed and analysed. Primary sources of law such as international and regional law treaties and legislation from South Africa and India are also analysed. Literature reviewed emanated from databases such as EbscoHost, Sabinet, SAEpublications, Taylor Francis, LexisNexis, Juta,

and Jstor. Search terms were utilised such as ‘translation’; ‘interpreting’; ‘secondary trauma’; ‘child witness’; ‘court interpretation’; ‘Children’s Courts’; ‘language policy’; ‘access to justice’. The period covered by the literature reviewed included predominantly literature from 1994 onwards as this is when the constitutional dispensation came into being in South Africa, inclusive of the operation of the Children’s Act of 2005 as well. Some literature from prior to 1994 were utilised where relevant for historical and other relevance.

## VII STRUCTURE OF THE DISSERTATION

The study will comprise Six Chapters.

Chapter One will introduce the study and will contain information to the background of the study, research problem, rationale, research questions and methodology.

Chapter Two will review the literature of the study in respect of gaps in court interpretation for children in South Africa. The following themes will be explored: inadequate training of court interpreters for children; measures to combat secondary victimisation of children during court interpretation; the undefined role of court interpreters in Children’s courts; the lack of norms and standards to guide court interpreters with children; and the impact of inaccurate or incomplete court interpretation on children’s access to justice.

Chapter Three will discuss domestic law on court interpretation for children. The following will be described and analysed: the Constitution of the Republic of South Africa, 1996 (the Constitution); the Children’s Act 38 of 2005 and its regulations; the South African Language Practitioners Council Act and its regulations; the memorandum on objects of the draft Children’s Court Rules; the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; Regulations relating to Sexual Offences Courts; the Child Justice Act 75 of 2008 and its regulations; the Uniform Rules for Courts (2009); the Amendment of Rules regulating the Conduct of Court Proceedings of the Magistrates’ Court of South Africa (2020); law reform on official languages; and the Language Policy of the Department of Justice and Constitutional Development (2019).

Chapter Four will discuss international and regional law on court interpretation for children. In particular, the obligations which are created for states parties will be considered, not only in relation to relevant provisions of the CRC and ACRWC, but also in relation to access to justice generally.

Chapter Five will discuss best practices from other jurisdictions in respect of court interpretation for children. In particular, India will be considered.

Chapter Six will have a conclusion to the study and provide recommendations.

## **CHAPTER TWO**

### ***LITERATURE REVIEW: INTERPRETATION FOR CHILDREN IN SOUTH AFRICA***

#### **I INTRODUCTION**

Cases relating to children require expert skills and need to be handled delicately. The needs and experiences of children in respect of interactions with court interpreters have not been explored at length in South Africa. Many studies exploring adults' interactions with court interpreters have been conducted but not those exploring the experiences of children (Matthias & Zaal, 2002: 351).

The following themes arising from the literature reviewed are discussed in this chapter: the impact of inaccurate or incomplete court interpretation on children's access to justice; inadequate training of court interpreters for children; the lack of norms and standards to guide court interpreters working with children; the undefined role of court interpreters; and measures to combat secondary victimisation of children during court interpretation.

#### **II THE IMPACT OF INACCURATE/INCOMPLETE COURT INTERPRETATION ON CHILDREN'S ACCESS TO JUSTICE**

Nyenti (2013: 903) states that "legal rights, processes and procedures make up the understanding of access to justice". This means that the right of access to justice requires that children's rights are upheld, and that fair processes and procedures are followed, such as the rendering of effective interpretation services to children in civil or criminal proceedings.

In the Report on Access to Justice for Children, a report of the United Nations High Commissioner for Human Rights, (2013) refers to access to justice as seeking fair and appropriate resolutions to violation of rights. It is perceived as a fundamental right that aids the protection of other rights. It is stated that for a right to materialise there have to be appropriate means for it to be enforced. Therefore, the justice system is crucial in facilitating a child's right to access to justice. If children do not have access to a fair justice system, they become vulnerable to abuse from all sectors of society. Whitcomb (1992: 15) submits that children develop differently from adults, so it cannot be expected that a child should function and understand on the same level as an adult. Children need the assistance of adults to help

them access their rights. Liefwaard (2019), citing the CRC Committee (2003), states that it is apparent that children are dependent and vulnerable. As a result, they face many challenges in resolving issues when their rights are violated. Liefwaard (2019: 203) further highlights that there are challenges such as a non-child-friendly complex justice system that poses barriers in accessing justice.

In view of the above mentioned, it is evident that children require the assistance of key role players such as their parents/guardians, lawyers, magistrates, intermediaries and interpreters in order for them to access their rights. Children require the stated role players to be aware of their functions and their role in empowering children.

In order for children to have an equal footing in court proceedings and for their language rights to be upheld, it is imperative that an interpreter translates the child's testimony accurately. Matthias and Zaal (2002) identify the fact that inaccurate or incomplete court interpretation is a serious problem. The findings of their study indicate that a few respondents have experienced well-skilled interpreters, while the majority of their participants felt that their translations by interpreters were inaccurate. Matthias and Zaal (2002: 355) assert that inaccurate interpretations can have serious effects on a child. Their study provides an apt example of this perception from a participant (a social worker):

*"At the end of a juvenile trial the magistrate decided upon a suspended sentence and stated, 'The accused is not to take any more drugs. The interpreter translated this as 'You are not to take any more drugs, even if these are prescribed for you by a doctor'."*

In the above situation, when dealing with a vulnerable, scared child, he/she may interpret it as he/she cannot access medical treatment, which is not what the court meant and which would be a violation of the child's rights. This shows how misinterpretation can impact on children's rights. Liu and Hale (2018: 299) concur that there is a need for high levels of accuracy when interpreting in an adversarial courtroom as it can have a damaging effect on the outcome of the case.

In South Africa we have a very diverse multilinguistic nation. Therefore, diversity in culture is evident in our verbal interactions. Hlophe (2004: 45) states that the quality of interpreting in courts is poor and that language context, cultural issues and the many South African language families can hinder accurate interpretation. For example, isiZulu, seSwati and isiXhosa fall within the Nguni family of languages, and may need to be translated accurately for judicial purposes. The assumption is that if an individual speaks one Nguni

language, they can understand another Nguni language, but this is not always the case. Hlophe further states that it is imperative that the interpreter recognises all these issues as the judicial officer relies on the interpreter's interpretation, even when it is incorrect. The reference to reliance on inaccurate interpretation points to the fact that judicial officers are not familiar with all of the South African official languages and depend on the interpretation of the interpreter. In fact, all judicial staff, as well as the accused, complainants and witnesses, rely on the accuracy of the translation offered by the interpreter. In order to achieve accuracy, the interpreter needs to have knowledge of the culture of the individual he/she is interpreting for.

Hale (2002: 44) found that interpreters tend to leave out minor features of speech style that affect the evaluation of the witness and could alter the outcome of the case. She concluded that training is required so that interpreters can become more aware of style in the courtroom which can enhance quality of interpreting. Poor training, which will be discussed further below, also contributes to inaccurate/incomplete interpretation. Powell et al. (2017), citing Hale (2011), explain that accuracy of information is undermined by untrained interpreters and that instances of adjourning proceedings compromise the safety of complainants.

When an interpreter interprets poorly for whatever the reason, the rights of a child could be compromised. Usadolo (2016), citing Hewitt (1995), highlights that the provision of competent interpretation catalyses access to justice for disadvantaged individuals and helps fulfil the stipulations in the Constitution of the Republic of South Africa, 1996 ('the Constitution'). The stipulations are found under the founding provisions:

- section 6;
- section 9(3), which highlights that people cannot be unfairly discriminated against due to their choice of language;
- section 30, which makes provision for the protection and promotion of language and cultural rights;
- section 34, which guarantees persons access to courts (which include civil courts such as the Children's Court);
- section 35(3)(k), which highlights that an accused person must be tried in a language he/she understands; otherwise an interpreter shall be provided; and
- section 28(2), which makes reference to the 'best interests' of the child being of paramount importance in 'all matters' that affect that child.

Section 28 makes provision for an array of children's rights; it does not, however, specify language rights. The protection of language rights is found in section 30, which is applicable to children as well as it refers to 'everyone'.

With regard to access to courts, section 34 guarantees the right of a person to resolve disputes with the assistance of the law. It makes provision for the right to "access courts, tribunals and other forums, for them to be impartial, and for the dispute to be decided in a fair public hearing". It also imposes a state obligation for resources to be made available for buildings, offices and personnel such as interpreters to be paid and trained (Currie & De Waal, 2013).

The application of these rights will be discussed in more detail in chapter 3.

Inaccurate court interpretation can have a severe impact on a case's resolution; the child; his/her family; other parties involved, such as the accused or civil litigants; and society at large. Many factors can contribute to inaccurate court interpretation, such as language context, cultural issues, poor training and lack of child-friendly techniques, among others. These barriers violate the facilitation of fair justice on the part of the child. The child is disadvantaged if the interpreter does not render proper services.

### III INADEQUATE TRAINING OF COURT INTERPRETERS FOR CHILDREN

Training enhances knowledge and skill; it equips a person to render good expertise in their line of work. Lebesse (2018: 7) states that in South Africa a variety of qualifications such as diplomas and undergraduate degrees in interpretation are offered. However, these qualifications are rarely taken up as court interpreters are usually hired on the basis of being able to speak two languages and then are given in-house training. It is submitted that this factor in itself could be one of the reasons that the field of interpretation is not adequately professionalised.

The Department of Justice provides training to court interpreters employed at the courts through the Justice College. It is submitted that a review of the Justice College Prospectus 2019/2020 indicates that none of the topics covered under their programmes address specific skills for interpreting with children. The topics are covered over two weeks and it seems as though the training is conducted on a once-off basis. There is no indication of continuous professional development training for court interpreters. Yet the code of conduct



in the South African Language Practitioners Council Act 8 of 2014 (section 16) calls for practitioners to participate in continuous professional development and it is essential that professionals are kept abreast with changes in law and professional techniques for children. In support of this submission, Ilse de Lange of *The Citizen* (2014) refers to critique from Prof Rosemary Moeketsi, the Executive Dean of Human Sciences at Unisa, regarding “the inefficiency of the six-week orientation course provided by the Justice College, which interpreters ridicule as ‘spaza training’”. She highlights that the short duration and absence of insight of the interpreting process contributes to the inadequacy of the course. Her comments support the belief that training in the field of interpreting is inefficient. Furthermore, Mpahlwa (2015: 34) highlights the fact that among court officials it is known that there is a sense of disregard toward court interpreters as they have a poor standard of qualification, poor matric results and below-par six-week training. This poor reflection of court interpreters could also result in interpreters having low self-esteem, thus allowing them to be overpowered and treated unfairly at court.

Miyanda (2009: 54, 55) investigated the problems that court interpreters face in Botswana and found that that interpreters lacked training, worked long hours and there was an absence of job descriptions and guidelines. These barriers had harmful impacts on court proceedings, judgments and all parties involved. These barriers to access to justice could be applicable to the South African court interpreters as supported by Lebesse (2015), who asserts that South African research on court interpreting has proved that a lack of training has contributed to their inadequate performance.

It can be established that there is a lack of training in the field of interpreting and this attributes to the inaccuracies that are presented by a poorly trained court interpreter. Since working with children requires more sensitivity, there should be a more specialised form of training offered to address the needs of children. Children experience much trauma when they experience or witness abuse and are often fearful or reluctant when they have to relay incidents that have occurred. The impact of trauma on the ability of children to participate fully in legal proceedings is related to the fact that their language skills are less fully developed as compared to those of an adult. Powell et al. (2017: 91) advocates for a specialised approach when conducting training that takes into account the child’s memory and language skills and ensures a fair court process is conducted in sexual offences cases. This means interpreters need to understand child development and be trained on how to apply special child-friendly techniques when interpreting to and for children. In their study, Powell

et al (2017: 97) found that participants articulated the perception that improved training on protection matters regarding children and sexual offences would empower them to work better with children, thereby rendering more effective services to both the child and the court officials.

The lack of training has contributed to poor services being rendered to children and can have adverse effects on the case and the child. The literature reviewed above stresses that there is a general need for training of court interpreters and, more importantly, specialised training in child-friendly techniques, as well as a knowledge of child development and relevant child protection aspects.

The Guidelines for the Committee of Ministers of the Council of Europe on Child-friendly Justice define ‘child-friendly’ justice systems’ as

*“justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child’s level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity”.*

This definition looks at reducing difficult encounters that children may experience through the interaction with the justice system. It is submitted that children often become intimidated by courts and by persons who have a demeanour that is not child friendly. Therefore, there is a need for specialised techniques to be used when interacting with children, which can make them feel comfortable enough to participate. Magagula (2018) stresses that training must be done with personnel who deal with cases involving children.

#### IV THE LACK OF NORMS AND STANDARDS TO GUIDE COURT INTERPRETERS DEALING WITH CHILDREN

As stated in chapter one, there are no formal norms and standards for court interpreters to serve as a guide for interpretation that exists. Lebesse (2014: 184) agrees that norms and standards of practice for interpreters vary among countries but have a common goal, which is to guide the practice of interpreters. The Code of Conduct embedded in the Regulations to the Language Practitioners Council Act, 2014 has not been brought into operation. Having no

formal norms and standards can cause interpreters to struggle in the field as language dynamics are complex and differ from language to language.

Kalina (2015:67) explains that norms gives us direction in respect of our professional undertakings and are defined as

*“referring to ways of actual behaviour and transfer-related solutions; it is the professional community of translators/interpreters that agree on their appropriateness”.*

From Kalina’s explanation, we understand that norms are like rules that guide interpreters’ behaviour and help to regulate their expertise, thereby enabling them to interpret more efficiently. Lebesse (2018) supports this understanding as determining what an interpreter or translator can do in particular situations.

Lebesse (2014: 190), citing Meulenbergs, Verpeet, Schotsmans and Gastmans (2004), states that “standards of practice are seen as a set of professional guidelines based on a code of ethics which includes related values and principles”. The standard of practice is used to assist as a measure in identifying qualifications, expectations and skills. Norms serve to function during the interpreting process and the standards of practice function externally. Standards of practice serve to aid interpreters and which they must follow at all times during the interpretation process.

Members of a professional body usually develop guidelines for professionals that are laid out in the code of conduct/ethics and norms and standards for practice. They assist the professional in guiding their actions and help them ensure that their conduct is ethically correct or acceptable. Interpreters need norms and standards of practice and guidelines that can help them assess their responses and conduct. This in turn results in more effective interpreter services.

Astiz (1990:103) highlights the Court Interpreters Act was enacted in 1978. Title 28 USC §1827 is the federal law that provides for non-English speaking people to access justice. It makes provision for interpreters in judicial proceedings instituted by the United States. The landmark case in judiciary interpretation is *United States ex rel Negrón v. New York* 310 F. Supp. 1304 (E.D.N.Y. 1970)

Appropriate legislation should be in place for norms and standards to be developed (Lebesse, 2014). For example, the National Association of Judiciary Interpreters and Translators (NAJIT) of the United States was born from legislation (the Court Interpreters Act of 1978). NAJIT views interpreters and their functions as a vital part of the judicial

process and has formulated a code of ethics and professional responsibilities that guide and protect interpreters and ensure that the professions standards are upheld. The US position on court interpreters is supported by Title 28 USC §1827 at a federal level, which establishes the appointment and qualification requirements for court interpreters as well as governing the decision in *United States ex rel Negrón v New York* 310 F. Supp. 1304 (E.D.N.Y. 1970), where translation in periodic summaries during breaks was found to violate the defendant's due process rights.

In South Africa, we have the South African Language Practitioners Council Act, 2014 and its regulations. However, the Act has not been brought into operation. Embedded in the Regulations is a professional code of conduct. However, the council to which the Act alludes is not in existence as it has not yet been established. Therefore, there is no professional body that can regulate the practice of interpreters. It is noteworthy that the abovementioned code of conduct makes no reference to children. It is submitted that the code of conduct should specify guidelines on requirements and skills for working with children, bearing in mind that they are vulnerable in their nature and therefore interpreters require more guidance and skill.

Lebese (2014: 199) analyses some extracts from transcribed court proceedings taken from previous studies undertaken by the same author in 2011 and 2013. In one case study, a male who was not legally represented was charged for assault with intent to do grievous bodily harm. After interpreting the charge to the accused, the interpreter formulated his own question and asked the accused: "Do you understand the charge you are accused of?" The freedom displayed by the interpreter to ask his own question can result in a miscarriage of justice. Lebese (2014), citing Erasmus (2009), advises that it is the magistrate's responsibility to pose such a question to the accused as to whether or not he or she understands the charge. Occurrences of this nature could give the interpreter the impression that he or she has the authority to participate in the proceedings, which can result in hampering the case and its outcome.

Moeketsi (2000: 225) suggests that South Africa needs a code of conduct that also identifies "consequences of failure to abide by it". Such a code of conduct is justified as the consequences of ethical or legal transgressions by interpreters on the conduct of legal proceedings for the parties involved, including children (witnesses, complainants or accused children) can be dire. It is submitted that a code of conduct should unpack specific guidelines

that can address issues pertaining to interpreting to children in both criminal and civil matters and in and out of court.

The South African Language Practitioner's Council Act, 2014 under chapter 1 states that interpreting: "*means the act of transposing an utterance from a source language to a target language in spoken or signed form*" while translation: "*means the act of transposing a written, spoken or signed text from a source language to a target language*". The key difference is that interpreters convert oral messages while translators convert written texts. The discussion below on the undefined role of the court interpreter unpacks in detail the difficulties placed on the interpreter as judicial staff seem to define their role differently as compared to the Act's definition. Accordingly, interpreters face many demands that are outside of their originally intended scope of work.

The Act refers to an interpreter as a language practitioner (section 1). In essence, this is a broad term. The Act does not single out interpreters but rather places them under the umbrella term which in turn could inhibit professionalisation in the field of interpreting. This gap could therefore be one of the reasons for the lack of performance by interpreters highlighted in the literature reviewed.

As highlighted, the emanation of norms and standards for practice can improve the services of interpreters in South Africa, but political will is needed to promulgate the Code of Conduct in the regulations and ensure that relevant amendments are made to guarantee child-friendly or child-sensitive interpretation.

## V UNDEFINED ROLE OF COURT INTERPRETERS

Lebese has done extensive research on the topic of court interpreters in South Africa. Lebese (2013) examined the quality of interpretation with regards to a lack of definition of the role of a court interpreter. His analysis of data showed that this gap negatively affected the duties of the court interpreter.

In South Africa there is no defined role of court interpreters and no provision of legislation that clearly identifies to officers of the court the precise role a court interpreter plays. Highlighted in this literature review is the 'crucial tool' which an interpreter is to the judicial officers, offenders and victims. It is vital that the role of interpreters is clearly defined, which helps unpack their job functions. It is submitted that a clearly defined role will help

guide interpreters and juridical officers on what they really can and cannot do within their scope of work, thereby eliminating confusion.

Mpahlwa (2015: 29), citing Mikkelson (1998), Morris (1999), Rudvin (2002, 2004), Angelelli (2004) and Hale (2005), asserts that interpreters are faced with different expectations and often feel pressure to meet the expectations of judicial staff, offenders and victims. Mpahlwa (2015) maintains that the court views are robotic language switchers, while the minority of language speaker sees them as saviours. Yet they still need to be professional. Morris (1999:7) refers to the contrasting situations as the 'gum syndrome' whereby interpreters are likened to a piece of gum on a shoe, overlooked but also difficult to remove. It seems as though court interpreters are caught up in a tug of war. The court imposes immense pressure to ensure that the interpreter interprets accurately while the minor who forms a bond with the interpreter because of familiarity of language expects the interpreter to be in his/her corner. This can be rather stressful for interpreters, especially when they do not have a defined role and norms and standards to fall back on.

Interpreters are also unsure of their duties; some have performed tasks out of pressure and lack of knowledge. Mpahlwa (2015: 30, 31) explains how at the east London regional court, an interpreter took it upon himself to establish the identity and language preference of the defendants and placed them in numerical order without being asked to do so by the presiding officer. The confusion arises from a situation where we could regard his actions as crossing the line of professionalism or he could be considered an officer of the court who ensures the smooth running of the court and access to justice.

Lebese (2011: 356) states that judicial officials have formed their own opinions of the role of a court interpreter as South Africa does not have legislation that clearly defines their role. Interpreters have thus compromised their work as they conduct duties outside their scope of work, as stated by Mpahlwa above. An undefined role also means that they have no protection from the law. As we know in South Africa, we have no current provisions that regulate interpreting; there is no protection from a professional body as one does not exist.

Lebese (2013: 4), citing Gonzalez et al (1991: 296), explains that a "court interpreter is a language mediator or a language conduit who allows an individual who does not speak or understand English to participate meaningfully in the judicial proceedings". However, Lebese (2013:13) goes on to state that interpreters are viewed differently from

helpers or bilingual specialists and that these perceptions set boundaries in relation to the role of the interpreter.

Lee (2009: 35), citing Kohn & Kalina (1996: 118), explains that “[i]nterpreting refers to communicative interaction between members of different language communities mediated by interpreters, and is by definition a form of cross-linguistic and cross-cultural communication”. Here, Lee refers to the fact that interpreters need to have knowledge of the language and the respective culture in order to retain the original message. With the different views we see the role of the interpreter being fluid in its nature. Their role is also constantly changing.

Moeketsi (2000: 225) states that the court interpreter cannot be just a ‘conduit’, as suggested by Gonzalez et al (1991), because most lay South Africans are unfamiliar with legal proceedings. This unfamiliarity can be stressful especially if they do not have legal representation. As a result, he argues that the interpreter should be considered an ‘officer of the court’ who ensures successful communication that is accurate. Moeketsi (2000) suggests a negotiated role of a court interpreter and that other court personnel should be aware of the professional responsibilities of the interpreter. It is important that judicial staff is made aware of the interpreters’ role as they are at times abused by higher ranked staff and this can create a low morale for the interpreter (Mpahlwa, 2015).

A well-defined and clear role that takes into context the South African dynamics can help professionalise the field of interpreting, reduce the abuse on interpreters and confusion. As explained above by Lebesse (2011: 356), conclusions are made by legal officials on an interpreter’s role in the courtroom. Consequently, there are instances where court interpreters are instructed to perform duties outside the ambit of their work. In addition, there are occasions when court interpreters take it upon themselves to perform the tasks of magistrates. The undefined role of an interpreter thus creates confusion for the interpreter and judicial staff. The absence of a well-defined role of the interpreter could lead to the abuse of power by judicial staff, as mentioned by Lebesse (2018), when an interpreter is instructed to perform duties not within his/her job description.

## VI MEASURES TO COMBAT SECONDARY VICTIMISATION OF CHILDREN DURING COURT INTERPRETATION

Hollely (2002: 14) stresses that research has unequivocally indicated that children are traumatised by abusive experiences. The healing process is a journey of which the social worker or therapist undertakes with the child through therapy. Part of the therapy usually consists of briefly discussing the court process. Children are often fearful as they are unfamiliar with the judicial process and fear the perpetrator. Evans and Graves (2018: 3), citing Alisic, Zalta, Wesel and Larsen (2014), argue that the level of post-traumatic stress that child victims and witnesses suffer is similar to that of soldiers who return from war. They further state that court proceedings can increase trauma. Similarly, even in family proceedings, whether in divorce or children's courts, trauma from exposure to the justice system can occur. De Joung (2010: 516) observes that the legal system is detrimental to children as the traditional court proceedings used in divorce cases often end with much resentment between divorcing parties. Townsend, Waterhouse and Nomdo (2014: 82) highlight the fact that even though some courts are designed to be 'child friendly', measures are insufficient as the court environment is cold and formal. In addition, the delays in proceedings and the possibility of confronting the perpetrator causes added trauma to the child. The authors above conquer that courts have a traumatic effect on children.

Orth (2002: 314) explains that secondary victimisation can make a victim lose hope in the justice system. Primary victimisation (impact of a direct crime) has a negative effect on the victim; secondary victimisation by criminal proceedings therefore exacerbates the trauma, leaving the victim with poor self-esteem and a lack of confidence in the world and justice system. Walklate (2016: 7) observes that "primary victimisation is a result of being a victim of direct crime". She further states the impact of crime such as rape, burglary and others constitutes primary victimisation. Orth (2002: 314), citing Montada (1994), explains that secondary victimisation has been defined as

"negative social or societal reaction in consequence of the primary victimisation ... experienced as further violation of legitimate rights or entitlements by the victim".

The Service Charter for Victims of Crime in South Africa (2004) has been established to minimise secondary victimisation. The Service Charter for Victims of Crime in South Africa (2004:6) highlights "a victim's right to be treated with fairness and with respect for dignity and privacy". It calls upon all judicial officials to minimise inconvenience by



conducting interviews with a language of choice and in privacy, but it does not make clear reference to the use of interpreters. Compliance with the requirements of the Victims Charter is challenging, considering that the South African Language Practitioners Act, 2014 has not yet been brought into operation. It is submitted that the lack of coherence in the legislative and policy framework can hamper access to justice for children. In other words, the question that begs to be answered is: how do we uphold the rights of victims, especially children, when the relevant policy and legislation do not speak to one another? For example, legislation and international instruments (such as the Constitution, CRC, ACRWC) refer to offenders' right to interpreters and not children in civil proceedings.

Hollely (2002: 14), citing Hollely and Müller (1999: 368), explains how testifying in court can be traumatic for children who experience abuse, especially in a courtroom setting. Even though children may use an intermediary in South African courts to mitigate secondary victimisation, participation in the criminal justice process can be a daunting experience for a child. Section 61(2) of the Children's Act makes provision for the use of an intermediary and states that one must be used as provided for in section 170A of the Criminal Procedure Act 51 of 1977. Jonker and Swanzen (2007), citing Coughlan and Jarman (2002), state that the intermediary system is seldom found in rural court settings. It is submitted that children who interact with the justice system in rural areas are thus at a disadvantage as the court does not provide them with adequate resources as contained in the provisions of the Criminal Procedure Act 51 of 1997.

There is confusion about whether an intermediary is a trained court interpreter. Hollely (2002: 16), citing Müller and Hollely 2000: 60), explains that the intermediary can be viewed as an interpreter who gives meaning to questions asked. Where the intermediary is not conversant in the child's language of preference, an interpreter would then need to step in. However, adding another professional to the process then compromises the goal of limiting secondary victimisation since the child would be exposed to another unfamiliar person.

As a result of not receiving special training, interpreters do not generally have knowledge of language development or techniques for interviewing children (Magagula (2018). When an intermediary and an interpreter are utilised in courts, questions may have to be rephrased and this could result in the loss of evidence and a harmful impact on the credibility of the child. It is submitted that the justice system and, in particular, court interpreters can inflict secondary victimisation on a child victim by their demeanour, their lack of child-friendly techniques and training and their overall quality of interpreting.

Appropriate behaviour when dealing with interpretation is vital. Matthias and Zaal (2002) allude to the fact that interpreters tend to be aloof and lacking warmth, and are impersonal when working with children. Such behaviour is not encouraging to a child who has to testify. This supports the writer's observations as stated under the rationale for this study and contributes to secondary victimisation. In addition, the psychological wellbeing of the interpreter is to be considered. Interpreters who suffer from burn-out and are affected by the sensitive nature of cases may render poor services as a result of their poor emotional wellbeing. For example, if an interpreter has not dealt with cases of rape and has to listen to and interpret the gruesome details about which a child has to testify, he/she may become emotionally distraught and this emotion can affect the child and the accuracy of the interpretation. Alternatively, the interpreter may become overwhelmed with the trauma of such cases, thereby affecting his or her performance. Powell et al (2017) noted that there may be a decline in the performance of the interpreter because of the emotional impact on the interpreter. Abuse is a sensitive matter and there are cultural taboos such as talking about sexual acts in front of elders. The interpreter's reaction can inhibit children disclosing important facts, thereby weakening the case. This could lead to a guilty perpetrator walking free and a child being denied justice. It is imperative that interpreters are debriefed and supervised. This will help them deal with emotional difficulties, stress and inadequacies appropriately (Maphlwa, 2015).

Training is an essential measure to limit secondary victimisation. The Sexual Offences courts were introduced in 1993, then reintroduced in 2003, then closed and again reinstated with regulations in 2018 (Geldenhuys, 2015). These courts play a critical part in the minimisation of secondary victimisation of child victims, witnesses and accused persons through their specialised child-friendly approach in procedures. However, Mpahlwa (2015: 116) bemoans the fact that interpreters have not been reskilled so that they can render effective services within this specialised court. In fact, most countries speak of a 'team approach' within the courts. However, interpreters are not listed as part of the judicial staff. An adequately trained court interpreter can facilitate the child's access to justice, thereby inhibiting secondary victimisation. Powell et al (2017) suggest that improved training in child developmental protocols, investigative interview processes, matters involving sexual offences and child protection would enable them to deal better with cases, both emotionally and professionally.

There is limited availability of interpreters (Powell et al (2017: 91), citing Morris 2008), which also puts a strain on our courts and inevitably affects the progress of cases. Powell et al (2017), citing Berk-Seligson (2000), further states that professionals have from time to time to resort to substandard alternative ways of interpreting, such as using unqualified persons or telephone services; otherwise the case may be adjourned until a qualified interpreter is secured.

It is submitted that these alternatives are unethical and should be avoided by all means. The court system and the interpreter can inflict secondary victimisation on a child through the exercise of their roles when they lack the relevant skill and training on aspects pertaining to handling children. Such skills and training include child-friendly techniques and an ability to handle the emotional trauma that child abuse cases entail. These factors can infringe the children's rights and can affect the proceedings and the administration of justice. This can ultimately leave the child lacking faith in the justice system.

## VII CONCLUSION

In exploring court interpretation services in South Africa, it has been established from the abovementioned reviewed literature that there are many shortfalls in respect of effective services rendered, especially to children. Inaccurate interpreting can infringe the rights of children and hamper progress in and finalisation of court cases. The lack of training, norms and standards and the undefined role of the interpreter results in poor service delivery. All of the above have a correlative effect on each other. For example, inaccurate court interpreting is a consequence of lack of training, and secondary victimisation is catalysed by an undefined role and a lack of training. Therefore, it is important that all the above aspects are attended to in the field of interpreting. The literature reviewed has shown a gap in respect of the inadequate regulation of specialised court interpretation services for children in children's courts in South Africa. The themes above indicate shortfalls in services rendered to children such as inaccurate or incomplete court interpretation, inadequate training of interpreters, lack of norms and standards to regulate practice of court interpretation, the undefined role of a court interpreter and the impact of secondary victimisation on a child. The study explores how the inadequate regulation of specialised court interpretation services in children's courts affects the application of children's rights with regard to non-discrimination, access to justice, participation, language and best interests.

## **CHAPTER THREE**

### **DOMESTIC LAW**

#### **I INTRODUCTION**

This chapter discusses the domestic law on court interpretation for children. The instruments discussed and analysed include: the Constitution of the Republic of South Africa, 1996 ('the Constitution'); the Children's Act 38 of 2005 and its regulations; the South African Language Practitioners Council Act 8 of 2014 and its regulations; the Memorandum on Objects of the Draft Children's Court Rules; the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; Regulations relating to Sexual Offences Courts; the Child Justice Act 75 of 2008 and its regulations; the Uniform Rules for Courts (2009); the Amendment of Rules Regulating the Conduct of Court Proceedings of the Magistrate's Court of South Africa (2020); law reform relating to official languages; and the Language Policy of the Department of Justice and Constitutional Development(2019).

#### **II THE CONSTITUTION**

The Constitution provides in the Bill of Rights (sections 7 to 39) for a number of rights to protect the interests of different language groups, children and court users. These include language and community rights; the rights to equality (and protection from unfair discrimination) and dignity; the right to a fair trial under the protection of access to courts and the rights of accused persons in criminal cases; and specific protection of children's rights, including the best interests of the child principle. The Constitution also provides for specific bodies to promote and monitor language related aspects.

##### *(a) Official and Unofficial Languages*

The Constitution makes provision for South Africa's eleven official languages to be promoted and protected in section 6(1). Section 6(4) imposes on "national and provincial governments the obligation to monitor and regulate the usage of the official languages by legislative and other measures". Section 6(4) also declares that "all official languages must enjoy parity of esteem and equitable treatment". Reddi (2002) states, however, that this should be an objective hoped for as compared to the real situation.

In the nineteen hundreds, South Africa declared English and Dutch as official languages and soon Afrikaans replaced Dutch. Later the new constitutional democracy recognised, for the first time, African indigenous languages and eleven languages were declared official (Van Niekerk, 2015). Cote (2005: 12) states that in South African courts, English and Afrikaans are the languages of record and courts have advocated for a single language of record in order to limit the difficulties that a multilingual justice system brings. Often courts have used the linguistic makeup of the judiciary to justify the use of English or Afrikaans as the language of record. An area of concern is when trials result in appeals or automatic review. It then becomes a lengthy and costly process because of the need for translation services. Some courts have begun to use the language that is predominantly spoken in the geographic area of the court. Van Niekerk (2015) states that there is a movement towards the use of African languages in courts; for example, Khayelitsha Magistrates' Court uses isiXhosa as it is widely spoken and used by the majority of the persons living in the area. The practice emerged as an aid to eliminate inaccurate verbal translations. Although courts have opted for proceeding with the most widely spoken language to dispense with delays, it does become a challenge when transcribing from an African language to English.

In respect of the justice system, Hlophe (2004) states that having eleven official languages imposes difficulties on courts and ideally all judicial staff ought to be able to converse in all official languages, but that is not the case. Section 6(5)(a)(iii) of the Constitution makes provision for promoting and creating conditions for sign language in addition to official languages. The parliamentary constitutional review committee is still considering the addition of adding sign language to the Constitution as the twelfth official language (Bangani, 2020). Perhaps the addition may pave the way for more guidelines in respect of interpretation services to children in South Africa. The submission was made in 2016, but to date it has not been passed and the delay highlights that there is little urgency in respect of language rights.

Section 30 and 31 of the Constitution make provision for people to use their language of choice, unlike section 6, which speaks of official languages. This means that if a language does not fall under the specified official languages, sections 30 and 31 make provision for individual persons.

(b) *The Role of the Pan South African Language Board (PanSALB)*

Section 6(5) of the Constitution makes provision for the establishment of the Pan South African Language Board (PanSALB). According to section 6(5) of the Constitution PanSALB

is tasked with “promoting and creating conditions for the development and use of official languages and promoting and ensuring respect for all languages”. PanSALB has not been involved in the promotion of the use of effective interpretation for children. It has in addition failed to publicise itself to marginalised groups. Kaschula (2004) concurs that this watchdog board is not doing enough. Mpahlwa (2015: 8) highlights that “the rights enshrined in the Constitution have no bearing on language use in courts; this is also expressed by some scholars”. It seems as though the language rights enshrined in the Constitution are not being monitored adequately. Murray and Simeon (2007) highlight that there is no sense of urgency from the government in respect of promoting and protecting language rights. They further state that English seems to dominate despite promises of promoting all official languages.

(c) *The Role of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (Communities Commission)*

The Constitution also makes provision for the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (‘the Communities Commission’) in section 181(c). Its mandate as per section 185 is to “promote respect for the rights of cultural, religious and linguistic communities and to promote peace, tolerance, and unity among them”. Section 185(2) gives the Communities Commission the power of monitoring, investigating, researching, educating, lobbying, advising, and reporting on issues relating to these diverse communities. Murray and Simeon (2007) highlight that the legislation creating the Communities Commission came into effect only in 2002 and became operational only after two years. This indicates that government does not seem to prioritise language matters as it is observed that delays in the passing and promulgation of laws are lengthy. Woolman and Aullo (2013) state that the Communities Commission presents with some redundancy as its functions are duplicated by other institutions such as the PanSALB and the South African Human Rights Commission (SAHRC), for example. This indicates that these bodies do not work together in promoting language rights.

(d) *The Role of the South African Human Rights Commission (SAHRC)*

South Africa’s Constitution makes provision for the South African Human Rights Commission (SAHRC) in section 184. According to section 184 the mandate is to

“(a) promote respect for human rights and a culture of human rights;

(b) promote the protection, development and attainment of human rights; and

(c) *monitor and assess the observance of human rights in the Republic*".

The SAHRC does not make specific reference to children. However, its services reach out to children. Couzens (2012) points out that the SAHRC does not show consistency, however, in working on children's issues and that children themselves, in a consultative workshop, mentioned that the SAHRC needs to be more available to them. Couzens (2012) asserts that the lack of a commissioner and a committee that solely addresses children's rights is the weakness of the SAHRC. It is submitted that although the SAHRC has employed efforts in advocating for the preservation of children's rights, it seems as though these efforts have not been sufficient. Court interpretation services are not regulated in South Africa and are not specialised in a child-friendly approach; therefore, children are not provided with adequate services. This is an issue which the committee could already have investigated.

(e) *The Right to Equality*

Contained in the Bill of rights in chapter two, section 9 is the right to equality and under subsection (3) the right not be discriminated against includes the right not to be discriminated against with regard to language. The provision of linguistic rights helps uphold equality and non-discrimination. It also facilitates access to justice and participation and preserves the best interests of the child.

(f) *The Right to Dignity*

Section 10 of the Constitution states that "everyone has inherent dignity and the right to have their dignity respected and protected". Pretorius (2016:290) states that the "Constitutional Court has recognised the protentional of dignity as the basis for substantive equality". The Constitution makes provision for all citizens to be equal before the law. Section 9(3) highlights the prohibited factors for discrimination, of which language is a factor that is listed. It is submitted that when one's dignity is upheld, it promotes equality, which means one needs to be given language choices, specifically, the opportunity to communicate in one's own language of preference. When a person is given this opportunity, a sense of dignity is instilled within that person as he or she is respected. An individual should abstain from discriminating against a person on the basis of the language he/she speaks. During court proceedings, a child's dignity must be upheld and one way of ensuring this is by allowing a child to participate. Claassen and Spies (2017) cite Eltringham and Aldridge (2000), claiming that

children feel empowered when professionals prepare them for court and support them. If these fundamental factors are not dealt with, it could result in damaging a child's dignity.

(g) *The Right of Access to Courts*

Section 34 states 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 or, where appropriate, another independent and impartial tribunal or forum”.*

This right is essential for constitutional democracy in South Africa. It gives citizens the platform to have their disputes resolved fairly. Section 34 places an duty on the state to guarantee that resources are made available among which court interpreters are essential resources that facilitate access to justice. Currie and De Waal (2013) also state that the right provides for judicial staff to be paid and trained as section 34 imposes obligations on the state to subsidise resources. This suggests that interpreters need to be adequately trained to facilitate access to justice.

Section 34 also highlights the right to a fair trial. Currie and De Waal (2013) cite *De Beer NO v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC) which shows that the court is obliged to guarantee that proceedings are fair. *Mabitsela v Department of Local Government* (2012) 33 ILJ 1869 (LC) cited with approval the application of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003) of the African Commission on Human and Peoples' Rights. It extends, in Article 2(g), “an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body”.

In *M v D* (2012) 33 ILJ 1869 (LC), it is mentioned that it is the obligation of those conducting the proceedings to inform the litigants of their rights and entitlement to an interpreter should they not comprehend with the language of record and if this obligation is not fulfilled then it results in denial of a fair hearing.

It is submitted that the right to access to courts facilitates access to justice. It is essential that justice is also fair, and the judicial staff have to fulfil this obligation as officers of the court. The provision of the right to an interpreter assists in ensuring a fair trial. Namakula (2019:228) similarly argues that



*“[t]he right to an interpreter is a constitutional guarantee that satisfies the requirements of the right to a fair trial where it is not practicable for proceedings to be conducted in a language that a person understands”.*

*(h) The Rights of Accused and Detained Persons*

Section 35(3)(k) of the Constitution highlights “to be tried in a language that an accused person understands or; if that is not practicable, to have the proceedings interpreted in that language”. Section 35(4) states that “whenever this section requires information to be given to a person, that information must be given in a language that the person understands”. Lebesse (2014) mentions that although the Constitution makes provision for linguistic rights of people, it does not make particular reference to matters relating to court interpreters, such as norms and standards, the role of the court interpreter and other related issues.

Section 28(1)(h) speaks of having a legal practitioner assigned to the child. It may be worth exploring whether or not there should be specific reference made in the Constitution to entitlement to the use of an interpreter for children, where needed, similar to the provision for accused persons found in section 35 of the Constitution.

In order for multilingualism to be embraced by the courts of South Africa it is necessary to adopt a multilinguistic approach, which means that all official languages must be respected and used. Hlophe (2004) confirms that English and Afrikaans seem to be the language of record in courts although the Constitution acknowledges recognition and protection of language and culture. Should these two languages continue to dominate, it will result in the marginalisation of our African indigenous official languages. Hlongwa and Ndebele (2017) cite Alexander (2013) and Madiba (2010), who support the possibility of marginalisation by stating that despite legislation and policy provisions that promote equality and parity, scholars have argued that African indigenous languages are still marginalised. Beukes (2009) concurs that the protection and transformation of South Africa’s indigenous languages have been sidelined, which is very concerning.

### III CHILDREN’S RIGHTS

The Constitution makes provision for the protection of children’s rights in section 28 of the Bill of Rights, which states that “a child’s best interests are of paramount importance in every matter concerning the child”. The best interests of the child must therefore be applied to all matters regarding children. Claassen and Spies (2015) cite Prinsloo (2008), who asserts that sensitivity and specialist knowledge must be used by professionals in children’s court

proceedings to uphold children's rights and maintain respect for children. It is submitted that respecting children's linguistic rights and enabling a child to exercise his/her constitutional rights maintain the best interests of the child.

(a) *The Bill of Rights*

The Constitution States in section 28(1)(h) that every child has the right

*"to have a legal practitioner assigned to [him/her] by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result".*

Friedman, Pantazis and Skelton (2013) highlight that the Constitutional Court has referred in chapter 7 of the Constitution, 1996 to the provision in relation to the appointment of a legal representative for very young children. Friedman et al. (2013) further state that section 28(1)(h) can aid in directly engaging with the child, thereby allowing a child to be heard directly.

*Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21 highlights that often children are not involved in legal matters, and Langa CJ asserts that it is necessary for the child's voice to be heard as children should be taking responsibility for their actions.

It is submitted that if the court observes that it is valuable to hear the views of the child, the court would need to provide the child with resources such as adequate court interpreters to facilitate the child to voice his/her views directly to the presiding officer.

(b) *Children's Act 38 of 2005*

The Children's Act makes provision for all children in South Africa. The Act does not specifically address language issues and the use of court interpreters for children, but does make reference to child participation and access to courts. Child participation and access to courts involve children communicating in their own language of choice. A court interpreter is used for children who cannot converse or understand the language used by the court. The only section that does make direct reference to the use of a court interpreter is section 52, which requires rules to be put in place for the use of interpreters. However, such rules have not yet been put in place. This will be discussed in detail below.

First it is necessary to discuss the best interests of the child principle. The protection of the best interests of the child, enshrined as a right in the Bill of Rights, is also

supported by the Children's Act. It is the 'golden thread' of the Act and is laid out in a number of provisions.

Section 6(2)(a) highlights that in "all proceedings and matters concerning children, there must be respect, protection, promotion and fulfilment of the best interests of the child". This means that children are entitled to effective court interpretation services as the best interests of the child should be upheld at all times. Maintaining the best interests of the child means ensuring that children's rights are adhered to and that children are given the appropriate resources to practise their rights as well as opportunities to be heard and to participate.

Section 7 refers to the "best interest of child standard" and identifies the pertinent factors to be taken into account when this is applied. Section 7 lists factors that should be taken into account when determining the best interests of the child. Section 7(g) includes the "child's age, maturity, stage of development, gender, background and any other relevant characteristics of the child". It does not mention language of the child; however, it may be classified under any other relevant characteristic of the child. This list is not open ended, therefore other aspects cannot be taken into consideration when determining the best interests. This can be regarded as the shortcoming of section 7 of the Children's Act (Ferreira, 2010). Barrie (2011) states that before the Children's Act, South African legislation did not offer a list of factors that should be taken into account when determining the best interests of the child.

Section 9 makes it clear that

*"[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied".*

The concept of the best interests of the child was first established in the case *Fletcher v Fletcher* 1948 (1) SA 130 (A). The courts recognised that the most important factor that the courts must consider is the best interests of the child as opposed to the rights of parents. It then became apparent that the main aspect in respect of matters regarding the child should be the best interest standard (Ferreira, 2010). International instruments such as the United Nations' Convention on the Rights of the Child and the African Union's African Charter on the Rights and the Welfare of the Child have contributed to South Africa's Constitution, which makes provision for the best interests of the child (Couzens, 2019). These instruments will be discussed further in chapter four. Couzens (2019) further states that the

best interests in the Act are limited in their scope when compared to the Constitution. It states 'in all matters' but applies only in respect of care, protection and wellbeing of the child, whereas the Constitution makes provision for every matter concerning the child. It is submitted that the Constitution is the supreme law of the land and will thus take pre-eminence. However, it would be beneficial if the Children's Act catered for a broader scope.

When determining the best interests of the child, it is essential that children are given opportunities to be heard and that they participate in proceedings that affect them. The linguistic needs of a child have to be taken into consideration to allow for the child to participate. Claassen and Spies (2017:76) highlight that a more child-centred, individualised and contextualised approach should be applied to children in court. This could facilitate the process towards a child's rights being fully realised. It is further stated that the best way to oblige the best interests of the child is to make the child's rights the focal point when making decisions regarding children. A court interpreter is required to aid the child and the court in overcoming language barriers. Mahlobogwane (2010) highlights that opportunities and space must be accorded to a child in order for the child to voice his/her views. South African courts are obliged to place emphasis on the best interests of the child because of the constitutional obligations because it is the upper guardian of children. It is submitted if a child is restricted as a result of language barriers and the lack of adequate court interpreters, it will result in not upholding the standard of the best interests of the child.

Section 10 of the Children's Act makes provision for child participation and section 61 calls for participation of children subject to court proceedings, which makes reference to "allowing the child involved in the matter to express a view or preference in a matter, taking into consideration the age, maturity, stage of development and special needs that the child may have". Given the fact that a person participates or expresses a view by communication, it is submitted that the child's 'language needs' should be included in the section to give pre-eminence to participation.

According to the National Child Participation Framework (2018) formulated by the Department of Social Development, participation is a fundamental children's right and it is an avenue through which their other rights can be realised. The document highlights a number of issues regarding participation of children in South Africa. According to the National Child Participation Framework (2018:18) "most of the laws exclude pre-teen and vulnerable children such as children with disabilities and children who live in extreme poverty, and that there are no formal systematic political participatory spaces and processes".

Therefore, participation has not been established as a right but rather various departments incorporate the views of a child, which means that often, a child is not directly heard. This results in merely considering children's views but not giving them priority. It has been further stated that there are many implementation gaps that hinder the fulfilment of child participation, mainly as a result of a lack of commitment from the government. Commitments from government that can help enhance and improve services to children, such as developing strategies to improve the gaps in legislation, making courts more child friendly and prioritising training for interpreters are vital.

Section 14 of the Children's Act makes reference to access to courts, which means that any child can come before a court of jurisdiction. Boezaart and De Bruin (2011) state that section 14 is linked to section 10 as it associates a child's right to participation with his/her right to access to courts. It is noteworthy that section 14 makes provision for every child as compared to section 10, which has restrictions in respect of age, maturity and stage of development. Moyo (2015) states that this is the shortcoming of section 10, and is due to the factors of age, maturity and stage of development, thereby suggesting that only children of a certain age, maturity and stage of development can participate instead of all children, without restrictions (Mahlobogwane, 2010). These factors are the determining factors to deciding the weight accorded to the child's views.

Boezaart and De Bruin (2011) indicate that section 14 provides a broader platform of access by children to courts. In view of the above, it is clear that by adding the restrictions of section 10, we limit children's participation, thus implying that younger children cannot participate. The two provisions should complement each other and not contradict each other, which causes confusion and leads to injustice. It is submitted that for children to participate appropriately, overcome language barriers and have fair access to the courts, they also need to have additional resources that can enable them to access the court and to participate effectively in proceedings. If children are not given the proper resources, in this case, court interpreters who are trained to deal with matters concerning the child, in order to exercise their rights to participation, then access to courts cannot be fulfilled. Hlophe (2004) stresses that professional language interpreters are required to resolve language barriers and are therefore a prerequisite in the courtroom.

Section 52(2) on rules and court proceedings specifies that adversarial procedures must be avoided in the Children's Courts. Subsection (2)(b) makes provision for

the use of a suitably qualified or trained court interpreter. The regulations do not expand on what constitutes a suitably qualified or trained court interpreter.

It is submitted that not outlining what type of qualifications are relevant puts children at risk as the interpreter may not possess the relevant qualifications/skills to interpret for children, specifically. Language competence does not necessarily equate to competence in dealing with children. The previous chapter discussed training of interpreters, and many authors agree that court interpreters need adequate training, and even more specialised training, when interpreting for children. Matthias and Zaal (2002) stressed that 80 percent of the respondents in their study noted that it was essential for court interpreters to have specialised training on working with children. Since the Children's Act is the main legislation governing matters involving children, it should be detailed in respect of its provisions for children, especially with regard to language. Ultimately, the use of a child's own language enables full participation in matters concerning the child. It is submitted that the Act should provide for educational qualifications of interpreters and additionally highlight that interpreters should be trained on how to deal with children in both criminal and civil matters.

The proposed 2018 amendments of the Children's Act Regulations as proposed by the Rules Board call for the addition of "including sign language, speech and tactile interpreters" in the Children's Court Regulations. The great strides made for hearing- and visually impaired children are commendable. The regulations fail to give detailed descriptions in respect of the usage of court interpreters, and their training and qualifications are not explained.

Language rights of children are not explicitly emphasised in the Children's Act. Provisions for child participation and access to courts are available but in order for these to be fully implemented, a court interpreter is required to bridge the language barriers of children who do not communicate in the language of record. Although section 52 accommodates the use of an interpreter on paper, this is insufficient, as the regulations do not define a suitably qualified or trained interpreter, and those rules have not yet been brought into operation, fifteen years after the legislation was promulgated. In 2018, a draft memorandum for Children's Court Rules was published. However, to date the rules have not yet been promulgated.

(c) *General Regulations regarding Children (2010)*

In the General Regulations regarding Children (2010) in terms of the Children's Act, there are references made in respect of a child's language use. The regulations highlight that a child's language needs must be respected, children must understand what is said to them, and they must be allowed to communicate in their own language or a language of choice. The regulations do not indicate how this will be achieved or what provision will be made to facilitate communication with a child who may have language barriers. The regulations make reference to an interpreter only in section 73 under rights of children in childcare youth centres. Regulation 73(n) provides that

*“every child who is cared for in a child and youth care centre has the right to the necessary support and to an interpreter if language or disability is a barrier to consulting with them on decisions affecting his or her custody or care and development”.*

It is submitted that failure to include specific provisions that seek to promote participation through language rights is a shortfall. The provision being made applicable only to children in childcare youth centres seems to exclude other matters concerning children.

(d) *Regulations relating to Children's Courts and International Child Abduction (2010) in terms of the Children's Act 38 of 2005*

Under the regulations relating to children's courts and international child abduction, there is no mention of language rights. However, section 12, which speaks of pre-hearing conferences, makes mention of an interpreter. Section 12(1)(c) states that “the court may, if necessary, direct that a court interpreter must attend the pre-hearing conference”. Seeing that many children have interactions with the justice system, the regulations should provide strategies or guidelines on how to overcome language barriers that children may experience in all matters concerning children. In addition, the word ‘may’ alluding to the child's language choice could possibly, if misinterpreted, indicate that it is not of paramount importance.

(e) *Memorandum on Objects of the Draft Children's Court Rules (2018)*

The memorandum stresses that the sets of regulations made in terms of the Children's Act do not sufficiently provide for processes and procedures to be followed in children's court proceedings. The new rules aim to create uniformity and accessibility. They allow for children to participate and have facilitated access to justice. The new rules fail, however, to make mention of section 52(2)(b) of the Children's Act, which makes provision for the “use of

suitably qualified interpreters or trained interpreters”. There is no mention of the use of an interpreter in the draft Children’s Court rules. It is submitted that by not including provisions or guidelines for the use of an interpreter, the court is left to its own discretion in this regard. It is submitted this can cause children to be susceptible to unfair justice or secondary victimisation.

Davel and Skelton (2019) state that the South African Law Reform Commission suggested that a child’s wishes regarding direct communication must be considered and arrangements must be made to aid direct communication. One of the adjudicating officers or an assessor must be able to communicate directly with the child. This recommendation was not retained in the Children’s Act. However, section 52(2)(b) was included which deals with rules to be drafted in respect of interpreters. It is submitted that although interpreters provide an invaluable service it may be beneficial to have at least one of the adjudicating officers in a particular Magistrates’ Court conversant in the child’s language, who will assist in clearing up any interpretation mistakes. Hlophe (2004) similarly advances that the judiciary must represent all official languages. This will in turn allow for linguistic diversity and facilitate accuracy of interpretation. The Law Society of South Africa’s (LSSA) submission on the Languages Bill in 2011, discussed below, put forward that the policy of the Constitutional Court, among others, to adjudicate matters only in English, violates section 6 of the Constitution. Rather, LSSA posits that judges’ and magistrates’ proficiency in languages in specific geographical areas should be promoted.

#### IV OTHER RELEVANT LEGISLATION, LAW REFORM AND REGULATIONS

##### (a) *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007: Regulations relating to Sexual Offences Courts*

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 does not make mention of language needs of victims, nor does it include the use of an interpreter for instances where language poses a barrier. In the regulations relating to Sexual Offences Courts, regulation 15(9) makes provision for an “interpreter to be available to assist the court preparation officer or victim assistant officer in the court preparation programme”. Regulation 17 speaks of interpreting services and outlines a few functions, while regulation 17 states that “an interpreter, in addition to his or her main function, must be able to assist the court



preparation officer, the prosecutor and the complainant”. Regulation 17(2) states that the senior interpreter must allocate an experienced interpreter to cases of sexual abuse. It is submitted that this provision in itself highlights the intention to limit secondary victimisation because a senior interpreter would be more capable of dealing with sexual offences cases which are of a sensitive nature.

Regulation 17(3) calls upon the senior interpreter to secure the availability of foreign interpreters and sign language interpreters for sexual offences cases. In light of the above, one can deduce that the regulations are more detailed in respect of the services of interpreters for sexual offences cases as compared to the other domestic laws. However, there are no special provisions for children in particular, for example, an interpreter skilled or trained in working with children.

*(b) Child Justice Act 75 of 2008 and Regulations*

The guiding principles of the Child Justice Act under section 3(d) highlight that children should be addressed and allowed to communicate in a language of their choice or through an interpreter. Section 26(1)(a) of the regulations states that “a probation officer must inform the child of his/her rights in terms of section 39 of the act –(i) in a language that he/she understands, preferably one of his/her choice or through an interpreter if necessary”. In addition, both sections 28 and 37 make provision for a presiding officer in a preliminary enquiry and court dealing with child justice to explain to the child in a language of his/her choice or through an interpreter. Children in conflict with the law also require specialised interpretation services. Although the regulations do provide for an interpreter, there is no mention of special skills that an interpreter should have to deal with the child and sensitive matters.

*(c) Uniform Rules for Courts (2009)*

The Uniform Rules for Courts regulate the proceedings for provincial and local divisions for high courts in South Africa. The rules refer to interpretation of evidence in which it makes three rules regarding interpreters. The Uniform Rules for Courts (2009) states that: “a competent interpreter must interpret evidence at proceedings where language poses as a barrier, interpreters must interpret faithfully and to the best of their ability”. The rules also speak to the integrity and competence of the interpreter and the costs incurred. In view of the

rules stated, there should be adequate resources provided to uphold the rules, such as training for interpreters, debriefing and other procedures.

(d) *Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa (2020)*

The substitution of rule 68(1) now allows for the “interpreter to take an oath or make an affirmation subscribed by him or her before a judicial officer”. This is beneficial as many intermediaries are at times called upon to interpret while providing services to children. This can be a means of preventing secondary victimisation as an intermediary can play the roles of both an interpreter and an intermediary. In the case *S v Motaung* ECJ 079/2005) [2005] ZAECHC 33, the accused argued that the intermediary had not been sworn in, which constituted an irregularity as the complainant had given evidence. The magistrate argued that the Act does not make provision for this and that the intermediary had acted as a conduit. Highlighted in the case is the essential role of the intermediary in ensuring fairness when presenting evidence, hence the need for an oath. Namakula (2019:228) asserts that an intermediary act as an interpreter therefore, the oath will enhance accuracy of the intermediary’s presentation of evidence. Namakula (2019:226) explains that “[i]ntermediaries are thought of as possessing special skills in communicating with children”. It is submitted that interpreters should also possess these special skills that would help the child during the court proceedings and that would aid in limiting secondary victimisation.

(e) *South African Language Practitioners Council Act 8 of 2014*

The South African Language Practitioners Council Act (SALPC Act) was established to make provision for regulation of the training, registration and accreditation of language practitioners in South Africa. The Act, published in May 2014, outlines the objectives and functions of the council who facilitates registration and accreditation of language practitioners. It also brings into effect a code of conduct for language practitioners. This Act should then regulate language practice and practitioners in South Africa. However, there is no record of the existence of this council, which means that the services of interpreters are not regulated in South Africa. In addition, the date of commencement of the Act has not yet been gazetted, nor have the regulations in terms of the Act. There is no indication of the reason for the delay of the commencement.

The Act, once promulgated, should accredit and register interpreters, which will ultimately catalyse effective interpreting services. Professional bodies have formed in aid of implementing professional standards in the absence of the council for example the South African Translators Institute.

Concerningly, the Act does not make specific reference to children. Given the fact that children are vulnerable, and that their language rights can be easily violated, it is submitted that the Act should lay out provisions for the regulation of language services to children in both civil and criminal proceedings in all courts, including the children's courts. In effect, the Act is not being implemented, which results in a child's right to effective court interpreting services not being upheld.

*(f) Law Reform on Official Languages*

The South African Languages Bill was tabled in Parliament in 2011. It was promulgated in 2012 as the Use of Official Languages Act 12 of 2012. The regulations were published only in 2014. According to the Use of Official Languages Act 12 of 2012 objectives, "it aims to regulate the use of official languages for government purposes by national government, promote parity of esteem and equitable treatment, facilitate equitable access to services and information, and promote good language management for public service administration". Pretorius (2013: 309) asserts that multilingualism cannot be achieved because of the poor environment, even though the objectives of the Act set out to do so. Pretorius (2013) points out that the non-independent state organs to which the Act refers will have to function with an inadequate framework to promote multilingualism and discretionary powers, which limits official language use. Pretorius (2013:282) there is doubt as to whether the Act will be able to halt the inclination towards English monolingualism.

The LSSA's submissions on the Bill questioned whether the Bill had provided a framework for courts to "transform the South African language dispensation" into an inclusive one that respects all the official languages and answered the question in the negative.

*(g) Language Policy of the Department of Justice and Constitutional Development (2019)*

The Use of Official Languages Act 12 of 2012 requires national departments to adopt a language policy and professional bodies for the use of language within the department. The Department's policy purpose is to "determine the use of official languages in the Department

and to provide for their promotion, regulation and monitoring in the Department”. De Vries, Kaschula and Docrat (2020) highlight the fact that South Africa’s Chief Justice has declared that English is the only language of record in the country’s courts. This means all records must be kept in English. It is submitted that this places individuals who do not understand English at a disadvantage as they should be able to access records in their own language. The Department, according to its language policy, should strive to uphold all official languages.

De Vries, Kaschula and Docrat (2020) highlights “Legal Aid South Africa, an organisation which provides services to predominantly disadvantaged people, reported that 27 percent of applicants in criminal cases speak, read and write English at a satisfactory level, while 54.2 percent had a minimal knowledge of English as a medium of communication”. Bearing this in mind, such decisions should not be made to cater for the convenience of the minority but should rather look at ways to promote and make provision for all official languages. In line with this, De Vries , Kaschula and Docrat (2020) suggest that PanSALB, departments and universities should be involved in highlighting the importance of language in access to justice and that the Department’s language policy should clearly outline ways in which African languages can be promoted and used as a language of record in court proceedings. It is also suggested that judicial staff who understand the language of the community should be placed at courts. This view is also held by Hlophe (2004).

## V CONCLUSION

Children should enjoy the provisions enshrined in the Constitution and all other pieces of legislation. A child must enjoy fair justice. Cassim (2003) argues that only with the use of a court interpreter can justice be achieved for witnesses and accused persons who have limited knowledge of English or the language of record. In South Africa, English is not widely spoken by the majority of the population; therefore, appropriate necessities such as a well-trained court interpreter must be made available for persons who speak languages other than English. Mnyandu (2016), citing Inggs (1998), also stresses that the majority of South Africa’s population do not speak English or Afrikaans as a first language. Therefore interpreters play a crucial role in eradicating linguistic barriers. Hlophe (2004) asserts that courts must be more user friendly in order for justice to be made more accessible to vulnerable people.

The Constitution, the Children’s Act and the SALPC Act all need to be aligned with each other to ensure that the rights preserved within the law respect the child’s linguistic needs. They need to make direct reference to the use of an interpreter who is adequately

trained in working with children to address the linguistic barriers that may prevail during both civil and criminal proceedings. Facilitating a child's right to participation and access to courts also aids in limiting secondary victimisation. In particular, this chapter has argued that the SALPC Act needs to be proclaimed so that the linguistic and child-specific rights in the Constitution can be realised.

Although there are various provisions in the Constitution for linguistic needs, it lacks specific reference to court interpreters for children. The body that is tasked to monitor language (PanSALB) is not doing justice in respect of interpretation services for children. Since PanSALB is responsible for promoting and creating language development, it is submitted that the organisation should work side by side with the South African Language Practitioners' Council to regulate language with specific reference to interpreters for children. Further, the board should collaborate with the Department of Social Development to advocate for children.

Section 6(4) of the Constitution places an obligation on government to regulate language use. However, this is not the case in practice. Failure of government regulation can constitute not upholding a child's constitutional right, which leads to further abuse by government institutions.

Kaschula (2004) (citing Heugh, 1999) mentions that in Africa the implementation of language progress has been poor and that although South Africa's Constitution promotes multilingualism, achieving a linguistically diverse country is not promising. It is also important for the existing provisions be implemented by government and government institutions in order to advance linguistic rights and to change the perceptions of Kaschula mentioned above.

To embrace the spirit of multilingualism, the law must be implemented, and strides must be made to resolve gaps. South Africa is known as the 'rainbow nation', a country that is diverse and full of culture. Language and culture will be lost if we do not uphold, embrace and instil linguistic rights, and will result in a generation that does not respect language and culture and loses the sense of identity. Hlophe (2004) highlights that communities develop when we recognise their linguistic rights and as a result dignity and self-respect are enhanced.

## CHAPTER FOUR

### INTERNATIONAL AND REGIONAL LAW

#### I INTRODUCTION

This chapter discusses international and regional law on court interpretation for children. In particular, the obligations created for states party are considered, not only in relation to relevant provisions of the United Nations' Convention on the Rights of the Child (CRC) and the African Union's African Charter on the Rights and Welfare of the Child (ACRWC), but also in relation to access to justice.

#### II AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

The African Charter on the Rights and Welfare of the Child (ACRWC) is an instrument unique to Africa as it takes into account the unique experiences of African countries that affect children in Africa. The three main principles of the ACRWC are the best interests of the child, non-discrimination and prohibition of harmful cultural practices. South Africa is a signatory to the ACRWC; therefore, it is obliged to adhere to the guidelines outlined in the ACRWC, which upholds the rights of children. The Charter was ratified in 2000 by South Africa. The provisions of the ACRWC will be discussed in relation to interpretation services for children.

##### (a) *Non-discrimination*

Article 3 of the ACRWC highlights non-discrimination of a child and covers language as an aspect that should not be discriminated against. Children who do not converse in the majority language or one of the official languages should not be disadvantaged in any way. According to General Comment 5 on State Party Obligations under the *African Charter on the Rights and Welfare of the Child (Article 1) and Systems Strengthening for Child Protection* of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) ('the Experts'), the ACRWC calls upon states to identify children that are discriminated against in any context and to take measures to eliminate discrimination (para 4.1). Given the fact that the ACRWC makes reference to ethnic groups, efforts need to be made to ensure that a child is not discriminated against because of his/her language of choice or the ethnic group to which he/she belongs. In addition, states need to guarantee that a child has access to an interpreter in all sectors. It is submitted that an interpreter can be classified as a resource who will be

dedicated to eliminating language barriers, thereby limiting the possibility of discrimination from occurring in courts.

(b) *Best Interests of the Child*

Article 4 of the ACRWC speaks to the best interests of the child. This article makes provision for the opportunity of the child's views to be heard. The child is therefore afforded the opportunity to participate and be the resources to do so.

Article 4 of the ACRWC states:

*“(1) In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.*

*(2) In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.”*

The wording in 4(1) in respect of ‘the child’ elevates the best interests principle. It provides better protection compared to the United Nations’ Convention on the Rights of the Child (CRC), which will be discussed later in this chapter (Bekink, 2016). South Africa is a multilingual nation in which a wide variety of languages is spoken. Taking measures to confirm that a child’s language needs are met enforces the best interests of the child principle. Article 4(2), however, mentions judicial and administrative proceedings but not all matters concerning children (Gose, 2002). It is submitted that there is some contradiction as it states ‘all actions’ and thereafter lists judicial and administrative matters only. It is submitted that this places a limitation on when children can communicate their views.

Noting that the ACRWC mentions communication in article 4, it should therefore make provision for a child’s language of choice or the use of interpreters should be specifically mentioned. General Comment 5 states that there are no conditions attached to the provision; therefore its scope, reach and standard cannot be diluted (para 4.2). It is beneficial that the provision calls upon the state to secure that the best interest is applied in both state and private contexts (para 4.2). This protection covers a wider scope, thereby ensuring that in all spheres, the standard of the best interests of the child is applied. However, the charter does not speak of how this is monitored as it is a challenge to monitor private institutions.

(c) *Freedom of Expression*

Article 7 covers a child's freedom of expression, which calls on the government to give children the opportunity to express themselves in all matters concerning themselves. Although children can express themselves in many ways, one main way in which they do so is by communicating verbally. According to the General Comment 5 (para 4.4), states lack an inclusive and coordinated approach to consulting with and obtaining the views of children in their child participation measures. The key challenge is how to translate the concept into context. The General Comment speaks of integrating the principle of participation into processes and these must be monitored to hold duty bearers accountable (para 4.4). It is submitted that one way of integrating the principle of participation is by providing interpreters to children who encounter language barriers to aid them in expressing their views. The General Comment (para 4.4) also highlights the need for ongoing financial and human resources to support child participation initiatives. It is submitted that it is essential to pool resources into training interpreters. In addition, the increased employment of interpreters for children in both civil and criminal matters helps children with language barriers to access justice.

(d) *Accused Children*

The ACRWC speaks to court interpreters in the administration of juvenile justice in article 17(2)(c)(ii). Cote (2005) states that the courtroom experience can be frightening and complicated. This, coupled with language barriers of the accused, can exacerbate the situation. This is the case in many courts in South Africa, where the majority of the accused do not communicate in the language of the court. General Comment 5 highlights that the support of dedicated courts that have a legislative base and specialised personnel and services can aid children in both criminal and civil proceedings (para 5.3.2). Although South African courts employ court interpreters, they are, however, not specialised in their skill of interpreting with regard to providing child-friendly services for children in both civil and criminal proceedings.

### III CONVENTION ON THE RIGHTS OF THE CHILD, 1989 (CRC)

The United Nations' CRC was adopted in 1989. It is one of the most widely ratified treaties. Ekundayo (2015) states that the CRC aims to protect children in respect of preserving civil, political, economic, social and cultural rights and treats all rights as equal. This is the unique feature of the CRC. The Committee on the Rights of the Child monitors compliance of the



Convention by the countries that have ratified it. States report to the Committee and engage in dialogue.

The ‘four pillars’ which are the general principles of the CRC accord children the right against “non-discrimination” (article 2), the right to have their “best interests” be “a primary consideration” in all actions concerning them (article 3), the “inherent right to life” (article 6), and the right of a child “who is capable of forming his or her own views and to express those views freely in all matters affecting the child” (article 12). The CRC was ratified in 1995 by South Africa. The obligations of the CRC in respect of children and their rights that pave the way for court interpretation services for them will now be discussed.

(a) *Article 2: Non-discrimination*

Article 2 of the CRC calls upon states party to respect and not discriminate against children, referring to various categories including children’s language. Besson (2005) highlights that children are more vulnerable to discrimination than adults. The detailed list in article two which highlights language is beneficial to children as language issues are prevalent among children. Besson (2005) highlights the fact that for many years children were not seen as rights bearers and thus discrimination against them escalated. Article 2 of the CRC recognises the status and special needs of children due to their dependency.

Children’s rights have now been recognised and instruments such as the CRC have advanced the rights of children to ensure their protection. Discrimination occurs in the context of the courtroom when children are excluded from actively participating in the judicial proceeding. An example of this is when a child is not provided with an adequately trained court interpreter during judicial proceedings.

(b) *Article 3: Best Interests of the Child*

Article 3 of the CRC sets out this principle:

*“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

*2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

3. *States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.*”

Bekink (2016) states that the best interest of the child concept is continuously evolving due to its complexities. General Comment 14 (2013) issued by the Committee on the Rights of the Child is aimed as a framework to guide when determining the best interests of the child. It strengthens article 3 as it guides people working with children. Gose (2002) states that the wording in the CRC of ‘a primary consideration’ makes the CRC inferior as is understood that other principles could override the best interests of the child. Gose (2002) further highlights the wording in the CRC: “in all actions concerning children” as compared to the ACRWC, which makes reference to “a child”. This broadens the scope of protection for all children.

Another useful instrument, the UN Economic and Social Council’s Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (2005) is sound in respect of interpreting in clause 12 the guidelines which speak to language, interpreters and other special assistance measures. The guidelines are internationally recognised and represent good practice (Justice in Matters involving Child Victims and Witnesses of Crime, Model Law and Related Commentary, 2009). It promotes participation, non-discrimination and the best interests of child victims and witnesses.

Songca (2019), referring to the case of *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* 2009 (7) BCLR 637 (CC), identifies that the court highlighted that in terms of the ECOSOC guidelines, special assistance and protection must be promoted for complainants and victims to limit trauma that may result from participating in criminal proceedings. With regards to the best interests of the child, the Guidelines stress that the rights of the accused must be safeguarded and that every child has the right to have his/her interests considered. In the above-mentioned case, in line with the CRC and the guidelines, the court pronounced that the child should testify in a child-friendly room separate from the court, thus upholding the best interests principle.

(c) *Article 12: Child’s Views to be Heard*

Article 12 makes provision for a child’s views to be heard. When a child’s views are heard, the child is given an opportunity to participate. Child participation has given rise to the view

that children are rights bearers and not mere objects; they can now voice their opinions. Moyo (2015) advances that the image of a child as a mere dependant is challenged as they are seen as complete human beings who are also bearers of rights. Article 12 of the CRC states:

*“(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

*“(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.”*

Article 12 makes provision for a child to express his/her views freely. It therefore holds states party accountable to provide a suitable platform for children to do so. Moyo (2015) stresses that accordingly authorities have to provide and develop conditions for children to exercise their right. This then means that states party such as South Africa need to provide the necessary resources and an adequately trained court interpreter for children with language barriers. Failure to do so would mean that South Africa is not complying with the obligations set out by the CRC.

The CRC makes provision for every child to express their views and age and maturity are applicable in respect of determining how much weight is given to the child's views, whereas, with the Children's Act, the age, maturity and stage of development must be fulfilled for them to participate, as supported by Moyo (2015). As a state that is a signatory to the CRC, South Africa is obliged to fulfil its obligations according to the CRC. In the case of the Children's Act, this domestic legislation binds individuals. Moyo (2015) states that the CRC binds states to hear children out in judicial and administrative proceedings while the Children's Act makes provision for families and other private sectors. Bekink (2016) states that the Committee in General Comment 12 makes reference to proceedings being accessible and child-appropriate, which entails a child-friendly environment and adequately trained staff, among other factors (para 34). Therefore, there is a need for adequately trained court interpreters to be made available for children.

In addition, the CRC makes provision for 'all matters' as compared to the ACRWC, which places restrictions by stating that specifically judicial and administrative

matters are dealt with. The CRC offers more protection, as highlighted by Gose (2002). It can therefore be understood that the CRC provides a broader scope for the child to participate.

(d) *Article 19: States Party: Measures to Protect Children*

Article 19 of the CRC reads as follows:

*“1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

*2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”*

Article 19 highlights the need to safeguard children from all forms of violence on all levels and holds states party accountable to establish measures on all spheres such as legislative, social, educational and administrative (Bekink, 2016)). The interventions should consist of measures that would aid children who experience violence to have a smooth progression through the criminal justice system. General Comment 13 (para 34) highlights that judicial staff need to be trained appropriately. Article 19 perhaps indirectly serves to limit secondary victimisation of children who experience language barriers, while Article 19(2) provides for protective measures and forms of prevention. It is submitted that by ensuring that children receive adequate court interpretation services we facilitate protection and prevention of a child from being exposed to secondary victimisation.

(e) *Article 30: Minority Groups*

Article 30 relates to minority groups, stating:

*“[i]n those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language”.*

The Committee on the Rights of the Child's General Comment 12 (2009) states that children who speak minority languages must be aided to have a chance to express their views (para 21). This again advocates for the use of interpreters when dealing with children who have language barriers. Besson (2005), citing Detrick (1999), argues that article 30 provides special protective measures for indigenous children, thereby protecting them against stigmatisation.

(f) *Article 40(2): Administration of Juvenile Justice*

The Committee on the Rights of the Child's General Comment (2007) on children's rights in juvenile justice mentions that in relation to the provision for administration of juvenile justice, states party have to apply some of the general principles of the CRC, such as non-discrimination, best interests and the right to be heard (para 4). According to the general principles of the CRC, children in conflict with the law should not be discriminated against in relation to their language choice, especially if they are from a linguistic minority group. Training for the staff involved with the administration of justice is essential, according to the General Comment (para 6). In all matters in the criminal justice system the child's best interests must be upheld. The General Comment raises the point that children differ from adults, which is why there is a need for a distinct separate criminal justice system that requires special treatment for children (para 10). It is submitted that the different treatment referred to could be the provision of specialised court interpreters who understand child development. The right to be heard must be promoted throughout the juvenile justice system. It is submitted that access to specialised court interpreter services will enable this right to be realised.

Article 40(2)(iii) establishes guarantees for children to receive a fair trial and treatment. The Committee emphasises in General Comment 10 that it is key for professionals involved in the administration of juvenile justice to be of high quality in order to achieve effective implementation of the guarantees (para 40). This means that personnel such as court clerks, judges, social workers, prosecutors and court interpreters should be adequately trained. The committee highlights the fact that these professionals need to be well informed on all aspects of the child as well as the special needs of children such as "children with disabilities, displaced children, street children, refugee and asylum-seeking children, as well as children belonging to racial, ethnic, religious, linguistic or other minorities" (para 40).

Professionals and staff should consider a child's dignity and worth in matters with children, this strengthens the child's respect for human rights; this is highlighted in the

CRC (para 40). In relation to the mentioned provision and court interpretation services offered to children, it is essential that interpreters do not expose children to secondary victimisation.

The right to a fair trial also means that a child has a right to participate and to be heard. Articles 12(2) and 40(2)(b)(iv) make provision for the child to be heard and to participate in the trial respectively. General Comment 10 (para 46) asserts that the Committee states that a child needs to understand fully the charges against him/her in order to advise his/her legal representative in challenging the respective parties and decisions made by the court. The child should also be given the opportunity to be heard by expressing his or her views (para 44). It is submitted that children comprehend when they understand simple language and language that is familiar to them. Therefore, the use of a specialised court interpreter will fulfil this obligation of allowing a child to participate and be heard during the juvenile justice process.

Article 40(2)(b)(vi) makes provision “to have the free assistance of an interpreter if the child does not understand or speak the language used”. The Committee states that this provision should be applicable throughout all stages of the juvenile justice system and should not be restricted to the court proceeding (para 62). They further state that interpreters dealing with children should be properly trained (para 62). If these professionals lack the required knowledge and skills, this can deny children access to justice and the right to a fair trial and participation. The provision also covers children who have speech impediments or disabilities (para 62).

#### IV INTERPRETATION OF THE CRC AND THE ACRWC IN SOUTH AFRICA

Article 4 of the CRC calls for states party to undertake appropriate legislative, administrative and other measures to incorporate provisions encapsulated in the treaty. The inclusion of the Bill of Rights in the Constitution made children’s rights justiciable, thereby making the courts the executors of justice (Kilkelly & Liefwaard: 2019). Section 39(1) of the Constitution makes provision for considering international and foreign law, thereby giving South African courts an opportunity to apply international instruments such as the CRC and ACRWC in court proceedings.

South Africa has made efforts to apply international law in proceedings. Bekink (2016) confirms that the interpretation of international treaties is evident in case law,

for example, in *Bhe v Magistrate, Kayelitsha 2005* (1) SA 580 (CC), the court took into consideration its international obligations when reaching its decisions with regard to article 2 of the CRC and article 3 of the ACRWC on non-discrimination. Section 233 also makes mention of the application of international law. Bekink (2016) highlights that the inclusion of “any legislation” in section 233 alludes to the fact that international law may have jurisprudential relevance when interpreting any legislation in relation to children.

Article 1 of the CRC and section 28(3) of the Constitution both declare a child to be under the age of 18 years and that the best interests of the child are of paramount importance in all matters concerning the child. However, the Constitution in section 28(2) goes beyond the CRC article 3(1) in respect of the wording “of paramount importance” in the Constitution as compared to the wording in the CRC of “a primary consideration” (Kilkelly & Liefwaard, 2019).

According to Kilkelly and Liefwaard (2019), the provisions of section 28(1)(h) give the child additional protection as they strengthen the view of the child as a legal actor and introduce the understanding of a child’s right to access to justice.

Kilkelly and Liefwaard (2019) recognise that the Constitution omits provisions for child participation which they consider constitutes its shortcoming, whereas article 12(1) of the CRC does provide for participation. The National Child Participation Framework (2018) also highlights the weakness of the Constitution with regard to its lacking in child participation provisions.

It is submitted that a specific participation right is essential to fulfil a child’s right to access to justice, a fair trial and access to interpretation services. Although other Acts such as the Children’s Act make such provision, it is the Constitution that supersedes other laws and will create more emphasis for rights to be realised.

Kilkelly and Liefwaard (2019) assert that section 38 of the Constitution, which gives power to the court to grant relief to any persons whose rights have been infringed, and section 7(2) of the Constitution, require the state to “respect, protect, promote and fulfil the rights in the Bill of Rights” to meet the expectations of the committee on the rights of the child.

Similarly to the CRC, the ACRWC includes participation rights in article 4(2), which makes provision for a child’s views to be heard. It is submitted that yet again it seems as though the Constitution falls short in making direct provision for participation.

It is submitted that Article 4(1) of the ACRWC makes provision for the best interests of the child. The focus on the word 'the' accelerates the best interests provision, similarly to the Constitution. Bekink (2016) asserts that the ACRWC secures better protection because of the elevation of the best interests principle. Bekink (2016) states that the ACRWC views the child as autonomous, which can be beneficial for Africa, as elders usually make decisions for children.

## V CONCLUSION

In both treaties there is a broad reference to participation and non-discrimination of language and both make direct reference to juvenile justice but not to civil proceedings. Having a direct reference to civil proceedings would have made way for more emphasis to be placed on the means by which these rights can be fulfilled, one of which is specialised court interpretation services to children.

For children to exercise participation in matters relating to them and for the best interests of the child to be upheld, children are entitled to efficient interpretation services. The South African government is a signatory to both treaties; therefore, the government is obliged to take relevant steps to uphold its commitments in relation to juvenile justice, but obligations in relation to civil or quasi-criminal proceedings in the Children's Courts are not clearcut. It is submitted that the omission of specific reference to participation in the Constitution is a shortcoming which can have an impact on interpretation services, as participation rights can make provision for interpretation services.

International treaties promote participation and non-discrimination. However, there is a gap in respect of specialised court interpretation services to children in civil proceedings.



## CHAPTER FIVE

### BEST PRACTICES: INDIA

#### I INTRODUCTION

This chapter will discuss practices from other jurisdictions in respect of court interpretation for children. In particular, India will be considered. The Chapter discusses and analyses the following: the Constitution of India of 26 January 1950; the Official Languages Act 19 of 1963; the Protection of Children from Sexual Offences Act, 2012; the Protection of Children from Sexual Offences Rules, 2020; the Government of India Ministry of Women and Child Development notification; Children's Commissions for Protection of Children's Rights and Declaration on the Rights of the Child, 1959; and the Convention on the Rights of the Child.

South Africa and India have a few features that are similar which provides the reason to compare both countries. Firstly, both countries have threads of discrimination embedded in their history. In respect of India, discrimination was perpetrated by the caste system. Deane (2009: 30), citing Kroeber (1930), refers to the caste system as “a ranked aggregate of people that is birth ascribed”. A person is considered a member of a caste into which he/she is born and is classified accordingly. Deane (2009: 31) highlights that in a similar way to race, caste is something one is born into. She further states that some countries such as South Africa were caste-based in nature during the apartheid era and that the caste system of India is an ancient system that has contributed to a number of inequalities.

According to Ellis (2019: 63):

*“[a]partheid in its original context is based on the domination of one group (Whites) over an indigenous majority (Blacks). It is a racial ideology with its origins in South Africa. Apartheid is typically defined as a social and political policy of segregation and discrimination against a minority.<sup>2</sup> It was a racial discrimination policy against non-Europeans in South Africa. The black majority was discriminated against, segregated, and denied rights of political participation”.*

It is submitted that in South Africa the apartheid system of the past catalysed discrimination whereby persons of different racial groups were discriminated against.

Another factor that is common to India and South Africa that gives reason for comparison is that both India and South Africa were colonised by the British (Govindjee,

2005). Deane (2009) raises the issue that in both India and South Africa many laws are influenced by British laws. It is submitted that this could be the reason that both countries lean towards English as an official language. Both India and South Africa's constitutions guarantee fundamental human rights, as supported by Govindjee (2005).

Both India and South Africa face major poverty constraints. Govindjee (2005) highlights that the similarity of the experience of poverty is illustrated in Thabo Mbeki's comments in an article titled 'India and South Africa: The ties that bind'. Govindjee (2005) further highlights that India, South Africa and Brazil had established a Trilateral Dialogue Forum to address issues such as poverty. It is further stated that the fact there is an 'India-Africa fund' for joint responses to poverty alone confirms the appropriateness of the comparison.

Govindjee (2005) suggests that India has a lot to offer to a South African legal study in respect of constitutional law. It is for the abovementioned reasons that India is explored further in respect of court interpretation services for children.

## II PROVISIONS FOR LANGUAGE AND INTERPRETATION SERVICES

### (a) *The Constitution of India, 26 January 1950*

The Constitution of India is the supreme law of the country and its powers are divided into executive, legislative and judiciary organs of government. All the organs are well defined (Govindjee, 2005). The Supreme Court was established by the Constitution and also drew on the experiences of other counterparts such as the USA, Canada, Australia and others (Govindjee, 2005). According to Govindjee (2005), the USA has influenced India's Constitution in respect of human rights protection measures.

### (b) *Official Language of the Union*

The Constitution of India states:

*"343. Official language of the Union*

*(1) The official language of the Union shall be Hindi in Devanagari script. The form of numerals to be used for the official purposes of the Union shall be the international form of Indian numerals.*

*(2) Notwithstanding anything in clause (1), for a period of fifteen years from the commencement of this Constitution, the English language shall continue to be used for*

*all the official purposes of the Union for which it was being used immediately before such commencement: Provided that the President may, during the said period, by order authorise the use of the Hindi language in addition to the English language and of the Devanagari form of numerals in addition to the international form of Indian numerals for any of the official purposes of the Union.*

*(3) Notwithstanding anything in this article, Parliament may by law provide for the use, after the said period of fifteen years, of— (a) the English language, or (b) the Devanagari form of numerals, for such purposes as may be specified in the law.”*

According to the *Times of India*, section 343 of the Constitution states that English and Hindi will be the official languages. After 15 years Hindi was supposed to be the sole official language; however, this has not yet been fulfilled.

Tusi and Tollefson (2007) highlight the fact that before India was partitioned, Hindi was a language understood by both Hindu and Muslim citizens. It was recognised as a language that would replace English as soon as India was partitioned. This notion changed. It was argued that if Urdu was to be the language of Pakistan then Hindi would be the official language of India. South India resisted; therefore, English and Hindi continued to be the languages used. Tusi and Tollefson (2007) point out that English has gained power and status.

English proved to be more widely used and was therefore retained for the use of non-Hindi speaking people who were not satisfied with Hindi being made an official language as they did not speak Hindi. As a result, the Indian parliament enacted the Official Languages Act, 1963 which made provision for the continuation of the use of English as well as Hindi.

Because of the large population and different castes, there is a wide variety of spoken languages in India, as supported by Tusi and Tollefson (2007). who indicate that India has 1 652 different languages belonging to five different language groups. Section 344 of the Constitution makes provision for the Eighth Schedule which lists 22 languages. India's government has to develop these languages so that they are used as a means of communication. It is submitted that although the Constitution provides for the 22 languages, it makes provision for predominantly the use of English and Hindi.

The Constitution states:

*“344. Commission and Committee of Parliament on official language*

*(1) The President shall, at the expiration of five years from the commencement of this Constitution and thereafter at the expiration of ten years from such commencement, by order constitute a Commission which shall consist of a Chairman and such other members representing the different languages specified in the Eighth Schedule as the President may appoint, and the order shall define the procedure to be followed by the Commission.”*

Section 29 highlights the preservation of languages. It states the following:

*“Section 29: Protection of interests of minorities*

*(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.”*

It is submitted that the preservation of minority languages helps to preserve the dignity of people as they feel respected by the protection of their language rights. Tusi and Tollefson (2007:2) state that “[e]mbodied in a language is the history, the beliefs, the cultures and the values of its speakers”.

Sections 120 and 210 of the Constitution make provision for Hindi and English to be used in parliament and the legislature respectively. It also states that the chairman of the council of states can permit any members who cannot express themselves to do so in their mother tongue.

Section 120 of the Constitution states:

*“120. Language to be used in Parliament.*

*(1) Notwithstanding anything in Part XVII, but subject to the provisions of article 348, business in Parliament shall be transacted in Hindi or in English:*

*Provided that the Chairman of the Council of States or Speaker of the House of the People, or person acting as such, as the case may be, may permit any member who cannot adequately express himself in Hindi or in English to address the House in his mother-tongue.*

*(2) Unless Parliament by law otherwise provides, this article shall, after the expiration of a period of fifteen years from the commencement of this Constitution, have effect as if the words “or in English” were omitted therefrom”*

(c) *Regional Languages*

The Constitution of India states:

*“345. Official language or languages of a State*

*Subject to the provisions of articles 346 and 347, the Legislature of a State may by law adopt any one or more of the languages in use in the State or Hindi as the language or languages to be used for all or any of the official purposes of that State: Provided that, until the Legislature of the State otherwise provides by law, the English language shall continue to be used for those official purposes within the State for which it was being used immediately before the commencement of this Constitution.*

*346. Official language for communication between one State and another or between a State and the Union*

*The language for the time being authorised for use in the Union for official purposes shall be the official language for communication between one State and another State and between a State and the Union: Provided that if two or more States agree that the Hindi language should be the official language for communication between such States, that language may be used for such communication.*

*347. Special provision relating to language spoken by a section of the population of a State*

*On a demand being made in that behalf the President may, if he is satisfied that a substantial proportion of the population of a State desire the use of any language spoken by them to be recognised by that State, direct that such language shall also be officially recognised throughout that State or any part thereof for such purpose as he may specify.”*

Since India is a very large country, it has many states which speak different languages. It is submitted that the provisions help the state to preserve the language widely spoken of in the state in providing that the state can adopt any other language that is in use in the state. The South African Constitution does not make any such provision. Although the South African Constitution makes provision for the many official languages, it is submitted that to allow a state to adopt an official language since it is the predominant language of the state can eliminate language barriers and fast track the justice system.

(d) *Language of the Supreme Court, High Courts, and in Official Public Notices*

The courts of India probably have the greatest challenge as people who speak the many different languages have to go through the justice system and language preferences need to

be considered. According to section 348 of the Constitution, English is to be used in the Supreme Court, the High Courts and for all Acts, Bills and other legislative measures.

Section 348 of the Constitution of India states:

*“348. Language to be used in the Supreme Court and in the High Courts and for Acts, Bills, etc.*

*(1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides—*

- (a) all proceedings in the Supreme Court and in every High Court,*
- (b) the authoritative texts*
  - (i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State,*
  - (ii) of all Acts passed by Parliament or the Legislature of a State and of all Ordinances promulgated by the President or the Governor 1\*\*\* of a State, and*
  - (iii) of all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State,*

*shall be in the English language.*

*(2) Notwithstanding anything in sub-clause (a) of clause (1), the Governor of a State may, with the previous consent of the President, authorise the use of the Hindi language, or any other language used for any official purposes of the State, in proceedings in the High Court having its principal seat in that State; Provided that nothing in this clause shall apply to any judgment, decree or order passed or made by such High Court.*

*(3) Notwithstanding anything in sub-clause (b) of clause (1), where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in, or Acts passed by, the Legislature of the State or in Ordinances promulgated by the Governor 1\*\*\* of the State or in any order, rule, regulation or bye-law referred to in paragraph (iii) of that sub-clause, a translation of the same in the English language published under the authority of the Governor 1\*\*\* of the State in the Official Gazette of that State shall be deemed to be the authoritative text thereof in the English language under this article.”*

From the above provisions, it can be deduced that English is the primary language of the Supreme and High courts. Thawani (2020) states that there is difficulty when other languages are spoken. In the case of *Madhu Limaye vs Ved Murti* (1970) 3 SCC 738, one of the parties insisted on arguing in person before the Supreme Court in Hindi. He refused to allow his counsel to argue or give a written argument in English. The Supreme Court cited article 348 of the Constitution, which refers to English as the language of the court, and therefore cancelled his intervention. Thawani (2020) emphasises that linguistic issues arise when cases from district courts, which use the language of the state, progress to High Courts and the Supreme Court, in all of which English is the primary language used. If judgments in these cases are delivered in English, the litigant will therefore not understand the judgment. Thawani (2020) highlights that if district courts are expected to apply the law of the supreme courts, then judges and lawyers need to be able to read judgments in English. Thawani (2020) says it can be presumed that although local languages are important, English cannot be excluded from the district courts.

The Constitution states as follows:

*“351. Directive for development of the Hindi language.*

*It shall be the duty of the Union to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interfering with its genius, the forms, style and expressions used in Hindustani and in the other languages of India specified in the Eighth Schedule, and by drawing, wherever necessary or desirable, for its vocabulary, primarily on Sanskrit and secondarily on other languages.”*

Article 351 above highlights the promotion of Hindi in a cultural context and not as the primary language of India.

### III OFFICIAL LANGUAGES ACT 19 OF 1963

The Act serves to provide for the use of official languages in the Union of India, the business of parliament, in respect of legislation, and in the courts. Section 3 of the Act makes provision for English to be used for the Union and Parliament. English would be used in addition to Hindi. It also provides for English to be used between the Union and states that have not adopted Hindi as their official language. The Act further states that if one state has adopted

Hindi and another has not, there needs to be a translation into English. Thawani (2020) points out that English is the primary language used in India.

Section 7 of the Act reads as follows:

*"Optional use of Hindi or other official language in judgments, etc., of High Courts*

*As from the appointed day or any day thereafter the Governor of a State may, with the previous consent of the President, authorise the use of Hindi or the official language of the State, in addition to the English language, for the purposes of any judgment, decree or order passed or made by the High Court for that State and where any judgment, decree or order is passed or made in any such language (other than the English language), it shall be accompanied by a translation of the same in the English language issued under the authority of the High Court."*

Section 7 states that the president can authorise the use of Hindi or other official languages of the state for the purpose of judgements, orders of decree or orders passed or made by the High Court, and they can be translated in the English language. It is submitted that the Constitution also makes provision therefor in the case of *Madhu Limaye vs Ved Murti*, where it poses the question as to why the litigant was denied the use of his local language. It is submitted that a translator should have been made available.

The Act is accompanied by the "Official Language Rules of 1976". It is submitted that these rules predominantly make reference to English and Hindi. There has been a call from the chief justice to add more vernacular languages to be used in courts rather than just English and Hindi (Rajagopal, 2020).

#### IV CHILDREN'S LEGISLATION: INDIA

A large number of children make up India's population. According to Bajpai (2017), 428 million children under the age of 18 were recorded in 2001 and this number is said to escalate in the years to come. The Constitution of India makes provision for children's rights in various sections.

*"21A. Right to education.*

*The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.]*

*24. Prohibition of employment of children in factories, etc.*



*No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.*

*39. Certain principles of policy to be followed by the State*

- (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;*
- (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment”*

In addition, children are entitled to other constitutional rights such as those provided for adults. Bajpai (2017) states that India’s Constitution makes provision for positive discrimination in respect of a child’s physical and psychological immaturity, by virtue of which they may need special protection. Discrimination in respect of religion, race, caste, place of birth or gender is prohibited in article 15(3) of the Constitution, which states that “[n]othing in this article shall prevent the state from making any special provision for women and children”.

This indicates that there can be other provision made for children if the need arises. Bajpai (2017) states that the government of India through its Constitution is obliged to ensure the safety of children. The fundamental rights in Part III of the Constitution are enforceable by the courts and Part IV contains guidelines to the governance to the country.

Several Acts in India make provision for children, such as the Child Labour (Prohibition and Regulation) Act, 1986, the Prohibition of Child Marriages Act, 2006, the Protection of Children from Sexual Offences Act, 2012 and the Juvenile Justice (Care and Protection of Children) Act, 2015, among others. It is submitted that some Acts do not make sufficient provision for language interpretation because there is such a vast array of languages present in India, while other Acts such as the Protection of Children from Sexual Offences Act of 2012 do so.

The Juvenile Justice (Care and Protection of Children) Act, 2015 makes provision for a Juvenile Justice Board.

Section 8(3)(d), which deals with powers, functions and responsibilities of the Board, states that

*“wherever necessary the Board shall provide an interpreter or translator, having such qualifications, experience, and on payment of such fees as may be prescribed, to the child if he fails to understand the language used in the proceedings”.*

It is submitted that fewer provisions are made for child offenders in respect of interpretation services.

## V PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 AND PROTECTION OF CHILDREN FROM SEXUAL OFFENCES RULES (2020)

The Act makes several provisions for the use of an interpreter. Under Chapter V (Procedure for Reporting Cases), section 19(3) encourages simple language to be used, and section 19(4) follows with provisions for a translator or interpreter for a child who fails to understand as a result of language barriers. Section 26 (2) makes provision for an interpreter to be used by a magistrate or police officer when taking a child’s statement. Section 38(1) refers to the use of an interpreter by the court when recording evidence. It is submitted it is helpful that the act refers to both the police and magistrate indicating that at all levels of the justice system a child should be afforded language rights.

The publication of the Protection of Children from Sexual Offences Rules, 2012 followed publication of the Act. The Rules were later repealed by the Protection of Children from Sexual Offences Rules, 2020. Section 5 of the rules (interpreters, translators, special educators, experts and support persons) provides 12 important rules in respect to the services of an interpreter.

First, section 5(2) calls upon each district to have a register with details of interpreters which must be made available to police and magistrates. Section 5(3), (4) and (5) speaks to the qualifications of interpreters. The rules highlight formal education or training of an interpreter. However, they also make provision for an interpreter to have knowledge or familiarity of the child’s and states language. Section 5(8) gives direction on the fees payable to the interpreter.

Section 5(9) highlights the provision that the court can grant the child power to state the preference of gender of the interpreter. and there can be more than one person available to assist with communication barriers. It is submitted that this clause of the provisions can be a great advantage in limiting secondary victimisation of children.

Rule 5(10) speaks to the ethics of an interpreter, calling on him/her to be unbiased, impartial and accurate. Section 5(11) refers to special courts for children with disabilities. It encourages the court to ascertain the language the child speaks and calls for the interpreter not to become involved in a conflict of interest. Section 5(12) calls upon the interpreter to maintain the rules of confidentiality. It is submitted that the act also highlights the need to uphold ethics and values when working with children, who are often seen as inferior and are at times deprived of adequate services in the criminal justice process. Songca (2019) asserts that children as witnesses, offenders or complainants experience challenges with the criminal justice system and often do not enjoy their rights in their entirety.

The provisions of the Protection of Children from Sexual Offences Act and its rules provide for more interpretation services to children when compared to South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SOMA). India's provisions are far more comprehensive. South Africa's SOMA does not make reference to an interpreter or language barriers. The Regulations relating to Sexual Offences Courts and the Uniform Rules for Courts (2009) do, however, unpack details on the services of an interpreter, as explained in chapter 3. However, there is no reference to children in particular, whereas India has a dedicated Act and Rules for children who are victims of sexual offences. It is submitted that it is extremely beneficial that India's legislation makes provision for the child to state a preference with regard to the gender of the interpreter. This provision can provide a child with reassurance and confidence as in many instances of sexual abuse a child is not comfortable with a person that is of the same gender of the perpetrator. This in turn can strengthen the child's faith in the justice system. India also provides more detail on the educational training of the interpreter compared to South Africa. This can help enhance interpretation services to children.

It is reported that there has been a large number of child abuse cases piling up at court as a result of language barriers. The Department for Women and Children received positive responses from states as a result of the provision of interpreters or translators who have assisted in speeding up the cases involving children with language barriers (Pandey, 2013).

It is submitted that this indicates that interpreters play a pivotal role in ensuring the execution of justice. Therefore, more efforts need to be implemented in order for interpretation services to be mandatory in all legislation and court actions relating to children.

## VI GOVERNMENT OF INDIA MINISTRY OF WOMEN AND CHILD DEVELOPMENT NOTIFICATION

The Ministry of Women and Child Development has published rules governed by the Protection of Children from Sexual Offences Act, 2012. These rules are called the Protection of Children from Sexual Offences Rules, 2012. Embedded in the rules are provisions for interpreters.

The rules highlight the qualifications of the interpreter, stating that the interpreter must be acquainted with the child's language and the language used by the state. However, although it does call for sign language interpreters to have recognised experience from a university, it does not require an interpreter to have any higher education training or specialised language skills. It is submitted that this can be detrimental to children and the outcome of cases as the interpreter is not skilled and is open to errors. Provision is made for the state to ensure that the interpreter is paid, and the rules also highlight that any preference by the child such as gender of the interpreter be considered. The provisions call for the interpreter to be unbiased and impartial and to maintain confidentiality. It is submitted that this notification is beneficial as it highlights a lack of references available to the court interpreters in the field of children's legislation in India. It is submitted that having such a ministry is essential as they can focus on the rights of children and ensure that children are protected from injustices. South Africa could benefit from such a ministry, given the high incidence of abuse perpetrated against children.

## VII CHILDREN'S COMMISSION FOR PROTECTION OF CHILDREN'S RIGHTS

Dinesh (2014:130) states that the "National Commission for Protection of Child Rights was set up in March 2007 by the Commission for Protection of Child Rights Act, 2005". Dinesh (2014) states that the role of the commission is to guarantee that policies, laws, programmes and related matters adhere to a children's rights perspective that the Constitution of India maintains and the United Nations Convention on the Rights of the Child (UNCRC). The functions of the Commission are outlined in the Act, which seeks to uphold the rights of children and takes a rights-based approach. It is submitted that although the commission does not directly address the use of interpreters for children, it is a platform that can be used to raise issues on the rights of children and access to court interpretation.

## VIII INTERNATIONAL LAW

### (a) *Declaration on the Rights of the Child, 1959*

The preamble to the Declaration describes rights and freedoms of which government must observe by legislative and other measures. It declares that children are entitled to special protection and this must be upheld by the best interests of the child (Bajpai, 2017). There is a discrimination clause also embedded in the declaration as well as appropriate legal protection to be provided to children. It is submitted that the clauses do not directly address interpretation, but can be used to fulfil the special need for language interpretation of children in India.

### (b) *United Nations Convention on the Rights of the Child*

India ratified the UNCRC in 1992. India having such a large population of children, it was imperative to ratify the Convention to accommodate the rights of children in India. The Convention states that all rights must be extended to children without discrimination and that children need special consideration. The Convention calls on governments to take measures to protect children. The 2011 Third and Fourth Combined Periodic Report on the Convention on the Rights of the Child reviews the country's implementation of the CRC.

Paragraph 144 states that

*"[t]he reporting period has witnessed adoption of some path-breaking legislations directly affecting children, as well as amendments in existing legislations to remove shortcomings. The challenge now is to ensure adequate training and capacity-building of personnel working with children at all levels, so that their effective implementation provides the necessary protection to children".*

The report further highlights that the country is making efforts to secure the safety and protection of children. The country's 11th Five Year Plan promotes the best interests of the child through schemes and programmes and the Ministry of Women and Child Development is continuously developing child friendly approaches, new policies, legislation and programmes. India's Constitution shows the incorporation of international law in article 51(c), which states:

*"The State shall endeavour to ...*

*(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another".*

India's Constitution highlights further recognition of international treaties in section 253, which states:

*"Legislation for giving effect to international agreements*

*Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."*

The inclusion of the above-mentioned provisions indicates India's commitment to upholding the principles of the CRC. It is also evident that the CRC is used in courts, as seen in *Bachpan Bachao Andolan vs Union of India and Others* 2011 (5) SCC 1.

## IX CONCLUSION

It is submitted that India has taken steps to enhance the protection of children's rights. The provisions discussed above in the Protection of Children from Sexual Offences Act and its Rules highlight that much recognition is given by India to a child's language needs in this regard. India must, however, make attempts to ensure that interpretation services for children are contained within in all legislation and not only in legislation relating to children who are victims of sexual violence. South Africa can adopt some practices from India that could benefit the services of court interpretation for children, such as a ministry dedicated to children, national commissions for the protection of children's rights, and legislation dedicated to sexual offences of children which considers a child's language needs.

## **CHAPTER SIX**

### ***FINDINGS AND RECOMMENDATIONS***

#### **I INTRODUCTION**

This chapter will provide a summary of the findings from the preceding chapters. The chapter will conclude with recommendations.

This study investigated the regulation of specialised court interpretation for children in the Children's Courts of South Africa in light of children's rights to access to justice, participation, language and best interests.

#### **II SUMMARY OF THE STUDY'S CONCLUSIONS AND MAIN FINDINGS**

##### ***(a) Breakdown of Chapters***

##### ***(i) Chapter One***

Chapter one outlined the research problem and provided a rationale, theoretical framework and the methodology for the study. The methodology used is a sociolegal approach and a children's rights approach in respect of the framework. The chapter stated the research questions and unpacked the structure of the dissertation.

The main research question addressed whether or not the regulation of specialised court interpretation for children in the Children's Courts of South Africa is in line generally with children's rights to access to justice, participation and best interests.

The study aimed to look at uncovering the answers to the below-mentioned questions:

1. What are the main components of the specialised nature of court interpretation for children in civil matters, particularly in the children's courts, evident from literature?
2. How does international, regional and domestic law express itself on the obligations on the state for provision of specialised court interpretation for children?
3. What measures are put in place in current regulation of court interpretation in South Africa to combat secondary victimisation of children during court interpretation and to promote children's rights to access to justice, participation and best interests?

4. What best practices from foreign jurisdictions on specialised court interpretation for children can be implemented in the South African context?

(ii) *Chapter Two*

**Chapter two** unpacked the literature reviewed. The following themes arising from the literature reviewed were discussed:

- The impact of inaccurate or incomplete court interpretation on children's access to justice.
- Inadequate training of court interpreters for children.
- The lack of norms and standards to guide court interpreters with children.
- The undefined role of court interpreters.
- Measures to combat secondary victimisation of children during court interpretation.

The chapter highlighted the shortfalls of interpretation services to children. The gaps found after the literature was reviewed have resulted in secondary victimisation of children, thereby impeding the implementation of children's rights with regard to non-discrimination, access to justice, participation, language and best interests.

(iii) *Chapter Three*

**Chapter three** discussed the domestic law on court interpretation for children. Several instruments were discussed and analysed in this chapter. They include the following.

The following instruments were discussed in respect of interpretation for children: the *Constitution of the Republic of South Africa, 1996* ('the Constitution'), *Children's Act 38 of 2005*, *General Regulations regarding Children (2010)*, *Regulations relating to Children's Courts and International Child Abduction (2010) in terms of the Children's Act 38 of 2005*, *Memorandum on Objects of the Draft Children's Court Rules (2018)*, *The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*, *The Child Justice Act 75 of 2008* and its regulations, *Uniform Rules for Courts (2009)* and the *Amendment of Rules Regulating the Conduct of Court Proceedings of the Magistrate's Court of South Africa (2020)*, *Language Policy of the Department of Justice and Constitutional Development (2019)*. The PanSALB, the Communities Commission and the South African Human Rights Commission were also discussed briefly. Conclusions were made after analysing the relevant instruments.



(iv) *Chapter Four*

**Chapter four** discussed the international and regional law provisions of the United Nations Convention on the Rights of the Child (CRC) and the African Union's African Charter on the Rights and Welfare of the Child (ACRWC) and the South African state's obligations thereto. Factors such as child participation, non-discrimination of language and the best interests of the child are discussed in respect of how they promote language rights and the best interests of the child.

(v) *Chapter Five*

**Chapter five** discussed practices from India for court interpretation services for children. South Africa and India have a few features in common that warranted comparison. The following legislation are discussed in the chapter: the Constitution of India of 26 January 1950; the Official Languages Act 19 of 1963; the Protection of Children from Sexual Offences Act, 2012; the Protection of Children from Sexual Offences Rules, 2020; the Government of India Ministry of Women and Child Development notification; Children's Commissions for Protection of Children's Rights and Declaration on the Rights of the Child, 1959; and the Convention on the Rights of the Child. By analysing the above-mentioned legislation of India, the researcher highlighted the strengths of India's legislation in respect of protection of children and how their legislations promote language rights of which South Africa can borrow from.

### III MAIN FINDINGS

In chapter two (the literature review) by exploring the mentioned themes it was found that there are many shortfalls in respect of court interpretation services rendered to children and that there is a need for interpreters specifically skilled to work with children in court proceedings. The literature reviewed shows that training programmes for court interpreters are inadequate and there is no specialised training that focuses on children's rights and needs. The lack of clear norms and standards and a specified role for court interpreters has hindered the quality of services rendered. There is no legislation that makes provision for the role of a court interpreter. It has been found that there is a degree of inaccuracy when interpreting in court and this can have an impact on the child, his or her family and the outcome of the case.

These factors have a correlative effect, for example, a lack of training in child-friendly techniques can inflict secondary victimisation on children when working with them. The chapter highlighted children are exposed to secondary victimisation by the justice system and the measures to combat secondary victimisation at court are not sufficient in South Africa. This is mainly because court interpretation services for children are not regulated.

Chapter three found that the three bodies that are aimed at achieving this are PanSALB, the Communities Commission and the South African Human Rights Commission (SAHRC). However, it was observed that these bodies have not adequately addressed court interpretation for children in South Africa.

In addition, it was noted that courts have leaned towards English as a language of record, which can disadvantage non-English-speaking people. It was submitted that other rights such as the right to equality and dignity help to facilitate access to justice and participation, which preserve the best interests of the child. Contained in the Constitution is the right to access to courts and to a fair trial. The right to access to courts facilitates access to justice; therefore, a child being provided with an adequate court interpreter will aid a fair trial. Section 35 of the Constitution provides for the right of an accused and detained person to be provided with an interpreter if he/she does not understand the language spoken. There is no provision for an interpreter for civil proceedings. However, section 28(1)(h) highlights the entitlement for a child to a legal practitioner.

The *Children's Act 38 of 2005* and its regulations were found to make several provisions for children. However, it does not emphasise language rights. Section 52 refers to a court interpreter; however, it does not outline who is regarded as a suitably qualified court interpreter or what qualifications an interpreter should possess. The Act refers to child participation and access to courts but does not clarify how these rights can be fulfilled. It was deduced that participation in court entails having access to a suitable court interpreter if there are language barriers presented by a child. Therefore, these provisions cannot be implemented adequately if an interpreter is not available to a child.

The best interests of the child are the focus of the Act; however, it was found that when a child is not provided with adequate court interpenetration services, it results in not upholding the best interests standard. The general regulations do not indicate what provisions will be made for children with language barriers and the regulations relating specifically to children's courts and international child abduction make no mention of

language rights for children. The study also discovered that the draft Children's Court rules have not been passed although they have been pending since 2018. This indicates a lack of commitment from the government in upholding the rights of children.

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* does not make mention of language needs of victims, nor does it include the use of an interpreter in instances where language poses a barrier. The regulations do, however, refer to the use of interpreters but with no reference to children's specific needs.

The *Child Justice Act 75 of 2008* and its regulations make provision for an interpreter when a child is faced with language barriers. However, there are no specifications for specialised skills that an interpreter should possess when working with children in sensitive matters.

In the *Uniform Rules for Courts (2009)* and the *Amendment of Rules Regulating the Conduct of Court Proceedings of the Magistrate's Court of South Africa (2020)*, the substitution for rule 68 now includes the intermediary with regard to taking the interpreter oath, which can be beneficial as intermediaries are often called upon to interpret for children.

With regards to the *South African Language Practitioners Council Act 8 of 2014*, as highlighted in chapter two, this Act seems to have failed us as it speaks of a council to regulate language practice in South Africa. However, it has been established that there is no record of such a council. In addition, the date of commencement of the Act has not yet been gazetted; nor have the regulations. Lastly, the Act makes no reference to children.

It was established that the *Language Policy of the Department of Justice and Constitutional Development (2019)* is not in line with the *Use of Official Languages Act 12 of 2012*. This is because South Africa's Chief Justice has declared English to be the language of record in the court, as highlighted by Kaschula, Docrat and De Vries (2020). It is submitted that this places non-English speaking persons who come into contact with the department at a disadvantage.

Chapter four found both treaties i.e., United Nations' Convention on the Rights of the Child (CRC) and the African Union's African Charter on the Rights and Welfare of the Child (ACRWC) make provision for participation, non-discrimination of language and the best interests of the child. However, there is a broad reference to these factors. In addition, the treaties do not discuss civil proceedings, which would have paved the way for more focus

to be placed on the means by which rights are fulfilled, specifically specialised court interpretation services for children. South Africa has ratified both treaties and have included the Bill of Rights in the Constitution, which makes provision for the consideration of international law. It is evident from case law that South Africa implements international law. The CRC and ACRWC both make provision for child participation. However, it has been observed in this chapter that the Constitution omits participation rights, which can be detrimental to children because participation is the foundation for interpretation services. Both the ACRWC and the Constitution elevate the best interests of the child principle as compared to the CRC.

Chapter five concluded that both India and South Africa experience discrimination and poverty. South Africa and India have both been colonised by the British; hence they both lean towards English as the primary language. The Constitution of India makes many provisions for language rights; however, it uses English and Hindi as primary languages. This is evident in the Use of Official Languages Act of India as well.

It was submitted there are several pieces of legislation in India that protect the rights of children but in particular the Protection of Children from Sexual Offences Act of 2012 and its rules have addressed interpretation services of children comprehensively. India's strength is displayed by the formulation of this dedicated act and its rules to children of sexual violence. It was submitted that although India has made progress in respect to developing children rights it is not satisfactory in fulfilling language rights and court interpretation services to children entirely as it is observed that there is a lack of interpretation services across other legislation relating to children, for example, the Juvenile Justice (Care and Protection of Children) Act, 2015.

South Africa could, however, draw from India's Ministry dedicated to children and the Children's Commissions for the protection of children's rights as it was established that both bodies are devoted to improving services for children and advocate for child protection rights. Perhaps South Africa's SAHRC committee, which is not fulfilling its functions, as stated in chapter three, can use its investigative powers to intervene in language rights violations of children and the delays of promulgation of legislation. The SAHRC should play a more distinctive role in child protection similar to that of India's Children's Commissions. Lastly, South Africa can draw from India's dedicated Protection of Children from Sexual Offences Act and its rules

#### IV RECOMMENDATIONS

This section of the conclusion provides possible recommendations that can pave the way to regulate specialised court interpretation services for children in South Africa.

##### *(a) Legal Recommendations*

##### *(i) Recommendation 1: Constitution, 1996*

1. It is recommended that the Constitution should include a specific child participation provision in the Bill of Rights. The Constitution has failed to include participation provisions under section 28 yet South Africa is obliged to align national legislation to the provisions of the CRC since it has been ratified, as supported by Reyneke (2013). The National Child Participation Framework (2018) highlights that it is through participation that other rights are realised. Participation also offers better protection to children as they are given opportunities to engage and voice their views.

##### *(ii) Recommendation 2: South African Language Practitioners Council Act and Regulations, 2014*

1. It is recommended that the South African Language Practitioners Council Act and regulations, 2014 need to be brought into operation without further delay.
2. The council to which the Act alludes needs to be established to regulate the practice of interpreters in South Africa.
3. The code of conduct embedded in the Act's regulations should provide guidelines for working with children. The Act's regulations should provide norms and standards and a clearly defined role for a court interpreter.
4. The Act should also address specialised training in its regulations for interpreters working with children which will promote child-friendly translation, thereby limiting secondary victimisation.

##### *(iii) Recommendation 3: Children's Act 38 of 2005*

1. The Children's Act should be more detailed with regard to language provisions for children. The Act should provide measures to address the language barriers faced by children in both criminal and civil matters, as well as in and out of court.
2. Section 52(2)(b) makes provision for an interpreter with no details on the qualifications interpreters should possess. The regulations need to outline what constitutes a suitably qualified or trained interpreter.

3. The Children's Court Rules need to be passed. The mandatory provision of services of an interpreter to a child when required should be included in the rules.

(iv) *Recommendation 4: Child Justice Act and SORMA*

1. The Child Justice Act and SORMA need to make provision for specialised court interpretation services for children that can handle sensitive matters. It should therefore make reference to the need for an interpreter to possess skills and techniques relating to applying a child-friendly approach when interpreting.
2. The Communities Commission should promote language rights and specialised court interpretation services for children and ensure that it investigates rights violations, including secondary victimisation perpetuated by the justice system on children as a result of language barriers. The Commission should work in tandem with the South African Human Rights Commission, which should act speedily to protect children's rights where violations occur.

(v) *Recommendation 5: ACRWC and CRC Provisions*

1. The ACRWC and CRC provisions make direct reference to juvenile justice proceedings only. There is a need to include direct references to civil proceedings for children in the treaties. This omission could be addressed by guidance being provided by treaty monitoring bodies such as the African Committee of Experts on the Rights and Welfare of the Child and the Committee on the Rights of the Child in their general comments. This may result in the realisation of how rights can be fulfilled by emphasis being placed on specialised interpretation services for children.

(b) *General Recommendations*

(i) *Recommendation 1: Legislative and Policy Frameworks*

1. The legislative and policy frameworks need to be coherent in order for children to access their rights. The Departments of Justice and Social Development should review and monitor and evaluate its policies to ensure these align with the Children's Act, Child Justice Act, SORMA and other relevant legislation.

(ii) *Recommendation 2: Practices from India*

1. South Africa can borrow some practices from India in respect of India's dedicated ministry to children and the national commissions for the protection of children's rights. By adopting such bodies there will be much more focus on children's rights.

(iii) *Recommendation 3: Adoption and Promotion of Child-friendly Measures*

1. South Africa needs to put more effort into promoting child-friendly measures that should ensure that all persons working with children are adequately trained in how to employ child-friendly techniques when working with children. The National Prosecuting Authority (NPA) currently runs the Ke Bona Lesedi Court Preparation programme which is engaged in preparing witnesses for court in sexual offences matters, mainly with regard to children. The NPA should develop a specialised training programme for interpreters and all other judicial staff that focuses on teaching child-friendly techniques. Sign language interpreters should also receive the same training.

## V CONCLUSION

This study sought to determine whether or not the regulation of specialised court interpretation for children in the Children's Courts of South Africa is in line with children's rights to access to justice, participation and best interests.

It is concluded that court interpretation is not regulated in South Africa and this applies to children as well. Therefore, the rights of children in respect of access to justice, participation and best interests are not adequately implemented.

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YAKWAZULU-NATALI

Miss Joyclyn Jess Govender (207504875)  
School Of Law  
Howard College

Dear Miss Joyclyn Jess Govender,

**Protocol reference number:** 00007750

**Project title:** The regulation of specialised court interpretation for children in the Childrens Courts of South Africa in light of childrens rights to access to justice, participation, language and best interests.

### Exemption from Ethics Review

In response to your application received on 03/08/2020, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

#### PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Simphiwe Phungula  
Research and Higher Degrees Committee  
School of Law

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