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Faculty of Law**

**Minority Language Rights in Namibia: An International Human Rights Perspective**

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**Mini-thesis submitted in partial fulfillment of the requirements for the degree of Master of  
Laws (Legum Magister)**

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## **Declaration**

I declare that *Minority Language Rights in Namibia: An International Human Rights Perspective* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student: Clement Shane Morwe

Signature:.....

Date :.....

## **Dedication**

I dedicate this work to my creator, the Lord and God who created the heavens and the earth and for whose praise and glory all things were made. I thank my God for blessing me with the wisdom, strength and mercy to complete this work.

## **Acknowledgements**

All the praise and glory be to God, who blessed me with the strength and wisdom to complete this work and who guided and protected me throughout my studies.

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battel, but a game of giving and receiving and which can not be played successfully without the rule book of the creator.

## **List of abbreviations**

ACRWC	African Charter on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights
CRC	Convention on the Rights of the Child
Declaration	Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
HC	High Court
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MTBLE	Mother Tongue-based Bi-lingual Education
RBC	Rehoboth Baster Community
SCA	Supreme Court of Appeal
SWAPO	South West African People's Organization
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHRC	United Nations Human Rights Committee
UN	United Nations
WWI	WORLD WAR ONE
WWII	WORLD WAR TWO

## **Key words**

- Namibia
- Linguistic minorities
- Language
- Human rights
- Language policy

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## Chapter 1: Introduction

### 1. Background of the study

Namibia is home to a number of linguistic minorities. According to the 2011 census, the Owambo constitute 49.35 per cent of the population, accounting for almost half of the country's total population.<sup>1</sup> The rest of the linguistic groups include the Bushman (San) (0.95 per cent), Caprivians (4.5 per cent), Herero (8.99 per cent), Kavango (10.42 per cent), Damara>Nama (11.32 per cent), Setswana (0.26 per cent), Afrikaans (8.72 per cent), German (0.54 per cent), English (2.43 per cent), other European languages (0.69 per cent), other African languages (1.74 per cent), Asian languages (0.08 per cent) and other unidentified languages (0.02 per cent).<sup>2</sup> English is, however, the only official language in terms of the Constitution of the Republic of Namibia, 1990 ("Constitution").<sup>3</sup> Yet, it is only spoken by 50 225 people out of Namibia's more than two million population.<sup>4</sup>

As the home to a large number of linguistic communities, Namibia faces the challenge of managing linguistic diversity. This is further complicated by the country's colonial and apartheid past.<sup>5</sup> The plan to divide communities along linguistic lines was part of the strategy used by colonial masters to gain control over the country. If united, the linguistic minorities, the colonial authorities assumed, would pose a lethal threat to the colonial masters.<sup>6</sup> The colonial masters argued that a unitary Namibia would lead to constant conflict caused by ethnic rivalry.<sup>7</sup>

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<sup>1</sup> Namibia Population and Housing Census Main Report, 2011 8-22.

<sup>2</sup> Namibia Population and Housing Census Main Report, 2011 8-22.

<sup>3</sup> Article 3(1) of the Constitution of the Republic of Namibia, 1990.

<sup>4</sup> Namibia Population and Housing Census Main Report.

<sup>5</sup> Melber H "Land & Politics in Namibia" (2005) *Review of African Political Economy* 135 at 135.

<sup>6</sup> Melber H "Land & Politics in Namibia" (2005) *Review of African Political Economy* 135 at 135.

<sup>7</sup> Melber H "Land & Politics in Namibia" (2005) *Review of African Political Economy* 135 at 135. The German authorities, who were the first to colonize Namibia, held the view that the black populations posed the danger of 'indiscipline' and potential unrest. In 1921, South Africa began to govern Namibia on the new legal basis of a League of Nations mandate. In the two decades that followed, the South African administration systematically

Legislation such as the Native Ordinance of 1951 was enacted to compel Africans to live in locations separate from areas of white settlement.<sup>8</sup> Enforcing segregation in the towns remained an important component of the state's overall strategy and the aforementioned Ordinance remained the key tool for implementing this segregation.<sup>9</sup> More importantly, the segregation of the linguistic communities was at the center of the Odendaal Plan that sought to establish 'homelands' for the different ethnic groups.<sup>10</sup> The Odendaal Plan basically was aimed at reproducing the Bantustan policy that was implemented in South Africa.<sup>11</sup>

Due to the unfortunate apartheid history of Namibia, the division of people into cultural or tribal groups is an extremely sensitive topic. The independent Namibian state is still trying to find a national identity. Citizens are encouraged to avoid referring to themselves in ethnic terms. They are encouraged to refer to themselves as Namibians rather than a member of an individual linguistic or ethnic group. The Government has taken a number of measures to end societal discrimination in Namibia.<sup>12</sup>

Yet, claims of marginalization by ethnic communities in Namibia did not disappear with the end of apartheid and the dawning of democracy. Minorities that feel sidelined and unfairly treated under the present dispensation continue to complain against the democratic government that has been in power for about twenty five years to date.<sup>13</sup> Some minorities, for example, claim to be

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applied its policies of racial segregation to Namibia. As the German government before it had done, its ultimate desire was to extract as much wealth from the colony as possible (See Wallace M & Kinaban J 'A History of Namibia' (2011) 205).

<sup>8</sup> Wallace M & Kinaban J 'A History of Namibia' (2011) 262.

<sup>9</sup> Wallace M & Kinaban J 'A History of Namibia' (2011) 263.

<sup>10</sup> Wallace M & Kinaban J 'A History of Namibia' (2011) 268.

<sup>11</sup> Wallace M & Kinaban J 'A History of Namibia' (2011) 243.

<sup>12</sup> Diescho J *The Namibian Constitution In Perspective* (2007) 62.

<sup>13</sup> For example, the controversial commemorations which took place on Thursday, 26 August 2010, is one of many that illustrate this point. The commemorations entailed the 'proper' burial of undetermined human remains, which had been discovered on, amongst others, Shark Island in the 1990s. The issue concerned complaints made by ordinary residents and senior traditional leaders in the Karas Region in Namibia to human rights monitors in the South of Namibia. The complainants alleged that they were either not consulted and therefore not involved in both the planning and the execution of 'proper' burial of the human remains and that they had been disregarded in the

marginalized, complaining that the SWAPO-led government has provided more development assistance to the numerically dominant Owambo ethnic group of the north of Namibia than to other groups and regions in Namibia.<sup>14</sup> A further example is where, in 1998, senior government officials – contrary to government’s efforts to promote national reconciliation – referred to white citizens as ‘foreigners’.<sup>15</sup>

In 2000, the Rehoboth Baster Community<sup>16</sup> brought legal action against the government of Namibia before the United Nations Human Rights Committee (hereafter referred to as UNHRC), in which they alleged, among other things, that their right to use their languages had been violated by the government of Namibia.<sup>17</sup> They claimed that the lack of language legislation in Namibia had the consequence of denying the Baster people the use of their mother tongue

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identification of the burial site. Other complaints revolved around not being invited to attend the commemorations. See for example Ya Nangoloh P ‘South demands respect from Namibian administration as watchdog lectures Pohamba on unity’ (2010).

<sup>14</sup> US Department of State ‘Namibia’ (1999) Annual Human Rights Reports Submitted to Congress by the US Department of State 357 at 367.

<sup>15</sup> US Department of State ‘Namibia’ (1999) Annual Human Rights Reports Submitted to Congress by the US Department of State 357 at 367.

<sup>16</sup> The members of the Rehoboth Baster Community are descendants of the indigenous Khoi and Afrikaans settlers who originally lived in the Cape, but moved to Rehoboth around 1872. They were governed by their ‘paternal laws’, which provided for the election of a Captain, and for rights and duties of citizens. At present the community numbers plus 45, 000 people and occupy Rehoboth, south of Windhoek, which has a surface of 14,216 square kilometers. In this area the Basters developed their own institutions, such as schools and community centers. The Rehoboth Baster Community’s concern is that the government of Namibian is less concerned with some of their rights as an ethnic minority. These concerns can be summarized as: 1) the confiscation of all property, by the state, collectively owned by the community robbed the community of the basis of its economic livelihood, which in turn was the basis of its cultural, social and ethnic identity, 2) that their right to self-determination inside the republic of Namibia is not recognized, 3) that they enjoy no right to equality before the Namibian Courts, 4) that they have been denied the use of their mother tongue in administration, justice, education and public life in Namibia and 5) that their right to privacy had been violated is not respected by the state. (*Diergaardt et al v Namibia*) [2000] United Nations Human Rights Committee.

<sup>17</sup> The Rehoboth Baster Community complained over alleged violations of the right to self-determination, equality before the courts, the right to privacy, the right to participate in public life, the ban of discrimination and minority rights under the ICCPR. (*Diergaardt et al v Namibia*) [2000] United Nations Human Rights Committee.

(Afrikaans) in administration, justice, education and public life and that this, they argued, amounts to discrimination, a violation of article 26 of the International Covenant on Civil and Political Rights (hereafter referred to as ICCPR).<sup>18</sup> The UNHRC held that in the absence of any reasons from the state, a violation of article 26 of the ICCPR had occurred and that Namibia is required to take positive measures to address the concerns of the Rehoboth Baster Community.<sup>19</sup> Although the Rehoboth Baster Community succeeded with their claim under article 26 before the UNHRC, little has been done to date to address the shortcomings faced by minorities in the country concerning the language rights of minority groups. The fact that English is still the only official language in Namibia and the lack of language legislation in Namibia means that the government has done little to address the Committee's finding in *Diergaardt v Namibia*.<sup>20</sup>

## 2. Problem statement

Against the backdrop of Namibia's colonial and apartheid past and the great strides made up to and after independence, the legislative protection of language (especially of minorities) still fails to make it high up on the agenda of law- and policy-makers. This is contrary to international law and instruments, which place greater emphasis on protection of language rights.<sup>21</sup> Public international law is also recognized as forming part of Namibian law in terms of the Namibian Constitution.<sup>22</sup>

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<sup>18</sup> (*Diergaardt et al v Namibia*) [2000] United Nations Human Rights Committee.

<sup>19</sup> (*Diergaardt et al v Namibia*) [2000] United Nations Human Rights Committee.

<sup>20</sup> (*Diergaardt et al v Namibia*) [2000] United Nations Human Rights Committee.

<sup>21</sup> *Examples include, but are not restricted: ICCPR, UDHR, ICESCR, Optional Protocol to the International Covenant on Civil and Political Rights, Second Optional Protocol to the International Covenant on Civil and Political Rights, UNHCHR and the ICERD.*

<sup>22</sup> Article 144 of the Constitution, which states that “[u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.” International law and the international community as applied in or connected with the South-West Africa cases played a vital part in Namibia's road to independence. See UN General Assembly Resolution 2145 XXI of 27 October 1966 and *South West Africa cases (Ethiopia and Lyberia v South Africa)* [1966] ICJ Rep 6.

The lack of language legislation in Namibia and the continued concern of minorities over marginalization – despite the provisions of international law, which is part Namibian law – raise the question whether the existing Namibian Constitutional and legislative framework provide adequate protection of the rights of persons belonging to minority groups to use their languages. In order to address this question, this mini-thesis addresses two issues.

- First, it looks at the protections provided to minorities to use their language under international law.
- Secondly, it looks at what protection is provided for minorities to use their language under Namibian law.

### **3. Significance of the study**

The significance of this study is to examine the concerns of the linguistic communities of Namibia from an international human rights perspective. After the decision in the *Diergaardt* case, little has been done to give value to the UNHRC's ruling, and even less had been written since the dawning of democracy to add value to Article 3(3) of the Namibian Constitution. Article 3(3) makes it possible for legislation to be enacted to provide for linguistic integration of the country's disadvantaged communities. This research, using international standards, aims to contribute to the debate on how best to advance the rights of linguistic communities in Namibia. In particular, this research provides recommendations on how best to advance the rights of linguistic minorities in Namibia and contribute to the jurisprudence on linguistic minorities in Namibia.

### **4. Methodology**

In order to determine if the rights of minorities to use their languages are adequately protected and respected in Namibia, this research makes use of international and regional human rights instruments, the national laws of Namibia as well as the decisions of the UNHRC. Secondary sources are also relied upon, including books, journal articles, reports and other sources. Primary and secondary sources on Namibian history and constitutional law will also be relied on.

## 5. Literature review

Minority rights is a topic covered extensively by legal scholars and academics worldwide. As mentioned above, little has been written to address the right of minorities to use their languages in Namibia from a legal perspective; even fewer scholarly works examine the implications of the UNHRC's decision in *Diergaardt v Namibia*.

James Suzman, in his article titled '*Minorities in Independent Namibia*', discusses the challenges that minorities are facing within an independent Namibia. He does so, however, from a social sciences perspective and does not address the legal issues.<sup>23</sup> No reference is made to the issues raised in the *Diergaardt* case. The discussion has not also addressed the failure by the Namibian Government subsequently to give effect to the judgment.

In a paper titled '*Minority Languages and Public Administration: A comment on issues raised in Diergaardt v Namibia*', Alexander Morawa addresses one of the aspects dealt with by the UNHRC. The author focuses on the use of minority languages for the purposes of public administration.<sup>24</sup> The contribution of the paper to the debate in Namibia, although important, is very limited. The paper does not thoroughly discuss the case of Namibia and the use of languages in domain other than public administration.

In the book titled '*Namibia Constitutional and International Law Issues*', Marius Wiechers and Romaine Hill note that English, which is the only official language in Namibia, is the language of very few Namibians and that Afrikaans can be described as the *lingua franca* of the country.<sup>25</sup> Furthermore, the authors speculate that article 3(3) of the Constitution point in the direction that Afrikaans may be reinstated at some future time once the ideological dust has saddled which associates the language with the National Party government in apartheid South Africa.<sup>26</sup> The

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<sup>23</sup> Suzman J '*Minorities in Independent Namibia*' available at <http://www.refworld.org/pdfid/469cbfcd0.pdf> (accessed on 12 April 2015).

<sup>24</sup> Morawa A '*Minority languages and public administration: a comment on issues raised in Diergaardt v Namibia*' available at [http://www.ecmi.de/upload/tx\\_1fpubdb/working\\_paper\\_16.pdf](http://www.ecmi.de/upload/tx_1fpubdb/working_paper_16.pdf) (accessed on 13 May 2015).

<sup>25</sup> Hill R and Wiechers M '*Namibia constitutional and international law issues*' (1991) 30.

<sup>26</sup> Hill R and Wiechers M '*Namibia constitutional and international law issues*' (1991) 30.

authors, however, do not address the concern of the lack of language legislation in the country to cater for the different indigenous languages spoken by the rest of the population.

In a discussion document of January 2003, the Minister of Basic Education, Sport and Culture discussed the language policy for schools in Namibia. In this paper it was acknowledged that a language is able to survive only if its mother tongue speakers communicate in their mother tongue.<sup>27</sup> Further it was highlighted that a person's identity is contained in the language and the culture you have inherited from your forefathers.<sup>28</sup> This discussion paper elevates the importance of indigenous languages in education, but does so only up to a secondary level of education. The medium of instruction for students from grade four, in Namibia, will be English and at a secondary level at least two languages will be compulsory subjects, of which English again must be one of the two, in terms of the discussion.<sup>29</sup>

From the foregoing examples, it is clear that the status and concern of linguistic minorities in Namibia has been the subject of some discussion. However, not much had been written on minorities' language rights post *Diergaardt*. The literature on the subject addresses the issue of linguistic minorities and minority's rights from different angles but does not address these issues from a legal or international law perspective and it neglects the implications of the ruling of the UNHRC in *Diergaardt* for language use in administration, law, education and public life at large. Even less had been written on the effectiveness of the Namibian legal framework to advance linguistic minorities adequately. This mini-thesis thus aims to contribute to the literature on linguistic minorities in Namibia from the perspective of constitutional law and human rights law.

## **6. Structure**

The study is organized into four chapters.

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<sup>27</sup> Ministry of Basic Education, Sport and Culture *The Language Policy for Schools in Namibia* (2003) 2.

<sup>28</sup> Ministry of Basic Education, Sport and Culture *The Language Policy for Schools in Namibia* (2003) 2.

<sup>29</sup> Ministry of Basic Education, Sport and Culture *The Language Policy for Schools in Namibia* (2003) 2.



In chapter two, the rights of minorities to use their languages under international law are addressed. This chapter examines the protection that international law offers for linguistic minorities and their right to use their languages in different domains of public life. In this chapter, the role that international law plays in Namibian law is also briefly addressed.

The rights of minorities to use their languages under Namibian law are the topics of discussion in chapter three. The aim of this chapter – which is intended to form the central part of the argument advanced in this contribution – is to see whether Namibia is acting in line with its international obligations. This is done first by analyzing the existing framework for language protection in Namibia and then contrasting same with the obligations (if any) on the Namibian state, through its elected government, to provide a proper framework for protection of language rights.

Chapter four is the conclusion. Here, the discussion in the preceding chapters is summarized and various recommendations based on the summary are advanced.

## Chapter 2: Language Rights under International Human Rights Law

### 1. Introduction

Cultural and linguistic diversity are the key features of many societies.<sup>30</sup> The two are interlinked. Language is the conduit through which culture finds expression; culture, in turn, is identified by the language spoken by the people belonging to a certain ethnic community. That is why language rights are deemed to be protected under the broader theme of cultural rights. Language rights are commonly defined as rights that protect the use of particular languages, namely one's mother tongue or native language. Language rights are also associated with minority rights. 'Language rights are regarded as minority rights because in a heterogeneous linguistic society, it is only the minority groups whose language requires legal protection'.<sup>31</sup> The objective of this chapter is to establish whether language rights, in general, and minority language rights, in particular, are protected under international human rights law.

Chapter two commences the discussion by addressing the rationale for recognising and protecting language rights as human rights. Thereafter the international legal framework for the protection of language rights will be analysed. The focus will then be shifted to language, culture and identity. The various uses of language will also be considered. This is followed by a discussion of the protection of language use in the private sphere. Under the private sphere the focus will be placed on minority languages and the right to equality and freedom from discrimination and on the protection of the use of languages using other rights. Thereafter, the focus will be moved to the protection of use of language in the public sphere. Under this banner, the discussion will be on language use for judicial proceedings; language use by public authorities for government business and language use for education.

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<sup>30</sup> Bultrini A 'Developments in the Field of the European Charter for Regional or Minority Languages' (2002 – 2003) *European Yearbook of Minority Issues Vol 2* 435.

<sup>31</sup> Pinto M 'On the Intrinsic Value of Arabic in Israel – Challenging Kymlicka on Language Rights' (2007) *Canadian Journal of Law and Jurisprudence* 143.

## 2. The rationale for recognising and protecting language rights as human rights

Although there are numerous advantages associated with the protection of minority language use,<sup>32</sup> one important reason to protect the right of minorities to use their language goes to the core of inclusion and participation of minority communities in the wider society.<sup>33</sup> Language is therefore key to societal inclusion. Language is at the centre of human activity, self-expression and identity.<sup>34</sup> Recognizing the primary importance that people place on their language fosters the kind of true participation in development that will achieve lasting results.<sup>35</sup> The following section will focus on the reasons why language rights should be protected.

Language is an element and one of the building blocks of culture. Language is a medium through which culture finds expression.<sup>36</sup> Language has a special role in culture and it may be said that language is one of the cornerstones of culture. The two are so closely interlinked that they cannot be divorced and may be thought of as the same thing. Countries which are rich in cultural diversities are known to attract visitors and tourists who take an interest in the uniqueness of certain traits and the way of life of a certain community by the very reason of their difference.<sup>37</sup> Namibia is one such example of an African country which has diverse cultures and which receives thousands of travellers from different countries every year.<sup>38</sup> Tourists come with a hope

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<sup>32</sup> These are the following: it improves access to and quality of education of children belonging to the minority community; it promotes equality and empowerment for minority women; it enhances better use of state resources due to efficient communication; it improves communication and public services; and it contributes to stability and conflict-prevention and it promotes diversity. For more, see *Language Rights of Linguistic Minorities: A Practical Guide for Implementation*.

<sup>33</sup> United Nations Special Rapporteur on minority issues 'Language Rights of Linguistic Minorities - A Practical Guide for Implementation' *Handbook by the United Nations Special Rapporteur on minority issues* (2017).

<sup>34</sup> United Nations Special Rapporteur on minority issues 'Language Rights of Linguistic Minorities - A Practical Guide for Implementation' *Handbook by the United Nations Special Rapporteur on minority issues* (2017).

<sup>35</sup> United Nations Special Rapporteur on minority issues 'Language Rights of Linguistic Minorities - A Practical Guide for Implementation' *Handbook by the United Nations Special Rapporteur on minority issues* (2017).

<sup>36</sup> Haysom N & Cachalia F 'Language and Culture' in Cheadle H, Davis D & Haysom N *South African Constitutional Law The Bill of Rights* 2 ed (2015) 25-1.

<sup>37</sup> Daniel T 'Namibia is Becoming a Tourist Hot Spot' *The Namibian* 08 September 2017 15.

<sup>38</sup> Daniel T 'Namibia is Becoming a Tourist Hot Spot' *The Namibian* 08 September 2017 15.

to enjoy their holidays in the beautiful and contrasting country because they admire its magnificent features, wildlife and cultural heritage on offer.<sup>39</sup> They enjoy learning of the key differences between people and value these differences. Language is one of the most distinguishing features of different cultures and also one of the most apparent differences in people belonging to different cultural communities.

The recognition and protection of minority languages can be interpreted to be a recognition and protection of cultural wealth, the geographical area in which the minority language is spoken, the encouragement of the possibility to use regional or minority languages, in speech and writing, in public and private life, and the teaching and study of these languages at all the appropriate stages of life.<sup>40</sup> Respect for cultural and linguistic rights may be seen as a natural and inherent deterrent to racism and tribalism and a natural stimulator of racial tolerance, cooperation and inclusion. If there is tolerance and respect for these features that distinguish difference in people, there would consequently be a better understanding between men of all races, nations and places.

It can further be stressed that the identity of a community is preserved and strengthened if the culture and language of that specific community is awarded legal protection. This protection saves the community from having to assimilate with majorities and protects the cultural differences of the minority groups from extinction. The process of assimilation may dilute the fundamental differences between different cultures, because of the pressure of subscribing to the way of life of the majority linguistic groups. 'The use and regulation of minority languages is an important issue which not only relates closely to notions of identity and belonging, but also influences access to political, social and economic opportunities'.<sup>41</sup>

Language is a listed ground under which discrimination is prohibited under a countless number of international, regional and national legal instruments globally. History had revealed that language

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<sup>39</sup> Daniel T 'Namibia is Becoming a Tourist Hot Spot' *The Namibian* 08 September 2017 15.

<sup>40</sup> Bultrini A 'Developments in the Field of the European Charter for Regional or Minority Languages' (2002 – 2003) *European Yearbook of Minority Issues Vol 2* 435.

<sup>41</sup> Holt S & Packer J 'The Use of Minority Languages in the Broadcast Media' (2005-2006) *European Yearbook of Minority Issues Volume 5* 339.

and culture were major factors on which discrimination was based. If access to political, social and economic opportunities are not regulated on the basis of equality, especially with regard to cultural and linguistic differences, then discrimination on these grounds will inadvertently creep in. Linguistic minorities will consequently suffer the blow and will be denied opportunities to partake meaningfully in public life.

The preference of one language over another by public or private authorities can have a prejudicial and discriminatory effect and affect a citizen's capacity to gain access to social services, employment, or information, if this preference is not reasonable and justifiable.<sup>42</sup> Language rights provide a mechanism through which cultures survive and enable individuals to think and speak differently and to be protected and respected in such difference.<sup>43</sup> In the first place language is an instrument of communication.<sup>44</sup> Furthermore, language is a highly developed tool, which was refined by generations of users, which enable a people to express their most intimate thoughts and finest ideas, to record their experiences, lament their losses, celebrate their triumphs and most importantly record these in their literature for coming generations.<sup>45</sup> To deny citizens and linguistic communities access to or the right to use their languages in administration, justice and education, are attacks on a critical element of their identity.<sup>46</sup> 'The reason for this is that language – 'the way of speaking'- shapes a subject's view of the world'.<sup>47</sup> "According to Vygotsky (1962, as cited in Nunan, 2010), language plays a crucial role in

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<sup>42</sup> Haysom N & Cachalia F 'Language and Culture' in Cheadle H, Davis D & Haysom N *South African Constitutional Law The Bill of Rights* 2 ed (2015) 25-1.

<sup>43</sup> Haysom N & Cachalia F 'Language and Culture' in Cheadle H, Davis D & Haysom N *South African Constitutional Law The Bill of Rights* 2 ed (2015) 25-1.

<sup>44</sup> Riagáin D Ó 'The Importance of Linguistic Rights for Speakers of Lesser Used Languages' 1999 *International Journal on Minority and Group Rights* Vol 6 289.

<sup>45</sup> Riagáin D Ó 'The Importance of Linguistic Rights for Speakers of Lesser Used Languages' 1999 *International Journal on Minority and Group Rights* Vol 6 289.

<sup>46</sup> Haysom N & Cachalia F 'Language and Culture' in Cheadle H, Davis D & Haysom N *South African Constitutional Law The Bill of Rights* 2 ed (2015) 25-1.

<sup>47</sup> Haysom N & Cachalia F 'Language and Culture' in Cheadle H, Davis D & Haysom N *South African Constitutional Law The Bill of Rights* 2 ed (2015) 25-1.

cognitive development”.<sup>48</sup> Language discrimination may therefore be seen as automatic indirect discrimination against thought, conscience and belief. Language and thought are inextricably linked and cannot be divorced, just as language and culture.<sup>49</sup> Thought conceptualizes through language and language makes thought possible and thought makes language possible.<sup>50</sup> Thoughts materialise in speech through language. This is especially true when it is considered how difficult it becomes for a person to express his thoughts in a newly learned language. It may therefore follow that mother tongue speakers of the majority language may be perceived as more intelligent than speakers of a different mother tongue, because people are inclined to judge knowledge based on fluency and eloquence of speech. It may therefore be easier to be convinced by an absurd argument of a fluent person than it would be to be convinced by an argument of a person who finds it difficult to express himself in a certain language. Language barriers therefore allow loopholes in the justice system. Literacy, degrees of intelligence and cognitive efficiency is therefore confused with proficiency of a language.

Stuart Woolman and Michael Bishop state that in many societies, individual liberty, multicultural recognition and nation building are incompatible.<sup>51</sup> This, they argue, is the case, because recognition of a distinct religion, culture or language reinforces minor differences that in turn provoke anxiety about the extent to which members of other groups secure access to the most important goods.<sup>52</sup> This may be true, but cannot be outweighed by the many disadvantages a nation and community would face if minorities are not afforded protection of their cultures, identities, languages and whatever it is that makes them different and unique from others with whom they share a community. The assimilation of minorities with majority communities

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<sup>48</sup> Rangriz S & Harati M ‘The Relationship between Language and Culture’ *Journal of Applied Linguistics and Language Research Vol 4* 209.

<sup>49</sup> Haysom N & Cachalia F ‘Language and Culture’ in Cheadle H, Davis D & Haysom N *South African Constitutional Law The Bill of Rights 2* ed (2015) 25-1.

<sup>50</sup> Haysom N & Cachalia F ‘Language and Culture’ in Cheadle H, Davis D & Haysom N *South African Constitutional Law The Bill of Rights 2* ed (2015) 25-1.

<sup>51</sup> Woolman S ‘Community Rights: Language, Culture & Religion’ in Woolman S & Bishop M *Constitutional Law of South Africa 2* ed (2014) 58-3.

<sup>52</sup> Woolman S ‘Community Rights: Language, Culture & Religion’ in Woolman S & Bishop M *Constitutional Law of South Africa 2* ed (2014) 58-3.

unfortunately comes at a very high price, which is that the cultures and traditions of the minority groups become diluted, because the minority community become invested so much in the culture of the majority community that they become disinvested in what it is that makes them unique. With time, some of the essence of the culture of minority communities becomes lost due to the process of assimilation.

From the foregoing it may be concluded that language and human identity are inextricably linked as well as language and thought and language and culture. Language is a medium through which culture finds expression, therefore cultures survives when the language rights of minorities are respected and protected. Respect for minority language rights may also be seen as a natural deterrent to discrimination and that such respect serves as a natural stimulator of racial tolerance and inclusion. Further, the ability to be proficient in a particular language may influence access to political, social and economic opportunities. The international and regional human rights legal instruments which protect language rights are imperative to linguistic minority communities worldwide, because they provide these minority communities with a legal basis and therefore a tool from which to assert their cultural rights and to fend off attacks on their identities. That is the focus of the remaining sections of this chapter. Before that, however, a few words on the different uses of language.

### **3. The international framework for the protection of language rights**

Language rights are indeed protected by a plethora of international human rights instruments. In the Universal Declaration of Human Rights (UDHR), language rights are protected under Article 27 (1), which states that ‘everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’.<sup>53</sup> In the International Covenant on Economic, Social and Cultural Rights (hereafter the ICESCR) language rights are protected under Article 15 (1) (a) which provides, ‘the State Parties to the present Covenant recognize the right of everyone to take part in cultural life’.<sup>54</sup> Similarly, Article

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<sup>53</sup> Article 27 the Universal Declaration of Human Rights (1948) General Assembly Resolution 217 A (III).

<sup>54</sup> Article 15 International Covenant on Economic, Social and Cultural Rights (1966) General Assembly Resolution 2200A (XXI).

29 and 30 of the Convention on the Rights of the Child declares respect for the child's own cultural identity, language and values, even when those are different from the country of residence and the right of the child to use his or her own language, in spite of the child's minority or immigrant status.<sup>55</sup>

More specific protection comes from the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which is one of the most important international human rights instruments that protect the right of minorities in general and their linguistic rights in particular. Article 1 (1) indicates that 'states shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity'.<sup>56</sup> It is further stated that States shall adopt appropriate legislative and other measures to achieve those ends.<sup>57</sup> Article 2 (1) of the said Declaration provides that 'persons belonging to national or ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination'.<sup>58</sup> The limitation of these protections is that, as provisions of a declaration, they are not binding.

An internationally binding protection comes from the International Covenant on Civil and Political Rights (hereafter the ICCPR). Language rights are protected under Article 27 of the ICCPR.<sup>59</sup> Article 27 of the ICCPR states that 'in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.<sup>60</sup> In relation to this, one, of course, may

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<sup>55</sup> Article 29 and 30 Convention on the Rights of the Child (1989) General Assembly Resolution 44/25.

<sup>56</sup> Article 1 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) General Assembly Resolution 47/135.

<sup>57</sup> Article 1.

<sup>58</sup> Article 2.

<sup>59</sup> Article 27 International Covenant on Civil and Political Rights United Nations General Assembly Resolution (XXI) (1966).

<sup>60</sup> Article 27.



wonder what the appropriateness of discussing language rights as minority rights are. Language rights are, however, regarded as minority rights because in a heterogeneous linguistic society, it is only the minority groups whose language requires legal protection as opposed to members of majority communities, whose languages enjoy a strong status without needing special legal protection.<sup>61</sup> Members of minority groups are usually under constant pressure to abandon their mother tongue in favour of the majority language. This is referred to as the assimilation of the minority language. Minority protection operates on the assumption that religious, cultural and linguistic affiliations are essential features of what it means to be human.<sup>62</sup> Governments should therefore remain committed to the protection of human identity by protecting and maintaining minority languages and by preventing assimilation so that all of its citizens may be equally advanced in education, administration and in justice and, therefore, are ultimately given the equal opportunities to thrive.

Language is used in various spheres, both private and public. One of the differences between language rights under the private sphere and in the public sphere is that, with respect to the former, in most cases there is a negative obligation on the state not to interfere with a person's right to use their language, be it in choosing names, surnames or which radio station to listen to, engage in private communication, alone or in concert with others. The right to use language in the public sphere denotes a positive obligation on the state to take positive measures to ensure that the individuals have, for example, access to courts, education and public administration. One notable difference between negative and positive obligations is that with negative obligations the state must allow the individuals or linguistic communities to exercise their language rights without interference. Positive obligations require that the state take some form of action, which may involve the use of public money to advance language through legislation or education, alternatively that the state provide a particular service in a certain language in order to bring the language on an equal footing with the language spoken by the majority. In the following section, the discussion focus will be on the different use of language in the public sphere.

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<sup>61</sup> Pinto M 'On the Intrinsic Value of Arabic in Israel – Challenging Kymlicka on Language Rights' (2007) *Canadian Journal of Law and Jurisprudence* 143.

<sup>62</sup> Macklem P 'Minority rights in international law'(2008) *International Journal of Constitutional Law* 531-552.

### **3.1 The protection of language use in private sphere**

#### **3.1.1 Minority languages and the right to equality and freedom from discrimination**

The rights to equality and freedom from discrimination enjoy strong protection under international and regional human rights instruments. Understood in its most general sense, ‘to discriminate’ means to prefer one option over another, whatever the option may be or to draw some type of distinction or to make some kind of preference.<sup>63</sup> It is necessary in any legal system that seeks to counter invidious discrimination to determine which grounds of discrimination to prohibit, and how those grounds are to be identified.<sup>64</sup> When choosing an option above another, especially where governments are the bodies making the selection and this selection involve its people, the selection must be justified or the selection may be perceived as arbitrary and capricious. This section focuses on language as one of the basis on which discrimination is prohibited. More particular, it looks into the relevance of the right to equality and non-discrimination to the protection of minority language.

In terms of Article 1 (2) and (3) of the UN Charter, the purpose of the United Nations is, *inter alia*, to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people and to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.<sup>65</sup> The UN Charter makes it clear that international peace and security depend to a large extent on universal respect for and observance of human rights and

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<sup>63</sup> Bamforth N ‘Prohibited Grounds of Discrimination under EU Law and the European Convention on Human Rights: Problems of Contrast and Overlap’ (2006-2007) *Cambridge Yearbook of European Legal Studies Volume 9* 1.

<sup>64</sup> Bamforth N ‘Prohibited Grounds of Discrimination under EU Law and the European Convention on Human Rights: Problems of Contrast and Overlap’ (2006-2007) *Cambridge Yearbook of European Legal Studies Volume 9* 1.

<sup>65</sup> Professional Training Series No. 9 ‘Human Rights in the Administration of Justice: a Manual on Human Rights for Judges, Prosecutors and Lawyers’ (2003) *Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association* 631.

fundamental freedoms for all without discrimination as to race, sex, language or religion, according to its Article 55 (c).<sup>66</sup> It is important to note here that language is a listed ground on which discrimination is prohibited. The reason for linking international peace and security with the right to equality may be traced back to the atrocities executed during World War I as well as World War II and the reasons which gave rise to these events in the world's history, including the genocide committed against individuals because they belong to a minority group.<sup>67</sup> There is little doubt that the sustainability, development and peace of any nation will be threatened if indigenous languages disappear.<sup>68</sup> After World War II the UN Charter prohibited discrimination on the ground of language, among others.<sup>69</sup> Language and other prohibited grounds of discrimination such as race, sex and religion repeatedly appear in the Charter, but were also given concrete expression in the peace treaties concluded between the Allied Powers after World War II.<sup>70</sup> The listed grounds on which discrimination was prohibited in the UN Charter had been incorporated into the UN Charter out of fear of a repeat of the atrocities brought about by the World Wars as a direct consequence of undermining these basic human rights. It is therefore an international responsibility as well as a national responsibility towards humanity that the right to equality and freedom from discrimination be exercised to uphold language rights as basic human rights.

Article 1 of the UDHR protects the right to equality and holds that all human beings are born free and equal in dignity and rights and are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.<sup>71</sup> Article 2 of the UDHR provides that 'everyone

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<sup>66</sup> Professional Training Series No. 9 'Human Rights in the Administration of Justice: a Manual on Human Rights for Judges, Prosecutors and Lawyers' (2003) *Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association* 631.

<sup>67</sup> United Nations Home Page 'Universal Declaration of Human Rights – History of the Document' available at <http://www.un.org/en/sections/universal-declaration/history-document/index.html> (accessed on 4 May 2018).

<sup>68</sup> Kamwi R 'Preserve indigenous languages - minister' *The Namibian* 09 April 2019 6.

<sup>69</sup> McDougal MS, Chen L & Lasswell HD 'Freedom from Discrimination in Choice of Language and International Human Rights' (1976) *Faculty Scholarship Series* 151.

<sup>70</sup> McDougal MS, Chen L & Lasswell HD 'Freedom from Discrimination in Choice of Language and International Human Rights' (1976) *Faculty Scholarship Series* 151.

<sup>71</sup> Article 1 the Universal Declaration of Human Rights (1948) General Assembly Resolution 217 A (III).

is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>72</sup> The right to equality and freedom from discrimination is also protected in Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) where it is stated that ‘the State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.<sup>73</sup> Article 26 of the ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.<sup>74</sup>

At regional level, Article 2 of the African Charter on Human and Peoples Rights (hereafter the African Charter) states that every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, *language*, religion, political or any other opinion, national and social origin, fortune, birth or other status (emphasis added).<sup>75</sup>

For purposes of social identification, language has long played an important role for according or withholding respect.<sup>76</sup> In societies highly conscious of the prestige of languages, what matters is not only the kind of language a person speaks, but even the accent of the speakers. Languages become endangered when the dominant society views minority languages as low-status or

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<sup>72</sup> Article 2.

<sup>73</sup> Article 2 International Covenant on Economic, Social and Cultural Rights (1966) General Assembly Resolution 2200A (XXI).

<sup>74</sup> Article 26 International Covenant on Civil and Political Rights United Nations General Assembly Resolution (XXI) (1966).

<sup>75</sup> Article 2 the African Charter on Human and Peoples’ Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>76</sup> McDougal MS, Chen L & Lasswell HD ‘Freedom from Discrimination in Choice of Language and International Human Rights’ (1976) *Faculty Scholarship Series* 151.

useless.<sup>77</sup> Therefore the society and its speakers develop negative language beliefs about the minor language, which further endangers the language. Nonspeakers of the dominant language are often made to suffer a deep sense of inferiority, because of the inadequacy in coping in the dominant language.<sup>78</sup>

From the above it is clear that international as well as regional human rights legal instruments strongly protect the right to language by specifically listing this right as a ground under which discrimination is prohibited. According to these instruments the mere distinction between languages is prohibited and there is therefore no need to mention minority language rights as a ground on which discrimination is prohibited. A mere distinction between languages, whether between an official language and a minority language, is automatically regarded as discrimination. When discrimination occurs on these listed grounds unfair discrimination is presumed unless the contrary can be proved. It may therefore be said that according to international human rights legal instruments equality and discrimination are tools which determine whether a violation of language or cultural rights had occurred. A difference in treatment based on language amounts to automatic discrimination. Linguistic rights are part of basic human rights.<sup>79</sup>

Deprivations in relation to language are deprivations of enlightenment and skill at a grassroots level, but may include deprivations in the following respects: denial of the opportunity to acquire proficiency or use the mother tongue; assimilation with the language of the national elite or world languages; deprivations imposed upon individuals through group identifications and differentiations effected by language; deprivations resulting from arbitrary requirements of specified languages for access to employment, access to a meaningful education, access to justice

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<sup>77</sup> Box C 'The Effects of Institutional Support of Endangered Languages on Language Ideologies' *The Pegasus Review: University of Central Florida Undergraduate Research Journal Vol 10.2* 1.

<sup>78</sup> McDougal MS, Chen L & Lasswell HD 'Freedom from Discrimination in Choice of Language and International Human Rights' (1976) *Faculty Scholarship Series* 151.

<sup>79</sup> Prina F 'Linguistic Rights in a Former Empire: Minority Languages and the Russian Higher Courts' (2011) *European Yearbook of Minority Issues Vol 10* 61.

and access to public administrative processes.<sup>80</sup> The most prominent arbitrary deprivations which may occur, based on an incapacity to be proficient in a majority language, include limitations in treatment in education, in justice and in public administration.

In conclusion what may be said of the above is that language appears to be a listed ground on which discrimination is prohibited under international and regional human rights legal instruments. In many jurisdictions the approach to discrimination is that it is presumed to be unfair automatically when based on a listed ground. The Human Rights Committee had recently taken the stance that whenever discrimination is based on a listed ground it requires a higher degree of justification than discrimination which is not based on a listed ground. It may therefore be concluded that discrimination based on language is automatically regarded as unfair discrimination, that discrimination based on this ground has far reaching adverse consequences and is therefore a violation of international human rights laws unless a high onus of proof can be discharged to show that the discrimination was fair. Minority language rights are therefore strongly protected in international human rights laws under the rights to equality and to freedom from discrimination.

### **3.1.2 Protection of the use of languages using other rights**

The question that this section is concerned with is whether the language rights can be protected by other rights such as the right to human dignity and the right to freedom of expression under international human rights laws.

The rights to human dignity and to freedom of expression are protected by a number of international and regional human rights legal instruments. The right to human dignity is protected under Article 1 of the UDHR and under Article 5 of the African Charter. Article 1 of the UDHR holds that all human beings are born free and equal in dignity and rights and further, they are endowed with reason and conscience and should act towards one another in a spirit of

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<sup>80</sup> McDougal MS, Chen L & Lasswell HD 'Freedom from Discrimination in Choice of Language and International Human Rights' (1976) *Faculty Scholarship Series* 151.

brotherhood.<sup>81</sup> Article 5 of the African Charter states that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.<sup>82</sup>

The right to freedom of expression is protected under Article 19 of the UDHR as well as under Article 19 of the ICCPR and under Article 9 of the African Charter. Article 19 of the UDHR states that everyone has the right to freedom of opinion and expression which includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.<sup>83</sup> Article 19 of the ICCPR provides that ‘everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance’.<sup>84</sup> Article 9 of the African Charter on Human and Peoples’ Rights states that ‘every individual shall have the right to receive information and every individual shall have the right to express and disseminate his opinions within the law’.<sup>85</sup>

The rights to human dignity and to freedom of expression supplement and strengthen minority language rights, since they allow linguistic minority communities the opportunity to openly profess and practice their culture through language and to be respected as human beings in so doing. ‘Expression clearly includes conduct that seeks to communicate’.<sup>86</sup> There is therefore a strong bond between the right to human dignity and to freedom of expression, on the one hand and language rights, on the other. The right to human dignity and to freedom of expression automatically reinforce language rights.

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<sup>81</sup> Article 1 the Universal Declaration of Human Rights (1948) General Assembly Resolution 217 A (III).

<sup>82</sup> The African Charter on Human and Peoples’ Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>83</sup> Article 19 the Universal Declaration of Human Rights (1948) General Assembly Resolution 217 A (III).

<sup>84</sup> Article 19 International Covenant on Civil and Political Rights United Nations General Assembly Resolution (XXI) (1966).

<sup>85</sup> Article 9 the African Charter on Human and Peoples’ Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>86</sup> Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 342.

From the above it can be noted that the rights to freedom of expression and to human dignity are rights which are closely connected to language rights and that these rights are protected under international human rights legal instruments. The right to freedom of expression and to human dignity reinforce and strengthen the position of minority language rights. Freedom of expression allows minority communities the right to speak and practice their languages in public and private life without unreasonable and unjust limitations and the right to human dignity allows everyone in society the right to be treated equally and to be respected as such irrespective of the languages they speak.

### **3.2 The protection of the use of language in public sphere**

#### **3.2.1 Language use for judicial proceedings**

The issues here are whether language rights are recognised in relation to judicial proceedings by international human rights sources and whether minority language rights are recognised in courts. The aim is to test whether international human rights legal instruments protect the rights of minority communities to understand and to be understood in relation to court proceedings.

Article 10 of the Universal Declaration of Human Rights provide that individuals are entitled to a fair trial and this is generally recognised to involve the right to an interpreter if an individual does not understand the language used in the court proceedings.<sup>87</sup> The individuals have the right to have the interpreter translate the proceedings, including court documents. Article 17 (2) (c) (ii) of the African Charter on the Rights and Welfare of the Child provide that State Parties to the present Charter shall in particular ensure that every child accused of infringing the penal law shall be informed promptly in a language that he understands and in detail of the charge against him and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used.<sup>88</sup> More importantly, the ICCPR provides in Article 14, paragraph 3 (a) and (f), that in connection with any criminal charge an accused is to be informed promptly and in detail in a

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<sup>87</sup> The Universal Declaration of Human Rights (1948) General Assembly Resolution 217 A (III).

<sup>88</sup> Article 17 (2) (c) (ii) African Charter on the Rights and Welfare of the Child (1990) 26<sup>th</sup> Assembly of the Heads of State and Governments of the Organization of African Unity.



language which he understands of the nature and cause of the charge(s) against him and is to have the free assistance of an interpreter if he cannot understand or speak the language used in court.<sup>89</sup>

The few international law sources which appear above recognise the importance language plays in due processes of law. This is one of the most important considerations in the administration of justice. Justice cannot prevail if communication in the administration of justice is flawed, not effective or if parties do not understand one another or the proceedings. In theory the protection afforded to language rights under the banner of fair trial rights by international human rights legal instruments curb injustices in courthouses. Unfortunately this is not a reality in all member states that are bound by these international human rights legal instruments as states often struggle with funding and are unable to fully translate legal proceedings in their totality into more than one language. Nations also struggle to provide interpreters who are able to interpret proceedings from the inception of a particular case to the point of finality and to interpret all court documents and court proceedings.

Judicial and administrative proceedings are often held exclusively in an official language in most jurisdictions. A miscarriage of the law is a natural consequence in these events. If no provision is made to translate court proceedings into a language that is understood by all the parties to the proceedings then justice will inadvertently not prevail. To ‘nonspeakers’ of the official language, judicial and administrative notices and proceedings, given in the official language, are often times more formalistic than real.<sup>90</sup> Victims of such hollow due process may extend from accused persons to witnesses. When people are unable to understand the nature and consequence of proceedings and due processes of the law, they often end up intimidated by the process and do not even attempt to participate meaningfully in due processes of the law. For criminal law proceedings this would mean that an accused person surrenders his defence, because he is unable to comprehend the nature and depth of the charges against him. Such a person does not understand the consequences of their silence or the inferences which may be drawn from their failure to put their case before courts. These accused persons do not challenge evidence

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<sup>89</sup> International Covenant on Civil and Political Rights United Nations General Assembly Resolution (XXI) (1966).

<sup>90</sup> McDougal MS, Chen L & Lasswell HD ‘Freedom from Discrimination in Choice of Language and International Human Rights’ (1976) *Faculty Scholarship Series* 151.

meaningfully nor ask crucial questions that may have an impact on the end result of their case. They do not understand that their challenge to the proceedings could change the outcome. In these circumstances it is needless to say that a miscarriage of the law had occurred.

From the foregoing it may be concluded that the right to an interpreter and to be informed of criminal charges in a minority language is a right which is protected under international human rights legal instruments. Fair trial rights, which include the right to an interpreter, are asserted in international human rights instruments. The right to an interpreter and the right to have official court documents interpreted from the official language to a language that a litigant or accused person speaks and understands falls into the spectrum of the right to be heard, also better known as the *audi alteram partem* principle of natural justice. This is correctly so, because an individual can not present or defend their case nor participate meaningfully in any judicial proceedings if they do not understand the proceedings or are not understood in relation to the proceedings.

However, as mentioned above, states often do not have the means to translate all court proceedings into the languages spoken by all its ethnic communities, especially where a country is still a developing nation, but the home of a large number of ethnic minorities. These states can simply not provide efficient translators in all circumstances that can translate all court documents and processes from beginning to the end, because it is too costly.

More importantly, it must be noted that minority languages are not afforded individual or specific protection under international human rights laws with regards to judicial proceedings. They are simply placed in one category with all languages which are not the official language as recognised in a particular court or tribunal. The right of the parties to be heard and understood by a court and the right to understand what is going on in a court is not a language right but an aspect of the right to a fair hearing.<sup>91</sup> Language use in relation to judicial proceedings are not about language rights and therefore not about minority language rights.<sup>92</sup>

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<sup>91</sup> *Société des Acadiens du Nouveau-Brunswick Inc v Association of Parents for Fairness in Education* (1986) 549.

<sup>92</sup> *Société des Acadiens du Nouveau-Brunswick Inc v Association of Parents for Fairness in Education* (1986) 549.

### 3.2.2 Language use by public authorities for government business

The concept of public service can be described as being plain and precise, but ever changing.<sup>93</sup> Public service can not be explained in simpler terms than a service which is rendered to the public by the state. The role of the state and the extent of its actions will vary according to the times and the countries. The UDHR was the first document to state that everyone has the right to equal access to the public service in its Article 21 (2).<sup>94</sup> Article 21 of the UDHR provided the foundation for Article 25 of the ICCPR which provides that everyone shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions to have access, on general terms of equality, to public services in his country.<sup>95</sup>

Historically people only required protection from the state against an enemy without order and security within.<sup>96</sup> Historically only three public services could be distinguished: the service of war, to protect the territory and the people of that territory against foreign attacks, the service of police and the service of justice, so that security, tranquillity and order would prevail in the country. Today the state has a much bigger and more complex responsibilities towards its citizens.<sup>97</sup> The state's responsibilities toward its citizen knower days typically include, for example, a common carriage, the postal and telegraph services, the transmission of electric power, the production of clean drinking water, the enactment of laws that govern the citizens, the provision of jobs and housing, fire brigade services, education and in more developed countries even providing free internet. A modern public service in a multi-ethnic state should usually reflect the diversity within the country.<sup>98</sup>

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<sup>93</sup> Duguit L 'The concept of public service' (1923) *Volume 32 Issue 5 Yale Law Journal* 424.

<sup>94</sup> Selbmann F 'Some Thoughts about Non-Discrimination and Access to the Public Service' (2001-2002) *European Yearbook of Minority Issues Vol 1* 207.

<sup>95</sup> Selbmann F 'Some Thoughts about Non-Discrimination and Access to the Public Service' (2001-2002) *European Yearbook of Minority Issues Vol 1* 207.

<sup>96</sup> Duguit L 'The concept of public service' (1923) *Volume 32 Issue 5 Yale Law Journal* 424.

<sup>97</sup> Duguit L 'The concept of public service' (1923) *Volume 32 Issue 5 Yale Law Journal* 424.

<sup>98</sup> Selbmann F 'Some Thoughts about Non-Discrimination and Access to the Public Service' (2001-2002) *European Yearbook of Minority Issues Vol 1* 207.

For governments to be able to provide services to the public both parties must be able to communicate with each other effectively. If the service provider, which is the government and the public, who is the client, are not able to communicate with one another due to language barriers, then the service may be affected or even hampered from being provided. This topic concerns the use of language by public authorities when providing services to the public and vice-versa. The subject of focus is whether or not services can be provided to local communities through a minority language and not only in the official language of the country. Is there a right to receive public services in a minority language and whether such a right enjoys protection under international human rights legal instruments.

An official language can be defined as a language ordained by law to be used in the public institutions of the state, more particularly, in the state's legislation and laws, its courts, its public administration and its schools.<sup>99</sup> There is a general consensus that three areas of the use of language are determinant for the survival of minority languages.<sup>100</sup> These three areas include education, administrative affairs and the media. If a minority language is to flourish, it should be spoken by the government and not only by members of the minority group and, in turn, members of the minority community should be able to speak their language when communicating with the government.<sup>101</sup>

Arguably, the right to human dignity; the right to equality and the right to freedom of expression are examples of rights that may be affected when the public is prevented from corresponding with the state in a minority language when seeking public services. If language is considered to be a part of the right which guarantees freedom to expression than the rights which guarantees the right to freedom of expression can be invoked when claiming the right to use minority languages

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<sup>99</sup> Devine P 'Language Rights in Canada and Quebec's Official Language Act' (1977) *University of Toronto Faculty of Law Review* 114.

<sup>100</sup> Ulasiuk I 'Language Rights in Relations with Public Administration: European Perspective' (2011) *International Journal on Minority and Group Rights* 18 93.

<sup>101</sup> Pinto M 'On the Intrinsic Value of Arabic in Israel – Challenging Kymlicka on Language Rights' (2007) *Canadian Journal of Law and Jurisprudence* 143.

in relation with public authorities.<sup>102</sup> The right to human dignity may likewise be affected when citizens are ignored when they make a request for public services in a minority language, if they are unable to speak the official language. The right to equality will also be affected when citizens are treated differently when public services are rendered based on their proficiency in the official language. Although these are some examples of rights that may be affected and therefore relied on for support when citizens are denied the right to use their minority language when communicating with state officials for public services. Whether or not these rights will hold up in courts and tribunals is still to be tested in the future. It must also be added that international legal documents do not explicitly provide for the protection of the right to receive public services in minority languages.

There is, however, one exception. In *Diergaardt v Namibia*, the United Nations Human Rights Committee had to determine whether states can reject a request for the provision of services and information in a minority language. In the case of *Diergaardt v Namibia* the Baster community complained that they had been denied the use of their mother tongue in administration, justice, education and public life.<sup>103</sup> They specifically claimed a violation of their rights under Article 26 and 27 of the ICCPR.<sup>104</sup> These complaints stems from the fact that English is the only official language in Namibia, in terms of Article 3 of the Namibian Constitution.<sup>105</sup> Article 3 (1) states that the official language of Namibia shall be English.<sup>106</sup> Article 3 (3) goes on to state that nothing contained in Sub-Article (1) shall preclude legislation by Parliament which permits the use of a language other than English for legislation, administration and judicial purposes in regions or areas where such other languages are spoken by a substantial component of the population.<sup>107</sup> It was contended in the Diegaardt matter that seven years after independence such laws had still not been passed and that this omission constituted a discrimination against non-

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<sup>102</sup> Ulasiuk I 'Language Rights in Relations with Public Administration: European Perspective' (2011) *International Journal on Minority and Group Rights* 18 93.

<sup>103</sup> *Diergaardt v Namibia* (2000) 8 IHRR 46.

<sup>104</sup> *Diergaardt v Namibia* (2000) 8 IHRR 46.

<sup>105</sup> *Diergaardt v Namibia* (2000) 8 IHRR 46.

<sup>106</sup> Constitution of the Republic of Namibia, 1990.

<sup>107</sup> Constitution of the Republic of Namibia, 1990.

English speakers.<sup>108</sup> Furthermore, it had been contended that attempts by the Baster community to have such legislation enacted have been thwarted by the Government which has declared to have no intention to take any legislative action in this matter.<sup>109</sup> In this regard, reference had been made to the 1991 census, according to which only 0.8 percent of the Namibian population used English as mother tongue.<sup>110</sup>

The Human Rights Committee found that the facts before it disclosed a violation of Article 26 of the ICCPR.<sup>111</sup> This finding was based on the fact that as the result of the lack of language legislation in Namibia the Baster community have been denied the use of their mother tongue in administration, justice, education and public life.<sup>112</sup> The Committee noted that the Baster community (hereafter the authors) had shown that Namibia had instructed civil servants not to reply to the authors' written or oral communications in the Afrikaans language, even when they were perfectly capable of doing so.<sup>113</sup> These instructions barring the use of Afrikaans do not relate merely to the issuing of public documents but even to telephone conversations.<sup>114</sup> In the absence of any response from Namibia, the Committee gave due weight to the allegation of the authors that the circular in question is intentionally targeted against the possibility to use Afrikaans when dealing with public authorities.<sup>115</sup>

Notwithstanding the decision of the Human Rights Committee in *Diergraadt*, the foregoing discussion makes it clear that the right of minorities to have their language used in the public domain is far from being a well-established right under international law.<sup>116</sup> Due to the limited

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<sup>108</sup> *Diergaardt v Namibia* (2000) 8 IHRR 46.

<sup>109</sup> *Diergaardt v Namibia* (2000) 8 IHRR 46.

<sup>110</sup> *Diergaardt v Namibia* (2000) 8 IHRR 46.

<sup>111</sup> *Diergaardt v Namibia* (2000) 8 IHRR 46.

<sup>112</sup> *Diergaardt v Namibia* (2000) 8 IHRR 46.

<sup>113</sup> *Diergaardt v Namibia* (2000) 8 IHRR 46.

<sup>114</sup> *Diergaardt v Namibia* (2000) 8 IHRR 46.

<sup>115</sup> *Diergaardt v Namibia* (2000) 8 IHRR 46.

<sup>116</sup> Ulasiuk I 'Language Rights in Relations with Public Administration: European Perspective' (2011) *International Journal on Minority and Group Rights* 18 93.

presence of this right in international instruments the right is uncertain and its position shaky.<sup>117</sup> Most countries argue that they can only provide comprehensive legal protection for a few minority languages.<sup>118</sup> This is because resources are not unlimited in most multilingual states. A multilingual state therefore often has to choose one or two minority languages to which it will offer strong legal protection such as access to state services, governmental and municipal publications and public education. The problem is that “if a language is not given access in the political, legal or administrative spheres, it will gradually lose all its terminological potential in those fields and become a ‘handicapped’ language, incapable of expressing every aspect of community life”.<sup>119</sup>

From the foregoing, the following conclusion can be made. In many countries, the use of a minority languages in the public domain is difficult or impracticable because of the lack of linguistic skills among civil servants; there is scant legislative framework and policy on the subject; economic constraints which include costs of translating documents and the lack of implementation or encouraging measures.<sup>120</sup> This means the right to a minority language in the public service is not well rooted in international human rights legal instruments and its position is shaky at best.

### **3.2.3 Language use for education**

The right to education is a widely protected international human right, but the same cannot be said with respect to receiving education in the mother tongue. The aim of this section is to determine the position of international law on the use of minority languages as the medium of

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<sup>117</sup> Ulasiuk I ‘Language Rights in Relations with Public Administration: European Perspective’ (2011) *International Journal on Minority and Group Rights* 18 93.

<sup>118</sup> Pinto M ‘On the Intrinsic Value of Arabic in Israel – Challenging Kymlicka on Language Rights’ (2007) *Canadian Journal of Law and Jurisprudence* 143.

<sup>119</sup> Ulasiuk I ‘Language Rights in Relations with Public Administration: European Perspective’ (2011) *International Journal on Minority and Group Rights* 18 93.

<sup>120</sup> Ulasiuk I ‘Language Rights in Relations with Public Administration: European Perspective’ (2011) *International Journal on Minority and Group Rights* 18 93.

instruction in education. Before that, however, follows a brief discussion on the value of providing language in a minority education.

Teaching in the mother tongue and other languages on a first language level holds big advantages.<sup>121</sup> There is overwhelming evidence across the world that the longer a child learns in his or her home language, the more likely the child is to succeed academically, and the quicker the child will learn a second or third language when the time comes.<sup>122</sup> The latest research report from Unesco's global training program (GEM) suggests that 40% of the children worldwide do not have access to education in a language that they understand.<sup>123</sup> According to the information documents titled "if you do not understand, how can you learn", which was released on 21 February, the International Day of the Mother tongue, there can be a negative impact on children's learning ability if they receive an education in another language which is not their mother tongue, especially where children live in poverty.<sup>124</sup>

A sound cognitive foundation in a well-known language that the child speaks at home and or is familiar with locally, needs to be laid first, otherwise the child will struggle to learn the unfamiliar language well enough to start learning other subjects through that language.<sup>125</sup> A period of three years of mainly mother tongue-based learning is simply too short and results in pupils being unable to read or write properly in both the mother tongue and in English.<sup>126</sup> It is therefore necessary that schools allow their learners to be taught in their mother tongues.<sup>127</sup> The focus during lessons should therefore be placed on the learner's ability to understand the learning materials and the lectures instead of their language proficiency.<sup>128</sup> An excuse often heard is that

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<sup>121</sup> Booyesen D 'Eersteklas redes vir eertse taal' *Republikein* 10 January 2018 11.

<sup>122</sup> Staff Reporter 'Taking home language to the nation' *The Namibian* 13 July 2017 7.

<sup>123</sup> Staff Reporter '40% do not have access to mother tongue education' *Republikein* 25 February 2016 5.

<sup>124</sup> Staff Reporter '40% do not have access to mother tongue education' *Republikein* 25 February 2016 5.

<sup>125</sup> Töttemeyer A 'English Proficiency – A Complex Problem' *The Namibian* 26 January 2018 11.

<sup>126</sup> Töttemeyer A 'English Proficiency – A Complex Problem' *The Namibian* 26 January 2018 11.

<sup>127</sup> Myburgh O, Poggenpoel M, Van Rensburg W 'Learners' experience of teaching and learning in a second or third language' *Faculty of Education and Nursing RAU, Rand Afrikaans University Vol 124 No. 3* 573.

<sup>128</sup> Myburgh O, Poggenpoel M, Van Rensburg W 'Learners' experience of teaching and learning in a second or third language' *Faculty of Education and Nursing RAU, Rand Afrikaans University Vol 124 No. 3* 573.



indigenous languages lack the terminology and until suitable terminology has been developed, these languages cannot be used as a medium of instruction.<sup>129</sup> However, a Tanzanian linguist known as Casimir Rubagumya argues that the languages can only develop when they are used continually since no language can evolve by itself.<sup>130</sup> It grows as new words are being created to describe concepts.

Denying a person access to his or her mother tongue, especially at an early stage, has been shown to have a cumulative retarding effect upon the development of a child.<sup>131</sup> A conscious or unconscious policy of linguistic and cultural exclusion and alienation has often led to an educational disaster and dismissal performance of bilingual children, as characterized by low attendance, poor achievement, and high dropout rates.<sup>132</sup> Language does not only have a communicative value but it is also crucial regarding the ways in which individuals view the world.<sup>133</sup> The practical difficulties of mother tongue teaching have led to the marginalization of mother tongue teaching out of the official school curriculum.<sup>134</sup> Deprivations resulting from language discrimination may be devastating for skill acquisition.<sup>135</sup> Language barriers often frustrate and stifle the full development of latent capabilities. When people are deprived of

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<sup>129</sup> Töttemeyer A 'English Proficiency – A Complex Problem' *The Namibian* 26 January 2018 11.

<sup>130</sup> Töttemeyer A 'English Proficiency – A Complex Problem' *The Namibian* 26 January 2018 11.

<sup>131</sup> McDougal MS, Chen L & Lasswell HD 'Freedom from Discrimination in Choice of Language and International Human Rights' (1976) *Faculty Scholarship Series* 151.

<sup>132</sup> McDougal MS, Chen L & Lasswell HD 'Freedom from Discrimination in Choice of Language and International Human Rights' (1976) *Faculty Scholarship Series* 151.

<sup>133</sup> Vertovec S and Wessendorf S 'Cultural, Religious and Linguistic Diversity in Europe: An Overview of Issues and Trends' in Penninx R, Berger M & Kraal K *The Dynamics of International Migration and Settlement in Europe* (2006) 171-199.

<sup>134</sup> Vertovec S and Wessendorf S 'Cultural, Religious and Linguistic Diversity in Europe: An Overview of Issues and Trends' in Penninx R, Berger M & Kraal K *The Dynamics of International Migration and Settlement in Europe* (2006) 171-199.

<sup>135</sup> McDougal MS, Chen L & Lasswell HD 'Freedom from Discrimination in Choice of Language and International Human Rights' (1976) *Faculty Scholarship Series* 151.

enlightenment and skill, their capabilities for effective participation in all other value processes are correspondingly diminished.<sup>136</sup>

In terms of the protection of the provision of education in a minority language, the Convention against Discrimination in Education prohibits under its Article 1 any distinction, exclusion, limitation or preference, on language or other grounds, which has the purpose or effect of nullifying or impairing equality of treatment in education of all types and levels.<sup>137</sup> According to Article 26 of the UDHR, everyone has the right to education, with relevance to the language of medium of instruction.<sup>138</sup> Article 17 (1) of the African Charter guarantees the right to education to every individual.<sup>139</sup> The African Charter on the Rights and Welfare of the Child provides that ‘every child shall have the right to education’.<sup>140</sup> It further provides under Article 11 (2) (a) that the education of the child shall be directed to the promotion and development of the child’s personality, talents and mental and physical abilities to their fullest potential.<sup>141</sup>

Education plays a fundamental role in the preservation and promotion of regional and minority languages.<sup>142</sup> Education includes access to education, the standard and quality of education, and the conditions under which it is given.<sup>143</sup> As the Permanent Court of International Justice observed in an *Advisory Opinion on Minority Schools in Albania*, ‘the policy underlying this detailed protection was to ensure that nationals belonging to “linguistic minorities” be “placed in every respect on a footing of perfect equality with the other nationals of the State,” and to ensure for the linguistic minorities “the possibility of living peaceably alongside ... and co-operating

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<sup>136</sup> McDougal MS, Chen L & Lasswell HD ‘Freedom from Discrimination in Choice of Language and International Human Rights’ (1976) *Faculty Scholarship Series* 151.

<sup>137</sup> Article 1. Convention against Discrimination in Education (1960) UNESCO.

<sup>138</sup> Article 26 the Universal Declaration of Human Rights (1948) General Assembly Resolution 217 A (III).

<sup>139</sup> Article 17. African Charter on Human and Peoples Rights (1981) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

<sup>140</sup> Article 11 African Charter on the Rights and Welfare of the Child (1990) 26<sup>th</sup> Assembly of the Heads of State and Governments of the Organization of African Unity.

<sup>141</sup> Article 11.

<sup>142</sup> Crnić-Grotić V ‘Developments in the Field of the European Charter for Regional or Minority Languages’ (2010) *European Yearbook of Minority Issues Vol 9* 505.

<sup>143</sup> McDougal MS, Chen L & Lasswell HD ‘Freedom from Discrimination in Choice of Language and International Human Rights’ (1976) *Faculty Scholarship Series* 151.

amicably with” the population that spoke the majority language, while “preserving the characteristics which distinguish them from the majority...”<sup>144</sup>

In conclusion, children, it is believed, are disadvantaged when they cannot be educated in their mother tongue. Their learning is more difficult than children who are educated in their mother tongue and these children may never develop academically as well as those children who are educated in their mother tongues. These are, however, conflicting views under international human rights legal instruments on whether children have the right to be educated in their mother tongues. What is clear is that all children have the right to an education, but less clear is the right in which languages to receive this education.

#### **4. Conclusion**

This chapter had established that both international and regional human rights legal instruments protect language rights. Language is a listed ground under which discrimination is prohibited under a plethora of international legal instruments. The unequal treatment of languages may lead to a violation of the right to human dignity, the right to equality and the right to freedom from discrimination. It is against this background that the next chapter will examine what legal measures Namibia, a country that is home to a large number of linguistic minorities, has put in place since its independence to protect language rights. The aim is to test whether Namibia is complying with its international and regional obligations of protecting and promoting the rights of linguistic minorities.

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<sup>144</sup> McDougal MS, Chen L & Lasswell HD ‘Freedom from Discrimination in Choice of Language and International Human Rights’ (1976) *Faculty Scholarship Series* 151.

## **Chapter 3: Rights of minorities to use their languages in Namibia**

### **1. Introduction**

Namibia is home to several linguistic minorities. The major linguistic groups include: the Owambo, Bushman (San), Caprivians, Herero, Kavango, Damara>Nama, Setswana, Afrikaans, German, English, several other European languages, several other African languages, Asian languages and other unidentified languages.<sup>145</sup> English is the only official language in Namibia under its Constitution, while English is only spoken by about 50 225 people out of a total population of more than three million people. The Constitution allows the country's Parliament to enact legislation that allows the use of the other languages in education, public administration and justice. The purpose of this chapter is to establish whether Namibia is complying with its obligations toward international law in the manner it treats minority language rights.

Chapter three commences the discussion by addressing the place of international law in Namibia. The chapter then moves to the discussion on the constitutional protection afforded to minority language rights. The focus will thereafter be placed on the legislative framework currently protecting minority language rights in Namibia. The focus will then go on to discuss minority languages in Namibia under the public sphere, where the following topics will be addressed: minority language rights in government business; minority languages in education; minority languages in the justice system and progress made in advancing minority languages rights since the finding of *Diergaardt et al v Namibia*.

### **2. The place of international law in Namibia**

Namibia signed or ratified the following agreements, *inter alia*: African Charter on Human and Peoples' Rights, 1981; Convention on the Rights of the Child, 1989; International Convention on the Elimination of All Forms of Racial Discrimination, 1966; International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966. This section deals with the international and regional human rights instruments which Namibia is

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<sup>145</sup> Namibia Population and Housing Census Main Report, 2011 8-22.

a signatory to. The focus is on establishing whether or not Namibia is bound by regional and international human rights obligation in protecting minority languages.

The two main theories of how the relationship between national law and international law correlates may be summed up with reference to the monist approach and the dualist approach.<sup>146</sup> According to the monist approach, international law and national law constitute aspects of a single universal system. With the monist approach, international law is automatically part of the national laws of a nation. In terms of the dualist approach, international law and national law are two distinct and independent legal orders, each with its own structurally distinct character.

The Namibian Constitution adopted a monist approach towards international law.<sup>147</sup> Article 96 of the Namibian Constitution states that '[t]he State shall endeavour to ensure that in its international relations it: adopts and maintains a policy of non-alignment; promotes international co-operation, peace and security; creates and maintains just and mutually beneficial relations among nations; fosters respect for international law and treaty obligations; encourages the settlement of international disputes by peaceful means'.<sup>148</sup> More specifically, Article 144 of the Namibian Constitution states that, unless otherwise provided by the Constitution or an Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under the Constitution, automatically form part of the law of Namibia.<sup>149</sup>

The effect of the above provisions in the Namibian Constitution are that the general rules of public international law and international agreements have direct and automatic application in Namibia, unless this is contrary to any other provision of the Constitution or an Act of

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<sup>146</sup> Tshosa O 'The status of international law in Namibian national law: A critical appraisal of the constitutional strategy 11.

<sup>147</sup> Tshosa O 'The status of international law in Namibian national law: A critical appraisal of the constitutional strategy 11.

<sup>148</sup> Constitution of the Republic of Namibia, 1990.

<sup>149</sup> Constitution of the Republic of Namibia, 1990.

Parliament.<sup>150</sup> The objective of the provision is to incorporate international law in general into the law of Namibia.<sup>151</sup> The only real qualification is that international law must be compatible with the Constitution and with municipal legislation. The term ‘general principles of international law’ is also often used in treaties on international law.<sup>152</sup> This in effect means that international law as far as provided and sanctioned above may be directly applied in the local courts in Namibia.<sup>153</sup> The point of departure for a litigant who wishes to assert his rights in a Namibian court of law would firstly be to rely on municipal laws, legislation and the Namibian Constitution and thereafter on international treaties and international law. However, nothing restricts a litigant from relying on international treaties, should he or she wish to assert his rights in the lower courts in Namibia. The provisions of the Namibian Constitution are a clear indication of the proactiveness of the Constitution toward international law.<sup>154</sup>

Namibia is a signatory to several international and regional human rights treaties and legal instruments and these treaties and agreements automatically form part of the laws of Namibia unless specifically excluded by other Namibian laws. This means that minority language rights protected by these agreements and Namibia has the obligation to go a step further and to enact laws which also protect minority languages.

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<sup>150</sup> Tshosa O ‘The status of international law in Namibian national law: A critical appraisal of the constitutional strategy 11.

<sup>151</sup> Erasmus G ‘The Namibian Constitution and the Application of Internal Law’ *The South African Yearbook of International Law Vol 15* 81.

<sup>152</sup> Erasmus G ‘The Namibian Constitution and the Application of Internal Law’ *The South African Yearbook of International Law Vol 15* 81.

<sup>153</sup> Tshosa O ‘The status of international law in Namibian national law: A critical appraisal of the constitutional strategy 11.

<sup>154</sup> Tshosa O ‘The status of international law in Namibian national law: A critical appraisal of the constitutional strategy 11.

### 3. Constitutional protection of language rights

Language policies have been created throughout African countries in a very similar way.<sup>155</sup> When the vast majority of African countries gained their independence from colonial rule, they were faced with the colossal task of drafting national constitutions, formulating new national policies, revising language policies that would peacefully unite the wide range of ethno-linguistic groups within their borders into a collective national whole.<sup>156</sup> What ultimately transpired in most African countries after they gained independence was a simple continuation of the language policies imposed by the former colonial rulers. Most African countries retained the *status quo* or made a single indigenous dominant language the official language, with the hope that this language would bring their varied ethno-linguistic groups together and unite them under the single official language. There were thus no transitions made which would distinguish the colonial linguistic systems to that which several African countries would opt for after independence. Most African countries took a lax approach to linguistic rights and could not counterbalance the promotion of language rights next to peace and stability. Most nations chose to assimilate with the language and the cultures of the majority groups, which in most countries are those belonging to the western nations. Although assimilation in effect ensures peace and stability, it comes at a very high price which is that rich indigenous cultures fade away as indigenous languages are used less and less, to the point where they eventually lose their power in public life, government business, the judicial system and in education, as well as their terminology.

Namibia belongs to the category of African countries that faced the colossal tasks of drafting national constitutions, formulating new national policies, revising language policies and ensuring that unity prevails while doing so. Namibia chose to carry on with most of the existing policies and therefore retained the *status quo*. Before Namibia's independence, Afrikaans was the *lingua franca* and before that German enjoyed a special status. Currently, language rights are protected in Article 3 of the Namibian Constitution. Article 3 of the Namibian Constitution provides that

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<sup>155</sup> Frydman J 'A Critical Analysis of Namibia's English-Only Language Policy' (2011) *In Selected Proceedings of the 40<sup>th</sup> Annual Conference on African Linguistics* 178.

<sup>156</sup> Frydman J 'A Critical Analysis of Namibia's English-Only Language Policy' (2011) *In Selected Proceedings of the 40<sup>th</sup> Annual Conference on African Linguistics* 178.

the official language of Namibia shall be English, but that nothing contained in the Constitution shall prohibit the use of any other language as a medium of instruction in private schools or in schools financed or subsidised by the State, subject to compliance with such requirements as may be imposed by law, to ensure proficiency in the official language, or for pedagogic reasons.<sup>157</sup>

It is stated above that Article 3 of the Namibian Constitution was drafted in discretionary language and not in peremptory language. In terms of the above provision, the Namibian government does not need to take any positive measures to ensure language development. It simply states that if Namibian minority languages developed of their own and if they were to be used as mediums of instruction in private schools that these actions were not to be opposed by the constitution. Further the constituent assembly may or may not create laws that allow the use of other languages in Namibia's judiciary, education system and in public life. No obligation is placed on law makers to ensure that this happens. This allows the Namibian parliament to be as lax as it currently is in promoting and protecting minority languages.

In summary, the wording of the Constitution which makes provision for language rights is evasive and gives Parliament a discretion instead of an obligation on whether or not to create legislation that would protect minority languages and ensure their use in education, public life and justice. It may therefore be concluded that languages rights are not protected in Namibia. It may further be concluded that Namibia's Constitution is neither progressive nor proactive as far as the protection and the promotion of language rights are concerned.

#### **4. Legislative framework protecting minority language rights in Namibia**

This topic considers the legislative measures Namibia had put in place to protect language rights since the coming into operation of its Constitution in 1990. This topic is therefore aimed at determining how far Namibia had come since its independence in complying with its international human rights obligations in protecting minority language rights.

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<sup>157</sup> Constitution of the Republic of Namibia, 1990.



In October 1995, the Monitor Action Group, a political party, introduced a Language Bill in Namibia's parliament for the first time.<sup>158</sup> The Bill stipulated that all Namibian languages should be made official, with the provisos that English be the national language. The Bill also stipulated that the language spoken by the majority in a particular region should accompany English in schools, business and government. Unfortunately the then Deputy Minister of Basic Education and the Deputy Minister of Higher Education, Vocational Training, Science and Technology rejected the Bill and argued that a law giving precedence to a language spoken by the majority in a particular region would exclude other learners.<sup>159</sup>

The above illustration is the furthest Namibia has come since its independence in 1990 in creating language legislation. Currently, there are no laws that protect or promote the many languages that are spoken in Namibia. Namibia has taken no legislative steps since its independence to enhance the position of language rights. What is then the current position of the law in Namibia with respect to language use in the public sphere? That is the focus of the next section.

## **5. Minority languages in Namibia under the public sphere:**

### **5.1 Minority language rights in government business (administration and parliament)**

As mentioned earlier, Namibia is a multicultural and a multilingual society. Despite this, Namibia has English as its only official language and as such adopted a policy of monolingualism, regardless of the fact that English has no historical ties with Namibia.<sup>160</sup> This section is concerned with language use in Namibia for government business and the role of minority languages in the public realm of Namibia.

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<sup>158</sup> Legère K, Trewby R & Van Graan M 'The implementation of the Namibian language policy in education: Lower primary grades and pre-service teacher education' (2000) *Namibian Educational Research Association* 9.

<sup>159</sup> Legère K, Trewby R & Van Graan M 'The implementation of the Namibian language policy in education: Lower primary grades and pre-service teacher education' (2000) *Namibian Educational Research Association* 9.

<sup>160</sup> Nyqvist SA English as a Lingua Franca in Namibia: Teacher's Attitudes Towards English as a Medium of Instruction in Classrooms (Degree Project English Linguistics, Dalarna University) 1.

The reason why the independent government of Namibia decided to make English the only official language in Namibia, despite the fact that Afrikaans was the *lingua franca* at the time of independence, is associated with the fact the people of Namibia were severely oppressed by South Africa's apartheid regime when South Africa colonised Namibia.<sup>161</sup> The South West African People's Organization (SWAPO) began to lead a liberation movement in the country before Namibia's independence and the SWAPO party drew its strength principally from within the Ovambo people. In preparation for independence, they felt it was necessary to replace the language of the oppressor, which was Afrikaans, because it 'undermined the self-concept and cognitive growth of the African language speakers'.<sup>162</sup> SWAPO adopted a policy naming English as the only official language of Namibia in 1981: however, Namibia did not become an independent country until 1990.

The Constitution of Namibia that was created when the country gained independence mandated that, in accordance with the SWAPO language policy, English was to be the only official language of the country and the means of all communication for every branch of the government, from the national to the local level.<sup>163</sup> There are two main reasons for why English was preferred.<sup>164</sup> The first is that English is an international language and the second is idea that Afrikaans was associated with the National Party government of apartheid South Africa. The new government wanted to move away from Afrikaans, the 'language of the oppressor,' and wanted to create unity.<sup>165</sup> This decision was made in spite of the fact that, according to the most recent

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<sup>161</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies*; Vol. 9, No. 3; 189.

<sup>162</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies*; Vol. 9, No. 3; 189.

<sup>163</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies*; Vol. 9, No. 3; 189.

<sup>164</sup> Carpenter G 'The Namibian Constitution – ex Africa Aliud Novi after All' *The South African Yearbook of International Law* Vol 15 22.

<sup>165</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies*; Vol. 9, No. 3; 189.

census data at the time, 0.8% of the Namibian population spoke English as a mother tongue.<sup>166</sup> The majority of whites spoke either Afrikaans or German and there were numerous indigenous languages which were spoken by the black segment of the Namibian population. It is important to note that pressure from donors, particularly those from Britain, also influenced this language policy.<sup>167</sup>

The implications of the decision to pick English as the only official language of the country are numerous. There are, for example, only a negligible number of students who choose to study African languages at higher education levels.<sup>168</sup> Students feel that to secure a job one must speak a European language and that if you study African languages you have no employment opportunities. The head of the University of Namibia's language and literature studies departments, Mr Jekura Kavari once remarked that 'indigenous languages would continue to die out as long as there are no incentives for sponsorship'.<sup>169</sup> Mr Jekura Kavari illustrated the negative attitudes toward indigenous languages, by mentioning an example where the University of Namibia did not replace two language lecturers after they had left the university.<sup>170</sup> This is similar to other African countries that, after becoming independent, chose to retain the *status quo* as far as official language laws are concerned. Many African countries therefore have a European component in their official languages.

There is no commercial incentive to be gained in striving to better know and speak a minority language in African countries. The position in Namibia is that its people feel obliged to study in English because of the function of the English language in the Namibian society.<sup>171</sup> English is the

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<sup>166</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies*; Vol. 9, No. 3; 189.

<sup>167</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies*; Vol. 9, No. 3; 189.

<sup>168</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies*; Vol. 9, No. 3; 189.

<sup>169</sup> Kamwi R 'Preserve indigenous languages - minister' *The Namibian* 09 April 2019 6.

<sup>170</sup> Kamwi R 'Preserve indigenous languages - minister' *The Namibian* 09 April 2019 6.

<sup>171</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies*; Vol. 9, No. 3; 189.

only official language in terms of Article 3 of the Namibian Constitution and if a person is not proficient in English such an individual is perceived as uneducated and has a diminished prospect of success in the public life of the community.<sup>172</sup> If for instance a person in Namibia wishes to enter the science field, work for the government or enter a professional and prestigious career, it is necessary that she or he is fluent in English.<sup>173</sup> However, even though having a job and being productive in society is an important part of individual development, neglecting the legitimacy of one's own native language may disregard his or her identity as a human being.<sup>174</sup> Thus while commercial value is gained, when proficiency in English is achieved, this comes at the expense of the person's identity. Cultural identities are therefore sacrificed at the altar of assimilation with world dominated languages. Namibia's education Minister stated that preserving their indigenous language kept her family going during their time in exile and expressed disappointment with people who are ashamed of their indigenous languages, at an assembly which was held in Windhoek at the beginning of 2019.<sup>175</sup>

When the Namibian government decided to make English the only official language in Namibia, Dr Hage G Geingob, the then Prime Minister of the country, defended this position based on the idea that Namibia had been restricted in their capacity to communicate with the outside world for a long time and that English would open the doors for the Namibian people to be able to communicate with the outside world.<sup>176</sup> Communication with the outside world may be useful and even crucial for the wellbeing and development of any country.<sup>177</sup> Although international relations are of fundamental importance to any nation's growth and wellbeing, this should not

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<sup>172</sup> Constitution of the Republic of Namibia, 1990.

<sup>173</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies*; Vol. 9, No. 3; 189.

<sup>174</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies*; Vol. 9, No. 3; 189.

<sup>175</sup> Kamwi R 'Preserve indigenous languages - minister' *The Namibian* 09 April 2019 6.

<sup>176</sup> Nyqvist SA English as a Lingua Franca in Namibia: Teacher's Attitudes Towards English as a Medium of Instruction in Classrooms (Degree Project English Linguistics, Dalarna University) 1.

<sup>177</sup> Nyqvist SA English as a Lingua Franca in Namibia: Teacher's Attitudes Towards English as a Medium of Instruction in Classrooms (Degree Project English Linguistics, Dalarna University) 1.

deter individual growth nor come at the expense of the authentic Namibian identity. International relations are not more important than self-development and the unique identity of a nation.

The decision to adopt English as the only official language of government business also has adverse implication for participatory democracy. In fact, Namibia has been striving to promote participatory democracy since its independence but with less success, which is partly attributed to the difficulties created by the fact that English is the country's only official language. As long as English is the only official language in its domain, Namibia will only be able to achieve selective democracy, which excludes the vast majority of its citizens.<sup>178</sup> It may therefore be argued that Namibia is only a constitutional democracy *de jure*, but not *de facto* as the overwhelming majority of Namibians do not participate in the election processes of the country, due to language barriers. To ensure true participatory democracy, the other Namibian languages would have to be acknowledged, implemented, protected, respected and promoted in official use and in the political realm.<sup>179</sup>

In summary it may be said that the people of Namibia were severely oppressed by the Afrikaner Government of South Africa during the dark days of apartheid. During this period Afrikaans was the *lingua franca*, but was not an option as the official language of the newly independent Namibia. English is chosen as the only official language and the language to be used for all official government purposes for a number of reasons. Minority languages accordingly have no room in the public realm in Namibia.

## **5.2 Minority language rights in education**

Since its independence, the country introduced some education policies in an effort to improve the provisioning and delivery of education services to all communities in the country, regardless

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<sup>178</sup> Frydman J 'A Critical Analysis of Namibia's English-Only Language Policy' (2011) *In Selected Proceedings of the 40<sup>th</sup> Annual Conference on African Linguistics* 178.

<sup>179</sup> Frydman J 'A Critical Analysis of Namibia's English-Only Language Policy' (2011) *In Selected Proceedings of the 40<sup>th</sup> Annual Conference on African Linguistics* 178.

of geographic location.<sup>180</sup> Geographic location is a fundamental consideration in Namibia's education system, because three quarters of the population live in rural areas. Prior to 1990, Namibia had 11 semi-autonomous political entities, which had the responsibility of administering education. Since the country was under the administration of the apartheid South Africa prior to 1990, education was divided along racial and ethnic lines. This automatically led to inequalities in the allocation of resources for the different ethnic authorities.

‘During the apartheid regime, the majority of black children had to stay out of school or compete for the few places in their designated schools. To further strengthen the inequalities and the apartheid state machinery, only a few, ill-equipped, poorly staffed and under-financed schools were made available for black children’.<sup>181</sup>

After 1990, the newly independent and democratically elected government of Namibia inherited this fragmented, stratified and dualist society of education policies and economy and this created an immediate problem and a major challenge the new government had to grapple with.<sup>182</sup>

Apart from the above challenge, Namibia is one of the countries in Africa which is home to the largest concentration of nomadic people. These hunter-gatherers are unable to read and write.<sup>183</sup> The history of the earliest of these hunter-gatherers in Namibia had been reconstructed from archaeological evidence and log-books of Portuguese and Dutch navigators who sailed the Namibian shores.<sup>184</sup> These people are among the most marginalized social groups in the world

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<sup>180</sup> Hailombe O Education Equity and Quality in Namibia: A Case Study of Mobile Schools in the Kunene Region (a thesis submitted in partial fulfilment of the requirements for the degree Doctor of Philosophy in Education Policy, University of Namibia, 2011) 1.

<sup>181</sup> Hailombe O Education Equity and Quality in Namibia: A Case Study of Mobile Schools in the Kunene Region (a thesis submitted in partial fulfilment of the requirements for the degree Doctor of Philosophy in Education Policy, University of Namibia, 2011) 1.

<sup>182</sup> Hailombe O Education Equity and Quality in Namibia: A Case Study of Mobile Schools in the Kunene Region (a thesis submitted in partial fulfilment of the requirements for the degree Doctor of Philosophy in Education Policy, University of Namibia, 2011) 1.

<sup>183</sup> Du Pisani A *SWA/Namibia The Politics of Continuity and Change* (1986) 5.

<sup>184</sup> Du Pisani A *SWA/Namibia The Politics of Continuity and Change* (1986) 5.

and are widely excluded from educational provisions.<sup>185</sup> In Namibia the government identified the nomads into two classes. On the one hand are the pastoralists, livestock herders that come from the Himba and Zemba ethnic communities and, on the other hand, are the food hunter gatherers belonging to the San people. In the year 2000, the Namibian government introduced the National Policy Option for Educationally Marginalised Children, which had the primary aim of facilitating the realisation of universal primary access to basic education and poverty alleviation by 2015. The 2001 Namibian Population Census (2001) revealed that there were more than 25 000 primary age children who did not attend school and over 10 000 who left school early.<sup>186</sup>

For our purpose, an important question in relation to access to education is the law and policy regulating the use of language in education. This is about whether language rights enjoy protection in the education system of Namibia and if so to what extent. As mentioned earlier, the Namibian Constitution makes provision in its Article 3 for language rights, but makes English the only official language in the country.<sup>187</sup> Several policies, frameworks and reports had been put in place by the Namibian government, aimed at achieving equity, quality education and equal access and opportunity to education. The list includes the Education and Training Sector for Improvement Programme (ETSIP, 2005-2020), Towards Education For All (1993), Presidential Commission Report 1999, the Education Act of 2001 and the Policy Options of Educational Marginalised Children (2000).<sup>188</sup>

One of the most important policies which had been produced by the Namibian government after its independence in 1990, concerning language in education, was *Education and Culture in*

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<sup>185</sup> Hailombe O Education Equity and Quality in Namibia: A Case Study of Mobile Schools in the Kunene Region (a thesis submitted in partial fulfilment of the requirements for the degree Doctor of Philosophy in Education Policy, University of Namibia, 2011) 1.

<sup>186</sup> Hailombe O Education Equity and Quality in Namibia: A Case Study of Mobile Schools in the Kunene Region (a thesis submitted in partial fulfilment of the requirements for the degree Doctor of Philosophy in Education Policy, University of Namibia, 2011) 1.

<sup>187</sup> Constitution of the Republic of Namibia, 1990.

<sup>188</sup> Hailombe O Education Equity and Quality in Namibia: A Case Study of Mobile Schools in the Kunene Region (a thesis submitted in partial fulfilment of the requirements for the degree Doctor of Philosophy in Education Policy, University of Namibia, 2011) 1.

*Namibia: The Way Forward to 1996.*<sup>189</sup> Discussions were held in all the regions of the country and the following criteria were taken into account in developing the policy:

‘the expectation that a language policy should facilitate the realisation of the substantive goals of education; the equality of all national languages regardless of the number of speakers or the level of development of a particular language; the cost of implementing the policy; the fact that language is a means of transmitting culture and cultural identity; the fact that for pedagogical reasons it is ideal for learners to study through their mother tongue, particularly in the early years of schooling when basic skills of reading, writing and concept formation are acquired; the need for learners to be proficient enough in English, the official language, at the end of the seven-year primary school cycle in order to gain access to further education as well as to a language of wider communication’.<sup>190</sup>

The policy recommended that English, as the official language, would be the medium of instruction from Grade four upwards. At the same time, it stated that learners should be taught through the medium of their mother tongue from Grades one to three and that all learners should be treated equally. The problem was that the implementation of the policy was not evenly applied throughout the entire country. Many schools in Namibia did not offer the Namibian indigenous languages as subjects for study up to Grade 12.<sup>191</sup> Another important language policy which had been formulated by the Namibian government after independence includes the *Language Policy for Schools: 1992 – 1996 and beyond*.<sup>192</sup> Despite the policy’s focus on home language learning in the early primary years, with continued instruction in these languages throughout formal education, the Ministry of Education and Culture interprets the official language policy within the same document by stating that “Grades one to three will be taught either through the Home

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<sup>189</sup> Discussion Document Ministry of Basic Education, Sport and Culture ‘The Language Policy for Schools in Namibia’ (2003) 1.

<sup>190</sup> Discussion Document Ministry of Basic Education, Sport and Culture ‘The Language Policy for Schools in Namibia’ (2003) 1.

<sup>191</sup> The Language Policy for Schools 1992 – 1996 And Beyond (1993) *Ministry of Education and Culture*.

<sup>192</sup> Chavez A ‘Rights in Education and Self-Identity: Education and Language of Instruction in Namibia’ (2016) *International Education Studies; Vol. 9, No. 3*; 189.



Language, a local language, or English”.<sup>193</sup> This gives schools the option to disregard the Home Language and local language and begin full instruction in English in Grade one. It would also seem like the policy protects minority languages in education, but only as a way station to elimination.<sup>194</sup> This means the state is required to take positive measures to accommodate the minority languages in public schools, but only until the children speaking minority languages are able to integrate into mixed classes where education is in the dominant language.<sup>195</sup> Some officials, even within the Ministry of Education, believe that the policy was meant to promote instruction in English over local languages, as one such official stated, “*The policy is not supporting multilingualism as was historically the case in Namibia. Traditionally, Namibians were multilingual but the policy is working against this*”.<sup>196</sup>

The ambiguity of the policy has led to many schools opting to forego formal instruction in students’ mother tongues and starting English-only instruction as early as Grade one. Despite the official guidelines given in the policy, many students are not receiving early primary instruction in their mother tongues due to the openness of the interpretation of the policy. In 2008 there were 243 schools in the country that had received permission from the Ministry of Education to offer instruction only in English from Grade one and onward. More schools have since adopted an English-only policy, partly due to the increase in parents who are taking their children out of schools that offer mother tongue instruction and enrolling them in schools that use English as the sole language of instruction.<sup>197</sup>

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<sup>193</sup> Chavez A ‘Rights in Education and Self-Identity: Education and Language of Instruction in Namibia’ (2016) *International Education Studies*; Vol. 9, No. 3; 189.

<sup>194</sup> Purvis C ‘Africa as a Generator of Human Rights Law’ (2013) *American Society of International Law Proceedings* 480.

<sup>195</sup> Purvis C ‘Africa as a Generator of Human Rights Law’ (2013) *American Society of International Law Proceedings* 480.

<sup>196</sup> Chavez A ‘Rights in Education and Self-Identity: Education and Language of Instruction in Namibia’ (2016) *International Education Studies*; Vol. 9, No. 3; 189.

<sup>197</sup> Chavez A ‘Rights in Education and Self-Identity: Education and Language of Instruction in Namibia’ (2016) *International Education Studies*; Vol. 9, No. 3; 189.

It must be acknowledged that having English as the medium of instruction holds some advantages. The positive impacts associated with English as the only official language in Namibia may be divided into four categories. These include: education, culture, politics and language.<sup>198</sup> In terms of education, it may be said that a sound knowledge of English increases cooperation with other countries and allows learners to take up tertiary studies in other countries and in so doing acquire skills which are not offered locally.<sup>199</sup> Politically, it is contended that ‘in order for state bureaucracies and services to function for the general public, but also regarding any kind of provision of information to facilitate participation, there has to be a standardised language which citizens are able to use’.<sup>200</sup> Culturally, it may be argued that English unites people from different cultures, ethnicities and countries and who have different mother tongues.<sup>201</sup> The fact that English serves as the common ground makes it possible for people from every corner of the world to communicate and thereby connect. Under the category of language, the fact that persons with different mother tongues know English means that they are bilingual and can learn to speak a third or fourth language faster than a person that only speaks one language.<sup>202</sup>

On the other hand, the current emphasis on English instruction in the implementation of Namibia’s educational language policy is inhibiting students from meeting their full potential in terms of personal development and professional success.<sup>203</sup> The most recent research from the United Nations Educational, Scientific and Cultural Organisation (hereafter UNESCO) indicates

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<sup>198</sup> Nyqvist SA English as a Lingua Franca in Namibia: Teacher’s Attitudes Towards English as a Medium of Instruction in Classrooms (Degree Project English Linguistics, Dalarna University) 1.

<sup>199</sup> Nyqvist SA English as a Lingua Franca in Namibia: Teacher’s Attitudes Towards English as a Medium of Instruction in Classrooms (Degree Project English Linguistics, Dalarna University) 1.

<sup>200</sup> Vertovec S and Wessendorf S ‘Cultural, Religious and Linguistic Diversity in Europe: An Overview of Issues and Trends’ in Penninx R, Berger M & Kraal K *The Dynamics of International Migration and Settlement in Europe* (2006) 171-199.

<sup>201</sup> Nyqvist SA English as a Lingua Franca in Namibia: Teacher’s Attitudes Towards English as a Medium of Instruction in Classrooms (Degree Project English Linguistics, Dalarna University) 1.

<sup>202</sup> Nyqvist SA English as a Lingua Franca in Namibia: Teacher’s Attitudes Towards English as a Medium of Instruction in Classrooms (Degree Project English Linguistics, Dalarna University) 1.

<sup>203</sup> Chavez A ‘Rights in Education and Self-Identity: Education and Language of Instruction in Namibia’ (2016) *International Education Studies; Vol. 9, No. 3*; 189.

that up to 40% of the children worldwide do not have access to an education in a language which they understand.<sup>204</sup> This is an important statistic, because this could have a negative impact on a child's learning ability, when receiving an education in a language which is different to their own, especially when these children live in poverty.<sup>205</sup> Research suggests that poor people who are constantly under financial stress experience reduced cognitive performance that is equivalent to a 13-point deficit in IQ.<sup>206</sup> The importance of home language learning can never be overemphasised.<sup>207</sup> Ehrens Mbamanovandu, the national programme officer for education at UNESCO, commented that, 'there is an overwhelming evidence across the world that the longer a child learns in her or his home language, the more likely is the child to succeed academically, and the quicker will a child learn a second or third language when the time comes'. The paradigm that has been created by society must be revisited in order to transform education and empower the youth of the country to reach their potential by embracing their cultural identity.<sup>208</sup>

The issue of language with regards to education had been discussed in detail in Namibia by Andree-Jeanne Töttemeyer in a local newspaper article titled 'English proficiency – A Complex Problem'.<sup>209</sup> In this article Töttemeyer states that Namibia, after 27 years of independence, is still struggling with English, because the wrong methodologies were chosen at independence to achieve English proficiency in the schools. Töttemeyer argues that two methodologies to introduce a second language or a foreign language as medium of instruction in schools were employed by the Namibian Government at independence in 1990. The one is changing the medium of instruction overnight, which is what the Namibian government did for Grade four to 12 in 1991, without training the teachers in the new language of instruction first and not taking enough time to produce enough well-thought out and expounded textbooks. The second is implementing mother tongue-based bi-lingual education (MTBLE). With this system, the pupil starts with the mother tongue but at the same time, the second language is gradually phased in.

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<sup>204</sup> Staff Reporter '40% het nie toegang tot moedertaalonderrig' *Republikein* 25 February 2016 5.

<sup>205</sup> Staff Reporter '40% het nie toegang tot moedertaalonderrig' *Republikein* 25 February 2016 5.

<sup>206</sup> Musutua R 'Dislike for Civil Society is a Sign of Failed leadership' *The Namibian* 28 June 2019 11.

<sup>207</sup> Staff Reporter 'Taking home language to the nation' *The Namibian* 13 July 2017 7.

<sup>208</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies; Vol. 9, No. 3*; 189.

<sup>209</sup> Staff Reporter 'Taking home language to the nation' *The Namibian* 13 July 2017 7.

According to Töttemeyer, success will depend on how gradual the phasing in will be. Töttemeyer goes on to state that in 1991 the Namibian government opted for the early exit MTBLE for Grades one to three only and in so doing expected pupils to switch to the English medium of instruction during Grade four already. Research, however, suggests that the late exit model which requires that learners study in their mother tongue for at least seven to eight years is more advantageous than the early exit model. This is a better basis for the successful learning of a second language, for instance. The disadvantage of the early exit model is that pupils end up being unable to read and write properly in both the mother tongue and in English.

An education system functions properly only when it provides students with both rights to education and rights in education.<sup>210</sup> An efficient education system will guarantee the right to its students to use their languages as a medium of instruction in private and public schools.<sup>211</sup> The system must provide learners with the four key elements of education, which are access, availability, acceptability and adaptability.<sup>212</sup> The most important difference between merely providing rights to education and allowing students to enjoy rights in education is that in the latter, 'students are not just to accept or simply agree with what the teacher is saying'.<sup>213</sup> Rather, students are encouraged to think for themselves and discover their own truths that will propel them to be successful in the future. Students who have rights in education are able to be motivated from within without needing to be motivated by an outside source and as a result, students start to develop their own being and their self-identity. Unesco's head of office in Namibia, Mr Djaffar Mousaa-Elkadhum, commented that the promotion and effective use of indigenous languages at school will contribute to the safeguarding of divers languages which are

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<sup>210</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies*; Vol. 9, No. 3; 189.

<sup>211</sup> Vertovec S and Wessendorf S 'Cultural, Religious and Linguistic Diversity in Europe: An Overview of Issues and Trends' in Penninx R, Berger M & Kraal K *The Dynamics of International Migration and Settlement in Europe* (2006) 171-199.

<sup>212</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies*; Vol. 9, No. 3; 189.

<sup>213</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies*; Vol. 9, No. 3; 189.

disappearing at an alarming rate.<sup>214</sup> Providing students with rights in education creates opportunities for their own self-discovery.<sup>215</sup> Linked with giving students rights in education is the medium of instruction used in education:

“Another essential step for providing students with rights in education is to instruct them in their native languages. Language is an essential part of culture. Every parent anxiously awaits the day that s/he can hear a child’s first words. It creates a bond in the family. Likewise, it creates unity in a community. Local languages are a fundamental part of the identity of a nation. Also, students are capable of learning much more in their own tongue than they can in their second language.... In order for students to develop critical thinking skills in school, they need to use a language in which they are free to formulate and express thoughts beyond a superficial level. Additionally, the very existence of a language is dependent upon its use by the youth within the culture... If the youth stop learning their native language, it could disappear, and that would contribute to the loss of these students’ identities. ...In order to fully utilize the tool of language in Namibia, it will be necessary that educational language planning be focused towards high levels of bilingualism or even multilingualism; monolingualism can no longer be regarded as something normal, desirable, and unavoidable ..... Children must be taught to learn and love their native language, and they should never feel ashamed to use it because it is a part of their heritage. Education should protect language and culture and teach respect for them.”<sup>216</sup>

There are several factors to be considered when devising and implementing a language policy for an education system.<sup>217</sup> The historical legacy of the nation must be taken into account, as well as the politics surrounding monolingualism, as well as demographic realities facing the nation’s

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<sup>214</sup> Kamwi R ‘Preserve indigenous languages - minister’ *The Namibian* 09 April 2019 6.

<sup>215</sup> Chavez A ‘Rights in Education and Self-Identity: Education and Language of Instruction in Namibia’ (2016) *International Education Studies; Vol. 9, No. 3*; 189.

<sup>216</sup> Chavez A ‘Rights in Education and Self-Identity: Education and Language of Instruction in Namibia’ (2016) *International Education Studies; Vol. 9, No. 3*; 189.

<sup>217</sup> Chavez A ‘Rights in Education and Self-Identity: Education and Language of Instruction in Namibia’ (2016) *International Education Studies; Vol. 9, No. 3*; 189.

minority languages. Other factors include the slow development of a rights culture and the general approach to minority issues in the nation, the impact of a developed government and the nation's international obligations of relevance to the question of language legislation.<sup>218</sup> In Namibia, one of the main concerns was overcoming apartheid and the influence of the oppressive, Afrikaner government of South Africa.<sup>219</sup> In the modern day Namibia the problem is partly self-inflicted as parents and elders no longer teach indigenous languages to their children, since communication in indigenous languages is falling out of daily use.<sup>220</sup>

Additionally, there are six issues that are generally debated regarding the influence of language on education. These are psychological, educational, linguistic, socioeconomic, political, and financial.<sup>221</sup> Those who favour an emphasis on local languages in education generally view these issues in preference of priority. The priority follows the same order in which these factors are listed above. These contrasting priorities reflect the difference between the instrumental and intrinsic values of education.<sup>222</sup> The difference between the two is that with the instrumental value of education, speakers of a language wish to obtain some monetary value from their understanding and learning of a particular language. With the intrinsic value of education, learners and speakers wish to learn a new language simply out of a love for learning and out of the love of acquiring a new skill, with no particular ambition in mind. Those who favour local languages in education fall into the latter category of persons who are inclined toward the intrinsic value of education. Those who favour assimilation or a global language are more inclined toward the instrumental value of education. A learner is in a better position to progress academically if their language proficiency in a given language of instruction is sufficiently

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<sup>218</sup> Dunbar R 'Language Legislation and Language Rights in the United Kingdom' *European Yearbook of Minority Issues Vol 2 (Part1)* 95.

<sup>219</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies; Vol. 9, No. 3*; 189.

<sup>220</sup> Kamwi R 'Preserve indigenous languages - minister' *The Namibian* 09 April 2019 6.

<sup>221</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies; Vol. 9, No. 3*; 189.

<sup>222</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies; Vol. 9, No. 3*; 189.

developed to be able to communicate academically.<sup>223</sup> It is therefore important that teachers and learners have a strong competence in the language which serves as the medium of instruction.<sup>224</sup> Some authors and Academics, such as Prinsloo, go as far as to regard mother-tongue education not only as a linguistic right, but also as an inalienable fundamental human right which is loosely connected to the rights to human dignity, freedom and equality.<sup>225</sup>

The goals of intrinsic education cannot be accomplished when students are instructed in a language that they do not fully understand. An investigative examination at a school in Windhoek, the capital city of Namibia, revealed that 22.4% of students in Grade eight were not functionally literate in English and that 49.2% of the students had numeracy skills below a Grade seven level.<sup>226</sup> All of the students that tested below the required level came from primary schools where English rather than the mother tongue was used as the language of instruction from Grade one.

In addition to the above, many educators in Namibia complain that students depend on thoughtless memorization of subject matter, which they merely repeat back on examinations without fully understanding.<sup>227</sup> In order for education to help students develop their capabilities, it must be presented through a language medium that students fully understand and through which they can competently and confidently express themselves. Many children speak mother tongues that differ from the language which serves as the medium of instruction at their schools they attend.<sup>228</sup> ‘Research confirms that children learn best in their mother tongues as a prelude to

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<sup>223</sup> Nyqvist SA English as a Lingua Franca in Namibia: Teacher’s Attitudes Towards English as a Medium of Instruction in Classrooms (Degree Project English Linguistics, Dalarna University) 1.

<sup>224</sup> Nyqvist SA English as a Lingua Franca in Namibia: Teacher’s Attitudes Towards English as a Medium of Instruction in Classrooms (Degree Project English Linguistics, Dalarna University) 1.

<sup>225</sup> Nyqvist SA English as a Lingua Franca in Namibia: Teacher’s Attitudes Towards English as a Medium of Instruction in Classrooms (Degree Project English Linguistics, Dalarna University) 1.

<sup>226</sup> Chavez A ‘Rights in Education and Self-Identity: Education and Language of Instruction in Namibia’ (2016) *International Education Studies*; Vol. 9, No. 3; 189.

<sup>227</sup> Chavez A ‘Rights in Education and Self-Identity: Education and Language of Instruction in Namibia’ (2016) *International Education Studies*; Vol. 9, No. 3; 189.

<sup>228</sup> Ball J ‘Enhancing learning of children from diverse language backgrounds: Mother tongue-based bilingual or multilingual education in early childhood and early primary school years’ *University of Victoria: UNESCO*.

and complement of bilingual and multilingual education'.<sup>229</sup> Studies further reveal that six to eight years of education in a language are necessary for the child to develop the level of literacy and proficiency in the language being learned which is required for academic achievement in secondary school.<sup>230</sup> When children are literate in their mother tongue, they are able to establish a set of skills that will then transfer over when they learn a new language.<sup>231</sup>

Research has shown that there is a strong and positive correlation between literacy in the native language and learning English and that the degree of children's native language proficiency is a strong predictor of their English language development.<sup>232</sup> The Minister of Education in Namibia, Mrs Itah Kandjii-Murangi once remarked that language is inseparable from our ways of being, our thoughts, our feelings and much more.<sup>233</sup> She added that it is through language that we find our identity and who we are.<sup>234</sup> The factors which lead to downfall of mother tongue training in Namibia includes: few teachers qualified to teach; teachers who give indigenous languages are regarded as less educated than those that teach science, English and history for instance; large pools of learners that require teachers to teach in these languages; insufficiency of resources and learning materials, which are often sponsored by international sources which are written in English; developing countries, like Namibia, may have financial difficulty in promoting all its locally spoken languages and the cost implication may inhibit promoting mother-tongue learning and it may create political conflict if only some languages were singled out and used in education, justice and in public administration, while others were left out.<sup>235</sup>

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<sup>229</sup> Ball J 'Enhancing learning of children from diverse language backgrounds: Mother tongue-based bilingual or multilingual education in early childhood and early primary school years' *University of Victoria: UNESCO*.

<sup>230</sup> Ball J 'Enhancing learning of children from diverse language backgrounds: Mother tongue-based bilingual or multilingual education in early childhood and early primary school years' *University of Victoria: UNESCO*.

<sup>231</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies; Vol. 9, No. 3*; 189.

<sup>232</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies; Vol. 9, No. 3*; 189.

<sup>233</sup> Kamwi R 'Preserve indigenous languages - minister' *The Namibian* 09 April 2019 6.

<sup>234</sup> Kamwi R 'Preserve indigenous languages - minister' *The Namibian* 09 April 2019 6.

<sup>235</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies; Vol. 9, No. 3*; 189.



The negative impacts of English as the only medium of instruction in our education system may be summed up as the following: learners lack sufficient exposure to English; teachers lack sufficient training in English and the impact English has on the other Namibian languages.<sup>236</sup> With the first ground of learners lacking sufficient exposure to English, it may be argued that the learner never gets the opportunity to gain proficiency in either their mother tongue or in English, because their time learning both languages are insufficient. The learner is confused in that they are taught English at school, but do not get any other exposure to the language outside of the school's perimeters, meanwhile they speak their mother tongue at home, but never learn to read or write in the mother tongue. They later end up as adults who speak both the mother tongue and English, but never gain proficiency in either and never master reading and writing in both languages on the same standard. The second negative impact of English is that teachers lack English proficiency. About 80% of Namibian teachers are qualified to teach; however, about 69% of Namibian teachers lack adequate English language proficiency.<sup>237</sup> In a national test once taken by teachers in Namibia, about 70% of teachers in senior secondary schools could not read and write in English, while 63% of junior secondary teachers lacked proficiency in English.<sup>238</sup> Concerning the last negative impact associated with English, it may be argued that the more the learner strives to know and become proficient in English, the less they tend to give attention to their mother tongues. The mother tongue is later being stereotyped as backwards and archaic, while English is typically associated with progress, class, stature and success. The learner thinks he is better exposed to the outside world and that he is becoming progressive, which sometimes is true, but the sad reality is that traditional values and identity becomes lost in the process.

From the above, it is clear that Namibia has a language policy which provides for instruction in the mother tongue for at least Grades one to Grade three.<sup>239</sup> However, these policies are often

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<sup>236</sup> Nyqvist SA English as a Lingua Franca in Namibia: Teacher's Attitudes Towards English as a Medium of Instruction in Classrooms (Degree Project English Linguistics, Dalarna University) 1.

<sup>237</sup> Nyqvist SA English as a Lingua Franca in Namibia: Teacher's Attitudes Towards English as a Medium of Instruction in Classrooms (Degree Project English Linguistics, Dalarna University) 1.

<sup>238</sup> Nyqvist SA English as a Lingua Franca in Namibia: Teacher's Attitudes Towards English as a Medium of Instruction in Classrooms (Degree Project English Linguistics, Dalarna University) 1.

<sup>239</sup> Chavez A 'Rights in Education and Self-Identity: Education and Language of Instruction in Namibia' (2016) *International Education Studies*; Vol. 9, No. 3; 189.

more superficial than real as they give the schools the option of educating its students in English and since schools are more inclined to choose English as the medium of instruction as soon as from Grade one. Many children worldwide do not have access to languages in education in their mother tongue or in languages which they understand properly. Namibia is no exception to this rule and many Namibian children are educated in English while they do not understand English sufficiently well enough to be educated in it. The result of receiving an education in English while having a different mother tongue is that the learner never learns to write and develop sufficiently in the mother tongue, while at the same time the learner never learns to properly speak English, because their only exposure to English comes from school lessons. A leading factor which contributes to learning deficiencies in Namibia is that children are not taught in their mother tongues at schools or are not taught in their mother tongues for a sufficient period of time so as to make a successful transition to a different language. It may therefore be said that language rights are not afforded legal protection in the Namibian education system.

### **5.3 Minority language rights in the justice system**

This section focuses on the position of language rights in the justice system of Namibia. The aim is to ascertain whether languages are protected or even at all recognised in the justice system of Namibia.

Before Namibia gained its independence in 1990, its judicial system consisted of two overlapping systems.<sup>240</sup> One for whites, being for “westernized” blacks and persons of mixed race and the other for indigenous Africans.<sup>241</sup> The formal court system in Namibia post-independence is comprised of the Supreme Court, which is the highest court in the country; the High Court; the Labour Court, which is a division of the High Court; the Magistrates’ Courts and the traditional courts of Namibia.<sup>242</sup> The Namibian Courts retained the Roman Dutch component, which had

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<sup>240</sup> Namibia ‘Annual Human Rights Reports Submitted to Congress by the U.S. Department of State’ (1984) 310.

<sup>241</sup> Namibia ‘Annual Human Rights Reports Submitted to Congress by the U.S. Department of State’ (1984) 310.

<sup>242</sup> Bukurura S H *Essay on the Constitutionalism and the Administration of Justice in Namibia* (2002) 22.

been brought into Namibia by South Africa when Namibia was under South African rule.<sup>243</sup> The Supreme Court is the highest court in Namibia, followed by the High Court and thereafter the Magistrates' Court, which is followed by the traditional courts.<sup>244</sup> Namibia now has a pluralist legal system, since Namibian customary law forms part of the legal system and operates next to the common law, which had been brought into Namibia, firstly by Germany and later by South Africa, when these two countries colonised Namibia.<sup>245</sup>

The judiciary in Namibia is the watchdog of fundamental rights and freedoms of individuals.<sup>246</sup> Unlike the other two organs of state, the judiciary is also entrenched with the dispensation of justice, as between citizens and as between citizens and the state.<sup>247</sup> Article 25 of the Namibian Constitution states that every individual who is of the opinion that his or her fundamental rights had been violated or threatened is entitled to approach a competent court to protect such rights or freedoms. The judiciary is also responsible for overseeing that the other branches of government do not abuse their powers. There is a duty on other organs of state in Namibia to assist the courts in order to protect its independence, integrity and effectiveness. Article 5 of the Constitution states 'a court with competent jurisdiction is given the power to declare invalid an Act of Parliament which is inconsistent with the provisions of the Bill of Rights'.<sup>248</sup> In short, the judiciary must itself project and nurture its good esteem in respect of its independence and integrity by providing adequate domestic mechanisms to correct erroneous or unjust decisions, making access to the courts friendly and comfortable and demystifying anything in the language of the law that makes it unintelligible.<sup>249</sup>

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<sup>243</sup> Ruppel OC & Ambunda LN 'The Justice Sector and the Rule of Law in Namibia' *Framework, Selected Legal Aspects and Cases* 1.

<sup>244</sup> Bukurura S H *Essay on the Constitutionalism and the Administration of Justice in Namibia* (2002) 22.

<sup>245</sup> Ruppel OC & Ambunda LN 'The Justice Sector and the Rule of Law in Namibia' *Framework, Selected Legal Aspects and Cases* 1.

<sup>246</sup> Ruppel OC & Ambunda LN 'The Justice Sector and the Rule of Law in Namibia' *Framework, Selected Legal Aspects and Cases* 1.

<sup>247</sup> Bukurura S H *Essay on the Constitutionalism and the Administration of Justice in Namibia* (2002) 22.

<sup>248</sup> Constitution of the Republic of Namibia, 1990.

<sup>249</sup> Ruppel OC & Ambunda LN 'The Justice Sector and the Rule of Law in Namibia' *Framework, Selected Legal Aspects and Cases* 1.

From the foregoing, it is clear that the courts in Namibia serve as the watch dog of human rights. Since English is the only official language in Namibia, it is the language used in courts. However, litigants and witnesses may request the service of interpreters if they do not speak and understand English. The interpreter is provided by the court concerned. Equality by and before the law and courts is seen in a special light in Namibia given Namibia's apartheid past. The Namibian courts recognise the principle of substantive equality, which in summary is a system which allows differences in treatment so as to advance categories of persons that had been disadvantaged by past injustices. It may therefore be said that all persons are treated equally by and before the justice forums of Namibia. The different languages may be used in Namibia when needed, but these languages are interpreted by translators and judgements are written and given in the official language of Namibia, which is English.

## **6. Progress made in advancing minority language rights since the finding in *Diergaardt v Namibia***

This topic considers the progress Namibia had made since the adverse ruling was made against it by the Human Rights Committee in the matter of *Diergaardt v Namibia*.

In the case of *Diergaardt et al. v. Namibia* it was noted by the Human Rights Committee that the authors have shown that the State party has instructed civil servants not to reply to the applicant's written or oral communications with the applicant's in the Afrikaans language, even when they were perfectly capable of doing so.<sup>250</sup> These instructions which bar the use of Afrikaans do not relate merely to the issuing of public documents but even to telephone conversations.<sup>251</sup> It was therefore held that in the absence of any response from the State party the Committee must give due weight to the allegation of the authors that the circular in question is intentionally targeted against the possibility to use Afrikaans when dealing with public authors.<sup>252</sup> Therefore it was

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<sup>250</sup> *Diergaardt v Namibia* (2000) 8 IHRR 46.

<sup>251</sup> *Diergaardt v Namibia* (2000) 8 IHRR 46.

<sup>252</sup> *Diergaardt v Namibia* (2000) 8 IHRR 46.

found that the applicants as Afrikaans speakers, are victims of a violation of Article 26 of the Covenant.<sup>253</sup>

The Human Rights Committee on 13 October 2014 released its ‘Consideration of reports submitted by State parties under article 40 of the Covenant, Second period report of States parties due in 2008’.<sup>254</sup> In the document’s long list of recommendations and responses, the Committee made the following recommendation to the Government of Namibia:

‘The Committee acknowledges the information provided by the State party on the implementation of its Views adopted under the Optional Protocol with regard to cases No.760/1997 (Diergaardt et al. v. Namibia) and No. 919/2000 (Müller and Engelhard v. Namibia). It nevertheless notes with concern the absence of a mechanism to implement the Committee’s Views adopted under the Optional Protocol (art. 2). The State party should establish a mechanism to implement the Committee’s Views adopted under the Optional Protocol’.<sup>255</sup>

The Namibian Government responded by stating that ‘Namibia is of the view that the issues which were raised in the Diergaardt case were properly addressed by Namibia’s Supreme Court.’<sup>256</sup> In addition, Article 25 (2) of the Namibian Constitution provides for a mechanism, which gives

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<sup>253</sup> Diergaardt v Namibia (2000) 8 IHRR 46.

<sup>254</sup> International Covenant on Civil and Political Rights Human Rights Committee ‘Consideration of report submitted by States parties under article 40 of the Covenant’ (2014) *Second periodic reports of States parties due in 2008*. Republic of Namibia. Human Rights Committee.

<sup>255</sup> International Covenant on Civil and Political Rights Human Rights Committee ‘Consideration of report submitted by States parties under article 40 of the Covenant’ (2014) *Second periodic reports of States parties due in 2008*. Republic of Namibia. Human Rights Committee.

<sup>256</sup> International Covenant on Civil and Political Rights Human Rights Committee ‘Consideration of report submitted by States parties under article 40 of the Covenant’ (2014) *Second periodic reports of States parties due in 2008*. Republic of Namibia. Human Rights Committee.

aggrieved persons the right to approach a competent court for a remedy'.<sup>257</sup> Further, it was stated by the Namibian Government that with regard to the case of Müller and Engelhard v. Namibia No. 919/2000, Namibia is of the view that the matter was considered by the Supreme Court of Namibia which indicated that it was justifiable in terms of our laws'.<sup>258</sup> From the above it is clear that the attitude by the Namibian government is that the matter had been dealt with conclusively and finally by the Supreme Court of Namibia, even though it had been decided by the Human Rights Committee thereafter. There was therefore absolutely no progress made by Namibia since the Human Rights Committee had found that Namibia had violated article 26 of the ICCPR.

The failure of the Namibian government to comply with UN recommendations was also indicated in a report prepared by NamRights Inc, a non-profit making human rights monitoring and advocacy organisation, and submitted to the UN Human Rights Committee. NamRights stated that it is deeply concerned by the systematic denial by Namibia of the minority rights of the Rehoboth Baster ethnic minority group.<sup>259</sup> In particular, Namibia has since its independence on 21 March 1990 been alienating certain properties and institutions which are sine qua non for the protection and promotion of the rights of, among others, the Rehoboth Baster community to enjoy and develop its identity, culture and language.<sup>260</sup> It seems like the government of Namibia is under a generational curse, in that its response to the Human Rights Committee is synonymous with that of the apartheid South African government, that refused to relinquish its jurisdiction over Namibia, even after the International Court of Justice in 1971 upheld the U.N. authority over Namibia and determined that South Africa's presence in Namibia was illegal and stated that

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<sup>257</sup> International Covenant on Civil and Political Rights Human Rights Committee 'Consideration of report submitted by States parties under article 40 of the Covenant' (2014) *Second periodic reports of States parties due in 2008*. Republic of Namibia. Human Rights Committee.

<sup>258</sup> International Covenant on Civil and Political Rights Human Rights Committee 'Consideration of report submitted by States parties under article 40 of the Covenant' (2014) *Second periodic reports of States parties due in 2008*. Republic of Namibia. Human Rights Committee.

<sup>259</sup> NamRights 'Special Alternative Report as Submitted to: UN Human Rights Committee During its 116<sup>TH</sup> Session Relating to the Consideration of Second Periodic Report of Namibia' (2016) 1.

<sup>260</sup> NamRights 'Special Alternative Report as Submitted to: UN Human Rights Committee During its 116<sup>TH</sup> Session Relating to the Consideration of Second Periodic Report of Namibia' (2016) 1.

South Africa was obliged to withdraw its administration from Namibia immediately.<sup>261</sup> NamRights went on to state that it totally disagrees with this disingenuous interpretation of Namibian Constitution which under Chapter 3 expressly recognizes the right to equality and non-discrimination and the right to own property as well as the right to culture which includes the right to enjoy, practise, profess, maintain and promote their culture, language and traditions.<sup>262</sup> Further, NamRights urges Namibia to comply in good faith with the provisions of Article 27 of the Covenant whose protection is directed towards ensuring the very survival and continued development of the cultural, religious and social identity of the Rehoboth Baster minority group. Namibia must be required to indicate in its next periodic report under the ICCPR the positive measures it has enacted to that end.<sup>263</sup>

## 7. Conclusion

This chapter had established that Namibia has an obligation under international and regional human rights legal instruments to protect the language rights of its linguistic minority communities. The ruling of *Diergaardt et al. v. Namibia* made it clear that Namibia had violated the language rights of the Rehoboth Baster community. It was also established that Namibia had taken no legislative measures since its independence and since the ruling of *Diergaardt et al. v. Namibia* to remedy this breach. This continued violation of language rights in Namibia amounts to a violation of fundamental human rights. This chapter also established that the Namibian Constitution does not offer any meaningful protection to language rights. Further, language rights are not offered any meaningful protection for government business nor education in Namibia, although the country provides interpreters when it comes to court proceedings. Several attempts have also been made since independence to advance the position of minority language rights in Namibia through policies. But these attempt have not been effective because they allow schools

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<sup>261</sup> Namibia 'Annual Human Rights Reports Submitted to Congress by the U.S. Department of State' (1984) 310.

<sup>262</sup> NamRights 'Special Alternative Report as Submitted to: UN Human Rights Committee During its 116<sup>TH</sup> Session Relating to the Consideration of Second Periodic Report of Namibia' (2016) 1.

<sup>263</sup> NamRights 'Special Alternative Report as Submitted to: UN Human Rights Committee During its 116<sup>TH</sup> Session Relating to the Consideration of Second Periodic Report of Namibia' (2016) 1.

the option of using English as the medium of instruction from Grade one, besides mother tongue and minority languages, which schools tend to ignore and opt for English as the medium of instruction from Grade one due to mainly financial reasons. Based on the findings of this chapter, the next chapter will provide the conclusion of this research and offer recommendations in an attempt to contribute to the protection of language rights in Namibia.



## **Chapter Four: Conclusion and recommendations**

### **1. Conclusion**

This study analyzed the position of minority languages in Namibia from an international human rights law perspective. It established that Namibia has the obligation under international and regional human rights law to protect and promote not only minority languages in Namibia, but also other fundamental human rights. Based on its own Constitution, Namibia has the legal duty to create legislation which will provide for the protection and promotion of minority languages. It is against this background that this thesis proceeded to its main purpose, which is to determine whether Namibia complies with its international and regional human rights obligations in adequately protecting and promoting minority languages.

It established that the position of minority languages in Namibia, under certain circumstances, violates certain fundamental human rights as protected under international and regional human rights law. According to the Constitution of Namibia, English is the only official language although the country is home to a large number of linguistic minorities. It was also established that minority languages are marginalized in government business and in education and this has placed persons belonging to minority communities at a disadvantage. Linguistic minority communities are being marginalized by the fact that their languages are not afforded protection in government, parliament, justice and education. The Namibian people are therefore held back and can not participate meaningfully in public life in Namibia. The study has also noted Namibia's failure or lack of progress to take any action to remedy the Human Right's Committee's finding in *Diergaardt v Namibia*. In short, Namibia has fallen short of international and regional human rights legal standards with respect to adequately protecting minority languages.

### **2. Recommendations**

Based on the findings of this study, few recommendations are suggested. The study recommends the creation of legislation which affords protection and promotes minority languages and which combats assimilation of minority languages to majority languages. Existing language policies

must be reformed and additional measures must be put in place that supports the promotion and protection of minority languages in Namibia. It also recommends that Namibia amends its constitution to make more than one language the official languages of the country. It is proposed that legislation be created to allow pupils to be educated in their mother tongue from at least grades one to seven of primary education, that officials in public office be compelled to respond to the public in a minority language whenever this is specifically requested from the members of the public or that an official be made available to address the public in their mother tongue when this is requested by a member of the public. Individuals must be provided with interpreters in Namibian courts rooms and tribunals whenever such persons appear in courts and tribunals and prefer to communicate and to be communicated with their mother tongues.

In the event that it will be too onerous to make more than one language an official language in Namibia, the Namibian Constitution must at least be amended to the extent that Article 3 (3) of the Namibian Constitution gives the constituent assembly a discretion to create legislation that will promote and protect the other minority languages.

In addition, implementation mechanisms must be placed in the new proposed Act's of Parliament that will monitor the implementation process of minority languages into public life. In particular, mechanisms must be focused on integrating minority languages in the justice system, public administration and education.

If the above proposed amendments to the Namibian Constitution can not take place, then, at least, the Namibian Parliament must be more proactive and take positive measures to address the Human Rights Committee's finding in *Diergaardt v Namibia* in as far as minority languages are marginalized.

Furthermore, public awareness of minority languages must be encouraged in Namibia by civil society, non-governmental organizations, human rights activists, reporters and journalists. Public debate must be provoked on the subject of minority languages and members of parliament must advocate for the promotion and protection of minority languages.

[25 530 words including footnotes]

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