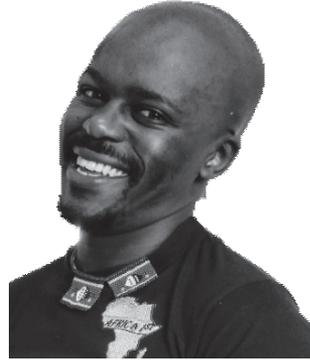


BREAKING THE LANGUAGE BARRIER IN LEGAL EDUCATION: A METHOD FOR AFRICANISING LEGAL EDUCATION

by Thokozani Dladla*



Abstract

Section 6 of the Constitution of the Republic of South Africa, 1996 recognises eleven official languages of the Republic and further requires the State to take practical steps to advance the use of African languages. The Statistics South Africa 2017/18 report shows that most South Africans' first language are African languages. Despite this reality and the constitutional imperatives, the South African Bachelor of Laws (LLB) curriculum does not prescribe any African language as a compulsory course, and very few sources of law are in an African language. Some law schools do offer some African languages as an elective. However, it is submitted that this is not sufficient. Experience has shown that the inability to articulate oneself in English can be a barrier to completing the LLB degree in regulation-time and admission to legal practice. Furthermore, it is submitted that the Chief Justice 2017 Directive, in which Chief Justice Mogoeng declared English as the only language of record in South African courts, does not address the language problems experienced by court staff. Instead it simply perpetuates the Eurocentric legal system. This is because it counters the advancement and use of African languages envisaged by the Constitution.

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This article investigates how the failure to advance multilingualism in the current LLB curriculum can disadvantage law students going to practice. It is proposed that law schools begin to address this issue by introducing two innovations. First, it is suggested that law schools make at least one African language a compulsory course. For English first language speakers in particular, this arrangement will strengthen their understanding of the sociological context in which the law operates. Second, it is proposed that each law school should choose an African language that is predominantly spoken in their geographical area and partner with schools of languages to translate sources of law. For African first language speakers in particular, this will assist them in understanding legal concepts better. Translations of legal texts may also allow for law schools to teach the law in the local African language.

Key words: Decolonisation of law, legal theory, African language, Legal education; Africanisation of legal education.

1 Introduction

Section 6(1) of the Constitution recognises eleven official languages,¹ a move from the previous discriminatory regime of the recognition of only English and Afrikaans as official languages.² Section 6(2) of the Constitution, in turn, imposes positive obligations on the state to take practical and positive measures to elevate the status and advance the use of historically diminished languages.³ This article argues that the state has failed to take the adequate measures envisaged in section 6(2) in the context of legal education. The argument is based on the fact that there has not been any inclusion of indigenous languages as compulsory courses as part of the transformational measures of legal education, particularly in the Bachelor of Laws (LLB) curriculum offered by tertiary education institutions allowed to offer the qualification.⁴

The relationship between law and language in South Africa is pivotal in ensuring that constitutional rights, obligations, values and principles are implemented across society through the assistance of the legal system. In this article, it is proposed that the law schools should begin to address the lack of transformation in the education system by introducing two innovations. Firstly, that law schools should make at least one African language a compulsory course.

1 The Constitution of the Republic of South Africa, 1996, (thereafter 'the Constitution').

2 The Constitution (n 1 above) sec 89(1).

3 This subsection provides: 'Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.'

4 Higher Education Act 101 of 1997; National Qualifications Framework Act 67 of 2008. This absence is also noticeable in the Council on Higher Education 'Higher education qualifications sub framework: Qualification standard for bachelor of laws (LLB)' (May 2015).

Secondly, it is argued that each law school should choose an African language that is predominantly spoken in their geographical area and partner with schools of languages to translate sources of law into that African language. In doing this, the goal is to equip law schools with the necessary tools to be able to teach law in an African language. The details of these recommendations are discussed later in this article.

2 The language versus law tension

The South Africa Act recognised English and Dutch as the official languages of the country.⁵ The definition of Dutch was extended to include Afrikaans in the Official Languages of the Union Act.⁶ In 1927, the recognition of Dutch fell away, and Afrikaans and English were recognised as the only official languages. This position remained in place throughout the apartheid era.⁷ The English and Afrikaans language requirements were legislated for attorneys and advocates in the Attorneys Act and the Admission of Advocates Act respectively.⁸ These statutes, in conforming to the official languages at the time of enactment, prescribed that English and Afrikaans, in addition to Latin at university level were requirements for admission to the Side Bar and Bar (as they were referred to at the time).⁹

In the Admission of Advocates Amendment Act of 1994,¹⁰ the Latin requirement was removed, however, the English and Afrikaans requirements remained unchanged. At the onset, cognisance must be taken of the dates when the legislation were enacted, namely; 1979 and 1994. Both dates are of significance. In 1970s the apartheid parliament put its stamp on the regulation of the legal profession and in doing so endorsed the official languages at the time, namely English and Afrikaans, as those in which legal matters had to be conducted.¹¹ And 1994 is the year in which the Interim Constitution became operational and democracy was ushered in.

It is argued that the legislature missed a golden opportunity in 1994 when it failed to include an African language-requirement in the Amendment Act of 1994 based on section 3 of the Interim Constitution.¹² If, at that time, the legislature had amended the

5 The South Africa Act of 1909 sec 137.

6 Act 8 of 1925.

7 Constitution Act 110 of 1983 sec 89(1).

8 Attorneys Act 53 of 1979; Advocates Act 74 of 1979.

9 Sec 15(1)(f) required applicants for admission to the side-bar to have passed examinations in 'the Afrikaans and English language which the joint matriculation board referred to in section 15 of the Universities Act, 1955 (Act No 61 of 1955), certified to be of equivalent or superior standard to one or other of the examinations in the said languages conducted at the matriculation examination ...'.

10 Act 55 of 1994.

11 G van Niekerk 'Multilingualism in South African courts: The legislative regulation of language in the Cape during the nineteenth century' (2015) 21 *Fundamina* 372.

Advocates Admission Act to require prospective advocates to be competent in at least one African language in order to be admitted that requirement could be justified by section 3(2) of the Interim Constitution which requires the state to elevate the status of historically diminished languages – indigenous languages.

The language requirements for a person to be admitted to the legal profession have not changed despite the advent of democracy. By virtue of sections 2 to 24 which deal with the qualifications, admissions and removal from the roll, It is apparent that being competent at least in one African language is not a requirement for admission to the roll.¹³ One reasonably expected that the Legal Practice Act,¹⁴ which has repealed both the Attorneys' Act and the Admission of Advocates Act in part to include a substantive language requirement for aspirant legal practitioners;¹⁵ for example, a requirement that prospective legal practitioners be competent in at least one African language in order to be admitted.¹⁶ The Act includes no such provision.

However, without being too optimistic, it can be envisioned that such a move can contribute to the transformation of legal education. In one way or another, the LLB curriculum should be changed to include African languages as part of its curriculum, with a goal of providing students with an option as to whether they would prefer to acquire LLB curriculum in an African language. It can be argued that the LLB curriculum as it is, perpetuates a form of unfair discrimination based on a prohibited ground in section 9(3) of the Constitution, namely; language.¹⁷ LLB students who learn best in their African first language could argue that they are disadvantaged when forced to learn in a second or third language and that it is reasonable to expect education in their home language. While English is an official language, it is not the only official language or the most important official language.¹⁸

12 This is now section 6 of the Constitution of the Republic of South Africa, 1996.

13 Attorneys Amendment Act of 1993, ss 2 to 24.

14 Act 28 of 2014.

15 Sec 24 of the Act that determines the requirements for admission of legal practitioners does not include any language requirements. Significantly, the Legal Practice Council published a notice on 4 March 2019 determining that admissions, notary and conveyancing examinations would only be written in English as from 2020, ending the longstanding practice of offering the examinations in English and Afrikaans. However, this notice was withdrawn on 14 January 2020, restoring the previous position. See <https://lpc.org.za/urgent-notice-examination-language/> and <https://lpc.org.za/withdrawal-of-notice-on-examination-language/> (accessed 21 February 2020).

16 Legal Practice Act 28 of 2014, sec 3(a).

17 The Constitution (n 1 above).

18 Afrikaans home language students have the opportunity to study in their mother tongue at some universities. Speakers of African languages do not have the same opportunity to study in their mother tongue.

Therefore, it makes sense to argue that if students find it to be in their best interest to be taught in one of the official African languages, and it is reasonably practicable to do so,¹⁹ a decision by a university to deny students the opportunity to learn in that language contradicts the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).²⁰ The above reasoning was found to be correct in *University of the Free State (UFS) v Afriforum*.²¹ The legal dispute in this case concerned a decision by the University of the Free State to adopt a new language policy, which replaced Afrikaans and English as parallel mediums of instruction with English as the primary medium. *Afriforum* argued that the new language policy, which prefers English over Afrikaans, will erode the position of Afrikaans as a language of instruction and its constitutionally protected status as an official language.²²

The respondent argued further that the UFS policy violates section 29(2) of the Constitution, which affords the right to education in a language of choice where this is reasonably practicable. The respondent, using the *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo*,²³ argued that UFS did not use the appropriate assessment to determine whether the attainment of the right to receive an education in a language of choice was reasonably practicable.²⁴ Despite the fact that the court did not rule in *Afriforum*'s favour the court made some assertions worth indicating here. One is that the legal standard to determine the language of teaching and learning in the context of section 29(2) of the Constitution is reasonableness, which of necessity involves a consideration of constitutional norms, including equity, redress, desegregation and non-racialism.²⁵ In a nutshell, the court held that what is required of a decision-maker, when there is a change in circumstances, is to demonstrate that it has good reason to change the policy. In other words, it must act rationally and not arbitrarily within the context of the particular institution.

It is posited that the some of the arguments used and reasoning advanced by *Afriforum* can be used to successfully argue that the LLB curriculum as it is, unfairly discriminates and undermines the Constitution, particularly sections 6(2), 9(3) and 29(2) of the Constitution. In the same breath, it is noteworthy that the argument

19 The Constitution (n 1 above) sec 29(2).

20 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereafter 'PEPUDA') sec 1.

21 *AfriForum and another v University of the Free State* 2017 48 SA (CC) (hereafter the 'AfriForum case').

22 *Afriforum* case (n 21 above) para 2.

23 *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) (hereafter 'Hoërskool case').

24 *Hoërskool* case (n 23 above) para 52.

25 *Afriforum* case (n 21 above) para 26.

here is not that English should be done away with as a language of teaching and learning in South African law schools. Rather, the contention is about the need to elevate the status of the African languages to assume their rightful place alongside English in the education sector.

3 Courts proceedings as a challenge to African languages

16 April 2017 is arguably the darkest day in the South African legal system since the dawn of democracy. On this day, Chief Justice (CJ) Mogoeng Mogoeng announced that English would be the *only* language of record with immediate effect, replacing the previous dispensation of English and Afrikaans as equal languages of record. This decision was announced shortly after the Heads of Courts meeting, comprising of all Judge Presidents of all the divisions of the High Courts. The immediate question that arises is: what is the legal status of this directive? According to section 8(3) of the Superior Courts Act:²⁶

- (3) The Chief Justice may, subject to subsection (5), issue written protocols or directives, or give guidance or advice, to judicial officers –
 - (a) In respect of norms and standards for the performance of the judicial functions as contemplated in subsection (6); and
 - (b) regarding any matter affecting the dignity, accessibility, effectiveness, efficiency or functioning of the courts.

Therefore, from the provision quoted above, one can conclude that the language directive the CJ issued is binding on the members of the judiciary, and that failure to abide by the CJ's directive amounts to a breach of the protocol.

Docrat and others argue that the removal of Afrikaans and the moving away from a *de facto* bilingual language of record to a monolingual position weakens the argument for a linguistically inclusive legal system.²⁷ According to Docrat and others it is questionable how the directive can be justified in relation to section 6 of the Constitution. Their argument goes further in asserting that the CJ's decision results in unfair discrimination on grounds of language in terms of section 9(3) read with 9(5) of the Constitution as well as the definition of unfair discrimination as envisaged in PEPUDA.

In an attempt to find a positive side to the CJ's decision, one could argue that it was intended to send a message to the legislature to

²⁶ Act 10 of 2013.

²⁷ Z Docrat *et al* 'The exclusion of South African sign language speakers in the criminal justice system: a case-based Approach' in MK Ralarala *et al* (eds) *Interdisciplinary themes and perspectives in African language research in the 21st Century* (2017) 1.

amend section 174(2) of the Constitution to include historically diminished languages' speakers as one of the transformative measures to diversify the judiciary.²⁸ If this was the case one would reasonably defend it on the basis that it constitutes a radical judicial decision. However, it does not fulfil this purpose, even if the argument is that the decision was based on the idea that Afrikaans is an 'apartheid' language, and as such, needed to be removed. This justification is fundamentally flawed, because if that was the reason, it necessarily follows that English language should be equally removed for the fact that it is a colonial language. Lastly, it would also be flawed to attempt to justify the CJ's decision on the basis that he believed that Afrikaans was not a widely understood language, and therefore limiting access to courts. Such a reasoning would not stand because the latest Statistics South Africa census shows that Afrikaans is one of the three most spoken first-languages in South Africa alongside isiXhosa and isiZulu.²⁹ This is illustrated diagrammatically below.

Graph: National language statistics (Census, 2011)

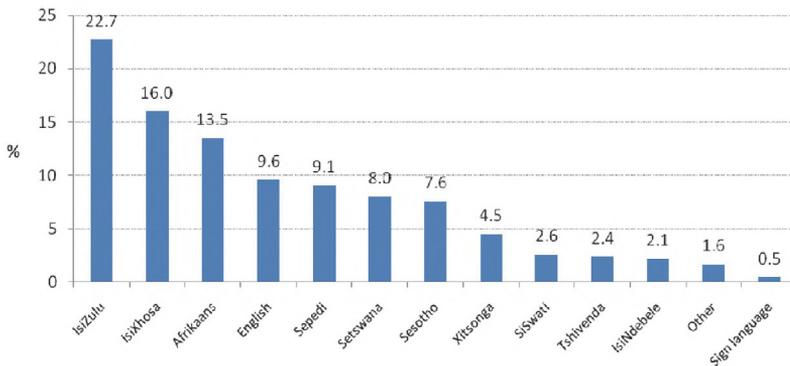


Table: National language demographics of South Africa (Census, 2011)

Language	EC	FS	GP	KZN	LP	MP	NC	NW	WC
Afrikaans	10.6	12.7	12.4	1.6	2.6	7.2	53.8	9.0	49.7
English	5.6	2.9	13.3	13.2	1.5	3.1	3.4	3.5	20.2
IsiNdebele	0.2	0.4	3.2	1.1	2.0	10.1	0.5	1.3	0.3

28 The Constitution (n 1 above) sec 174.

29 Statistics South Africa (2011) Census <http://www.statssa.gov.za/?page%20id=3836> (accessed on 30 June 2019). As such maintaining Afrikaans as one of the languages of record makes sense, especially when one considers the fact that the 2017 Revised Language Policy for Higher Education recognises Afrikaans as one of the indigenous South African languages.

IsiXhosa	78.8	7.5	6.6	3.4	0.4	1.2	5.3	5.5	24.7
IsiZulu	0.5	4.4	19.8	77.8	1.2	24.1	0.8	2.5	0.4
Sepedi	0.2	0.3	10.6	0.2	52.9	9.3	0.2	2.4	0.1
Sesotho	2.5	64.2	11.6	0.8	1.5	3.5	1.3	5.8	1.1
Setswana	0.2	5.2	9.1	0.5	2.0	1.8	33.1	63.4	0.4
Sign Language	0.7	1.2	0.4	0.5	0.2	0.2	0.3	0.4	0.4
SiSwati	0.0	0.1	1.1	0.1	0.5	27.7	0.1	0.3	0.1
Tshivenda	0.1	0.1	2.3	0.0	16.7	0.3	0.1	0.5	0.1
Xitsonga	0.0	0.3	6.6	0.1	17.0	10.4	0.1	3.7	0.2
Other	0.6	0.6	3.1	0.8	1.6	1.0	1.1	1.8	2.2

Graph 1 represents the national percentage of speakers for each official language. It is evident from these percentages that speakers of African official languages are the majority, whereas only 9.6 percent of the population speaks English as their mother tongue and 13.5 percent speak Afrikaans as their mother tongue.³⁰ It is also important to note the provincial language demographics in determining whether there is one dominant African language in each province and contrast those percentages against the number of English speakers in the various provinces. The significance of the statistics in relation to this article is to substantiate a critique levelled at the use of English as the language of record in all courts. Simply put, how can the language of record in all courts be English, when there is a smaller percentage of English mother tongue speakers in the Republic? The Chief Justice's reasoning for making the directive is that it is for practicable reasons, given that all the judges understand English. The weaknesses of this justification have been illustrated above.

In a press release the CJ reaffirmed the judiciary's decision to remove Afrikaans as a language of record.³¹ It was stated that this decision was because of practical reasons, given that all the judges understand English. This reasoning is even more flawed than the hypothetical arguments canvassed above. By removing Afrikaans, the Chief Justice appears to have undermined the Constitution by ignoring section 6(2) of the Constitution. In doing so, he has limited the language of record in courts to English which has always been recognised, used and developed prior, during and post the apartheid era.

30 Statistics South Africa (2011) Census <http://www.statssa.gov.za/?page%20id=3836> (accessed on 30 June 2019).

31 J Chabalala 'English will be only language of record in courts – Mogoeng' (2017) *News24* <https://www.news24.com/SouthAfrica/News/english-will-be-only-language-of-record-in-courts-mogoeng-20170929> (accessed 29 September 2017).

It is clear that English was the preferred language of the liberation's leadership both during and after Apartheid. Alexander advances the leadership's basis for choosing English, arguing that English is 'the international language of trade and commerce'.³² Based on that reasoning, Alexander concludes that it makes sense for South Africa to make English the national language of communication and a language of teaching and learning.³³

Arguably, Alexander's reasoning is flawed because if the international-use of language was the standard, then China would not be the second biggest economy in the world while their language of communication, learning and teaching is Mandarin.³⁴ Therefore, the fact that a country chooses to make English their language of instruction does not guarantee economic success.

4 Courts proceedings as a catalyst for African languages

The benefits of equipping law students with African languages can be argued also about South African case law. For instance, in *S v Matomela* where the Court *a quo* heard the entire case in *isiXhosa*.³⁵ On automatic review Tshabalala J, as he was then, enquired from the Magistrate who presided over the trial asking – 'Why was the evidence, conviction and sentence in the Xhosa language? Is this in terms of an instruction from the Department of Justice? Full reasons are required.'³⁶ The response from the Senior Magistrate to the query read as follows:

The fact that the evidence was recorded in Xhosa, is not in terms of an instruction from the Department of Justice, but due to the following reasons:

- (a) On the day that this matter came before the Court, we had a shortage of interpreters. The matter would of necessity have to be postponed because of this. This would have caused the complainant in the matter further hardship.
- (b) When I was approached for assistance, I ascertained that the parties were all Xhosa speaking. The presiding officer is Xhosa and could thus communicate with the parties. I instructed the presiding officer to continue with the case in the language that the accused understood.

32 N Alexander 'Language policy and planning in the new South Africa' (1997) 1 *African Sociological Review* 87.

33 As above.

34 The common language in China is Mandarin, often known as the 'Han language' which is spoken in the People's Republic of China and Taiwan. It is the language favoured by the government, education and media.

35 *S v Matomela* 1998 3 BCLR (CK) (thereafter '*Matomela case*').

36 *Matomela case* (n 35 above) 340.

The recording of the evidence was discussed between us. I advised that the recording be done in Xhosa. The reason for that was that I did not want the presiding officer to act as an interpreter. I believe and submit that this procedure at the time was the best we could do.³⁷

According to the Senior Magistrate's reasons, IsiXhosa is one of the eleven official languages, hence, the judgment that followed complies with section 6(1), (2) & (4) of the Constitution.³⁸ Tshabalala J found the Senior Magistrate's reasons to be fair and reasonable in the circumstances.³⁹ Although he did not expressly make this point in the judgment, it appears that Tshabalala J would support the idea that the Legal Practice Act should be amended so as to require legal professionals to undergo vocation-specific language training,⁴⁰ or deal with the root of the problem by developing the LLB curriculum to include at least one African language as a compulsory course, as a build-up to the ultimate goal of providing an option to students of being taught the LLB programme in an African language.

Hence, it is proposed that each law school in South Africa may select a predominant African language in their geographical area and collaborate with schools of languages to translate sources of law to the selected African language.⁴¹ For English first language speakers, this arrangement will strengthen their understanding of the sociological context in which the law operates. For African first language speakers, this will assist them in understanding legal concepts better. For these propositions to be realised, a buy in from the judiciary, executive and legislature is necessary. Similarly, the Department of Higher Education and Training may have to amend its language policy. The reason is that the 2017 Revised Language Policy for Higher Education is not specific in guiding institutions in that it does not address the linguistic transformation areas such as legal education explicitly.⁴²

The case of *Mthethwa v De Bruyn*,⁴³ also illustrates the benefits of having all legal practitioners and judicial officers competent in an African language that is dominant in the geographical area they serve. The facts of *Mthethwa* can be briefly set out as follows; the accused was a Zulu speaking person who was charged with the theft of a motor vehicle in Vryheid. The accused applied through his attorney for his trial to be conducted in isiZulu, his home language as well as one of

37 *Matomela* case (n 35 above) 341 -342.

38 *Matomela* case (n 35 above) 692.

39 *Matomela* case (n 35 above) 341.

40 *Matomela* case (n 35 above) 342.

41 See Z Docrat 'The role of African languages in the South African legal system' Master of Arts Thesis, Rhodes University, 2017, Mpati (Interview Appendix D).

42 The Department of Higher Education and Training 'The Revised Language Policy for Higher Education (2017)' <http://www.dhet.gov.za/Policy%20and%20Development%20Support/Government%20Notice%20Revised%20Language%20Policy%20for%20Higher%20Education.pdf> (accessed 10 July 2019).

43 *Mthethwa v De Bruyn* 1998 3 BCLR 336 (N) (thereafter '*Mthethwa v De Bruyn*').

the official languages as per section 6(1) of the Constitution.⁴⁴ The application was dismissed, and it was ordered that the case be heard in English and, or Afrikaans, the official languages of record at that time. On review the applicant argued that the failure to be tried in an official language of his choice, isiZulu, was both unlawful and unconstitutional.⁴⁵ The accused argued further that an order be granted for him to be tried in a language of his choice, namely isiZulu.⁴⁶

The court dismissed the application on the basis that it would not be practicable for the matter to be heard in isiZulu.⁴⁷ Docrat comments that the court was of the view that there were no presiding officers who were competent in isiZulu to hear the case in isiZulu.⁴⁸ But such challenges could be overcome if a requirement of the LLB is that students may graduate after being certified fully competent in at least one African language. This would result in a substantial number of graduates who will eventually be admitted to practice and they will be able to conduct cases in African languages. In the long run, the same practitioners will be appointed as members of the judiciary and they will be able to hear cases conducted in African languages. So, there are clear short- and long-term benefits for making African languages compulsory in the LLB curriculum.

The case of *S v Damoyi* was heard by way of an automatic review in terms of section 302(1)(a) of the Criminal Procedure Act.⁴⁹ The facts of the case are like that of *Matomela* discussed above. In this case, the proceedings were recorded in isiXhosa.⁵⁰ The magistrate detailed the reasons why the record appeared in isiXhosa. The magistrate's reasoning draws a bright picture of the linguistically diverse and effective South African legal system. Such a system is to be aspired to as it is one in which cases are heard without undue delay, ensuring a fair trial to the accused and the state, and having prosecutors and magistrates proficient in an African language dominantly used where they practice and preside respectively. This arrangement does not favour any particular linguistic community in South Africa. Instead, it gives effect to section 6 of the Constitution.⁵¹

44 *Mthethwa v De Bruyn* (n 43 above) 336-337.

45 *Mthethwa v De Bruyn* (n 43 above) 337.

46 *Mthethwa v De Bruyn* (n 43 above) 338.

47 *Mthethwa v De Bruyn* (n 43 above) 338.

48 Docrat (n 41 above); in *Mthethwa* case, the judge gave a clear picture of the linguistic make-up of the judiciary in the Natal Division of the High Court. In 1998, when the judgment was rendered, there was only one judge of the twenty-two in the division who could speak isiZulu, the language in which the complainant wanted to have his trial conducted.

49 *S v Damoyi* 2004 (1) SACR 121 (C) (thereafter '*S v Damoyi*'); Criminal Procedure Act 51 of 1977, sec 302(1)(a).

50 *S v Damoyi* (n 49 above) 123.

51 As above.

5 Conclusion

Despite the transition from the Apartheid regime to democracy, the legal framework still perpetuates apartheid era practices to a large extent. This is because of the lack of linguistic transformation in South African legal education. Evidence can be found in the lack of legislative and policy frameworks and the LLB curriculum that exclude African languages. The central recommendation made in this article is not new. In March 2017, Dr Mathole Motshekga raised a similar proposal in the Parliamentary Portfolio Committee on Justice and Correctional Services. He proposed that all LLB students first pass one of the indigenous languages before being awarded a law degree. He succinctly said: 'Law is not just mastery of rules, it has to do with people. If you don't understand society and how it functions, then how do we extend rights to people?'⁵²

Ultimately, what is required is for universities to ensure that only linguistically-competent students graduate with LLB degrees.

52 B Ndenze, 'No law degree without fluency in indigenous language proposed' (2017) *Port Elizabeth: Herald Newspaper, Tiso Blackstar* 4.