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Linguistic barriers on trial: 'Epistemic (in)justice' as a tool for safeguarding access to justice and procedural rights in the courtroom

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Abstract

From calls for the equal treatment of languages to making justice more accessible, linguistic barriers to the right of access to justice persist in South Africa. Not only is English the only official language of court record, but it is also the dominant language in which legal information is available in South Africa. Even with interpretation services in court proceedings, forensic linguists have highlighted the inherent shortcomings of translation and how these impact the right of access to justice. This raises the question of whether the South African legal landscape can offer insight on linguistic obstacles to the right of access to justice. This article endorses the affirmative, arguing that linguistic barriers to the right of access to justice provide fertile ground for litigants to suffer injustice of a special kind: what the philosopher Miranda Fricker calls "epistemic injustice". In epistemic injustice, a speaker is unable to articulate experiences not recognised in a society's dominant conceptual pool. Epistemic injustice proves to be an important concept for the field of law in that it clarifies socio-linguistic aspects of the court experience in a way that objective law cannot do on its own. The concept therefore offers a jurisprudential basis upon which to better understand and respond to linguistic barriers in the court process. In effect, this contribution

aims to not just confront linguistic barriers to access to justice; it also seeks to elevate the status of 'epistemic injustice' in South African legal discourse.

Key words: linguistic barriers; epistemic injustice; monolingualism; access to justice; court proceedings; language of record; hermeneutical injustice; testimonial injustice

1 INTRODUCTION

South Africa is a diverse, multilingual democracy,[1] but with diversity comes disagreement. Thankfully, the Constitution confers on persons the right of access to the courts.[2] This right entails that people may approach the courts or other forums to resolve their disputes if such disputes "can be resolved by the application of the law".[3] But the legal system already decides in what language this form of dispute resolution should take place, namely English.[4] The following sections will show that making English the only language of record poses barriers for many litigants and impacts on how they exercise their right of access to the courts.

This article addresses this problem by making a unique legal and philosophical contribution to the discourse on linguistic barriers in the court process. It argues that such barriers provide fertile ground for litigants to suffer epistemic injustice. First, the article construes access to justice in a procedural light by defining it as the capacity of potential litigants to pursue, claim and enforce their legal rights. Secondly, linguistic barriers to access to justice are contextualised by situating them in an interdisciplinary framework. Thirdly, the relationship between these linguistic obstacles and epistemic injustice is illuminated, with the argument being that such barriers provide rich scope for epistemic injustice to occur. Finally, legal insights relevant to the South African court system and legal profession are offered in response to the problems described.

2 CONCEPTUALISING ACCESS TO JUSTICE

In South Africa, access to justice has a constitutional basis. Section 34 of the Constitution confers on everyone the right "to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".[5] In this sense, the Constitution can be said to

1 According to section 6(1) of the Constitution of the Republic of South Africa, 1996, the country has 11 official languages.
2 Section 34 of the Constitution.
3 Section 34 of the Constitution.
4 *S v Oosthuizen and Another* 2024 (2) SACR 600 (ECMk) para 22.
5 Section 34 of the Constitution.

empower potential litigants to enforce their legal rights or resolve their disputes by means of the application of legal rules.

The constitutional basis for access to justice turns on notions of due process. In the South African law of criminal procedure, due process is seen as broadly comprising the principles of legality, double jeopardy, confrontational trial, and access to the courts.[6] For its part, the law of civil procedure requires, among other things, that litigants be afforded equal opportunity to present their cases, that proceedings be conducted publicly, and that court judgments be grounded in reason and law.[7]

The concept of access to justice thus seems to live in an overwhelmingly procedural spirit. This much is apparent when scholars suggest that due process in South Africa translates into procedural fairness.[8] Unsurprisingly, the procedural conception of access to justice renders potential litigants capable of pursuing, claiming and enforcing their legal rights.[9] This article adopts the procedural conception.

There are broader conceptions of access to justice, however. The Parliamentary Assembly of the Council of Europe describes access to justice as encompassing more than just procedural elements when the correction of rights violations is sought.[10] According to the United Nations, access to justice entails "normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement and civil society oversight".[11] Some writers therefore hold that access to justice constitutes more than just the ability to seek redress and is in fact all-encompassing.[12]

Nonetheless, it is not inappropriate to endorse the procedural conception of access to justice. Such a conception promotes access to justice as a basic right in that it must be secure for persons

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6 Hlophe Z et al. *Criminal procedure in South Africa* 1st ed South Africa: Oxford University Press (2020) at 101.

7 Theophilopoulos C, Van Heerden C, Boraine A & Rowan A *Fundamental principles of civil procedure* 4th ed South Africa: LexisNexis (2020) at 3.

8 Hlophe et al. (2020) at 101.

9 See Leach N "Language and the right of access to procedural justice in South Africa" in Ralarala M, Kaschula R & Heydon G (eds) *New frontiers in forensic linguistics: Themes and perspectives in language and law in Africa and beyond* (2019) 133.

10 Parliamentary Assembly of the Council of Europe "Equality and non-discrimination in access to justice" (2015) 1 *PACE*.

11 United Nations Development Programme "Strengthening judicial integrity through enhanced access to justice: Analysis of the national studies on the capacities of the judicial institutions to address the needs/demands of persons with disabilities, minorities and women" (2013) 6 *UNDP* at https://www.undp.org/sites/g/files/zskgke326/files/migration/eurasia/Access-to-justice.pdf (available 11 December 2024).

12 See, for instance, Durojaye E, Mirugi-Mukundi G & Adeniyi O "Legal empowerment as a tool for engendering access to justice in South Africa" (2020) 20 *International Journal of Discrimination and the Law* 224 at 226.

to be able to enforce their other rights.[13] Without section 34 of the Constitution, it is hard to think of persons as having the capacity to approach the courts for legal relief in respect of enforcing their legal rights or resolving their disputes. Procedural law offers appropriate channels for legal claims to be enforced, thereby preventing self-help.[14] Thus, although the broader conception of access to justice emphasises substantive relief, this does not render the procedural conception incapable of promoting substantive aims. While the concern of this article is primarily procedural, this a focus that can assist with matters incidental to substantive justice.

3 LINGUISTIC BARRIERS TO THE RIGHT OF ACCESS TO JUSTICE

3.1 Contextualising linguistic barriers to access to justice

Notwithstanding its constitutional basis, access to justice is still not a reality for many. According to General Recommendation No. 33 on the Convention on the Elimination of All Forms of Discrimination Against Women, many people – especially women – face various obstacles to access to justice.[15] These obstacles include limited time and financial resources, the complexity of legal proceedings, the poor quality of the justice system, and physical barriers for disabled people.[16] Other obstacles are poor literacy levels, delays in the conclusion of legal disputes, and insufficient public participation in reform programmes.[17] Achieving access to justice evidently entails overcoming barriers of various kinds.

This article focuses on a class of barriers that have a linguistic character. Such barriers include insufficient knowledge of the language in which legal information is available, the inherent shortcomings of translation, and the fact that English is, in South Africa, the only language of court record.[18] These linguistic obstacles fall within the scope of the right to use a language with other members of, and to form, a linguistic community.[19] Additionally, the Constitution

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13 For this construal of a basic right, see Shue H *Basic rights: Subsistence, affluence and US foreign policy* United States: Princeton University Press (1980) at 19.

14 Kleyn D, Viljoen F, Zitzke E & Madi P *Beginner's guide for law students* 5th ed Cape Town: Juta (2019) at 140.

15 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) General Recommendation No. 33 on women's access to justice (2015) 5–15.

16 CEDAW (2015) at 5–15.

17 Leach (2019) at 131.

18 Leach (2019) at 131; Lebese S "Do justice to court interpreters in South Africa" (2014) 13 *Stellenbosch Papers in Linguistics Plus* 183 at 202; Docrat Z "A review of linguistic qualifications and training for legal professionals and judicial officers: A call for linguistic equality in South Africa's legal profession" (2022) 35 *International Journal for the Semiotics of Law* 1711 at 1721.

19 Sections 30 and 31 of the Constitution.

requires that official languages be treated equitably and "with parity of esteem".[20] Finally, it is not clear why the bulk of translation issues should be left only to forensic-linguistics research, without any contribution from the discipline of law.

3.2 Debating linguistic barriers to access to justice

Linguistic barriers to access to justice are a complex problem. Sometimes the use of one language is deemed a matter of necessity. In *S v Matomela* ("*Matomela*"), the court recognised that every official South African language should have parity of esteem, but noted that practicality and the effective administration of justice dictate that a single language of record be employed in the legal process.[21] A further constraint is the cost of treating all official languages with parity of esteem.[22] The result is the adoption of monolingualism, which in this context refers to the practice of conducting legal proceedings in a single language, English.[23] The enforcement of linguistic parity of esteem seems to be of secondary importance.

There is thus an apparent conflict between the constitutional demand for linguistic equality and practicality. On the one hand, the Constitution is "the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".[24] This supremacy clause, read with sections 6, 30 and 31, renders it mandatory to treat official languages equitably in the legal process. On the other hand, case law suggests that considerations of practicality, administration of justice and cost should guide the enforcement of constitutional demands. The apparent tension seems to be almost insurmountable.

A similar conflict occurs between monolingualism and access to justice. To the extent that litigants understand the English language, they are protected by monolingualism; to the extent that they do not understand the language, they face the inherent disadvantages associated with translation and lack of legal literacy, especially in a court system where the legal process can be intimidating in and of itself. If this is correct, then monolingualism fails to uphold the interests of litigants who do not understand the English language, although this might be an unintended effect.[25]

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[20] Section 6(4) of the Constitution.
[21] *S v Matomela* 1998 (2) SA 1 (Ck) at 4.
[22] Leach (2019) at 141.
[23] Docrat (2022) at 1721.
[24] Section 2 of the Constitution.
[25] The exclusionary effect may be unintended owing to practical considerations taking primary importance. It would thus seem unfair to charge decision-making bodies with intentionally creating language policy that works against the interests of certain litigants. However, this does not mean such bodies could not have foreseen the exclusion litigants may suffer, despite the applicable constitutional safeguards, including the right

While the conflict between practicality and linguistic equality seems to justifiably favour the former, it is problematic to claim that monolingualism should supersede access to justice on the same basis. Access to justice is more important than monolingualism because, as argued above, it is constitutionally protected and one of the foundational principles of procedural law. As the law discourages self-help, it is necessary for access to justice to be treated with the utmost priority. Without this kind of treatment, what is monolingualism if not a bystander to dispute resolution by arbitrary means? Hence, the attractiveness of monolingualism may itself be interrogated.

It is tempting, for instance, to endorse English as the only language of record for apparently speeding up the legal process, but just how speedy is it? Delays in the conclusion of legal disputes are a general barrier to access to justice.[26] By extension, this barrier transcends litigants' particular inability to have legal intercourse through use of the English language. Therefore, it is not clear how monolingualism can speed up the legal process any more than the general barrier of delays can allow.

Of course, it can be objected that the translation of court records from indigenous languages to English is itself a costly and time-consuming exercise. This forces the conclusion that multilingualism does not lead to any swifter justice than monolingualism. Therefore, it could be said that multilingualism offers but weak support for the aim of fulfilling swifter justice.

Even if this were conceded, it would miss the point that swifter justice is itself not the strongest argument for monolingualism. According to Legal Aid South Africa, English is the primary spoken language of only 5 per cent of criminal litigants and 12 per cent of civil litigants.[27] That is, most court proceedings involve litigants (and potentially witnesses) who do not have English as their mother tongue. This implies the almost ever-present need to source competent interpreters and to prolong proceedings for oral translation to facilitate fact-finding. Empirical observation confirms this much.[28] These implications are consistent with the observation that the translation of oral evidence in conformity with English-only prerogatives itself prolongs court proceedings, leading to postponements and hence restricted access to justice.[29] Therefore,

of access to the courts. Whether the exclusionary effects of monolingualism are unintended is, therefore, debatable.

26 Leach (2019) at 131.

27 Legal Aid South Africa: Language Policy, 2017 GN R 244 in GG 40733 of 31-03-2017.

28 See Malan K "Considering an appropriate language policy for judicial proceedings in South Africa" (2016) 3 *Revue de droit linguistique* 20 at 38–39.

29 See Malan K "Considering an appropriate language policy for judicial proceedings in South Africa" (2016) 3 *Revue de droit linguistique* 20 at 38–39.

the foregoing interrogation of monolingualism exposes the myth that the policy necessarily brings about swifter justice.

Additionally, sometimes justice is sacrificed for the sake of swiftness. In a study conducted in lower court proceedings, it was found that court interpreters would at times get impatient with non-English witnesses or accused persons – reflecting a similar impatience displayed by judicial officers – in which case the interpreter would play the simultaneous role of prosecutor, magistrate and interpreter to satisfy the perceived rush by legal professionals to conclude the proceedings.[30] This suggests that an uncritical preference for efficiency in the name of swifter justice can work to the detriment of essential fact-finding and the legitimate exercise of fair-trial and language rights in the justice process. Once again, the argument for swifter justice offers weak support for monolingualism – it is a universal principle of the law of evidence that the preservation of truth may not be sacrificed for convenience, simplicity and speed.[31]

Accordingly, even the contributions that court interpreters make in legal proceedings should not be left unscrutinised. Experience suggests that court interpreters are susceptible to asking questions of their own, failing to include certain details in translation, and inserting information not necessarily conveyed by a speaker.[32] Courts have therefore defined a competent interpreter not only as a person with knowledge of the applicable languages, but also as someone with an understanding of the legal process who fulfils his or her duties with neutrality and impartiality.[33] Interpreters should therefore be seen as occupying a strategic position in the court hierarchy, one that necessitates scrutiny of their role in the justice process.

At the same time, it is apposite to ask why the quality of translation should fall squarely on the shoulders of interpreters. For one thing, the occupation of court interpreters is largely unregulated.[34] This leaves open the question of responsibility for the dire state of interpretation services in South African courts. For another thing, the right to a fair trial in criminal proceedings can be said to impose a duty on the state to deploy legal professional staff in a way

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30 See Steytler N "Implementing language rights in court: The role of the court interpreter" (1993) 9 *South African Journal on Human Rights* 205 at 215–217. Admittedly, the study precedes the constitutional era, but academic commentary by Leach (2019) and Docrat (2022) on the status of court interpretation services in South Africa suggests its findings are still relevant. See also Lebese S "Do justice to court interpreters in South Africa" (2014) 13 *Stellenbosch Papers in Linguistics Plus* 183 at 202.

31 See Mueller G & Le Poole-Griffiths F *Comparative criminal procedure* New York: New York University Press (1969) at 50; Schwikkard P & van der Merwe S *Principles of evidence* Cape Town: Juta (2016) at 9.

32 Lebese (2014) at 202.

33 *S v Sehlabaka* 2011 JDR 1045 (FB) at para 15; *Sayed and Another v Levitt NO and Another* 2012 (2) SACR 294 (KZP) at para 14; *S v Shange* 2012 JDR 1996 (KZD); *S v Tsatsa* 2009 JOL 24019 (O).

34 Docrat (2022) at 1718.

that maximises application of the right to be tried in a language one understands.[35] That is to say, professionals fluent in other official languages should be appointed in areas where the applicable languages are concentrated.[36] It is also conceivable for functionaries such as the Judicial Service Commission, Magistrates Commission, Department of Justice and Constitutional Development, and potentially the Legal Practice Council and South African Law Reform Commission to play a more active role in the regulation of court interpretation services and provide adequate training in partnership with forensic linguists.[37]

Finally, policy considerations can be said to weaken the case for monolingualism. In principle, the social representation of group identity tends to border on "exclusive or narrow terms".[38] On this reading, the English-only model fails to meaningfully accommodate South Africa's linguistic demographics and therefore falls to be charged with inherent exclusion. When the interests of a single demographic are given preferential treatment in a diverse society, it becomes difficult to defend notions of common good.[39] On this reading, even if monolingualism had a face other than English, such a practice would arguably still undermine the public interest. Monolingualism appears to be answerable to some normative questions.

It must be granted, however, that the above questions do not settle the debate about monolingualism. A flexible form of monolingualism, for instance, can provide scope for legal interaction to occur in a language other than English under the appropriate circumstances: in *S v Damoyi* ("*Damoyi*") the High Court of South Africa endorsed a lower-court decision to conduct criminal proceedings in isiXhosa.[40] While the court in this case reiterated that English-only prerogatives are the way forward, the decision illustrates that opportunities for flexible monolingualism exist, even as an outcome of review proceedings. The policy may thus have further grounds for consideration.

Although it is not clear what view should be held of monolingualism at this stage, having set out the debate helps us to better understand the nature of linguistic impediments in the legal process. Indeed, the debate about monolingualism offers an interdisciplinary platform upon which to explore these barriers and their effect on litigants' interaction with the justice system.

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35 As advocated by Malan (2016) at 35.
36 See Steytler (1993) at 221.
37 Admittedly, these points about the state of interpretation services do not by themselves defeat the policy of monolingualism; they were nevertheless considered as necessary implications incidental to the debate.
38 Heywood A *Politics* 5th ed United Kingdom: Palgrave Macmillan (2013) at 202.
39 Heywood (2013) at 202.
40 *S v Damoyi* 2004 (2) SA 564 (C) at paras 10–20.

If this is correct, then the issues transcend the disciplinary boundaries of forensic linguistics and invite contributions from law, ethics, philosophy, and legal theory. To this end, the following section will show that linguistic barriers to the right of access to justice provide fertile ground for litigants to suffer what will be described as "epistemic injustice".

4 EPISTEMIC INJUSTICE AND THE COURT PROCESS

In *Epistemic injustice: Power and the ethics of knowing*, the philosopher Miranda Fricker introduces the idea that a person can be harmed in his or her capacity as a knower.[41] To be a knower means to be a person who communicates with credibility.[42] However, a person who receives little credibility for her statements is not necessarily harmed, for she might be dishonest or improperly informed.[43] This raises the question of what it means to be wronged as a knower.

A person wronged in his or her capacity as a knower is properly called someone who suffers epistemic injustice.[44] The ordinary equivalents of epistemic injustice include the notions of gaslighting and victim-blaming. This is to say that the claims of a speaker are unreasonably dismissed. She is thereby harmed in that her lived reality is not recognised as such. A similar aspect of epistemic injustice concerns the inability to describe a legitimate feeling or experience not recognised by powerful social actors – a type of occurrence known as "conceptual exclusion".[45] The idea of epistemic injustice thus seems to invite more than one characterisation.

4.1 Hermeneutic injustice and the court process

One form of epistemic injustice – that is, hermeneutic injustice – occurs when an important area of one's social experience is hidden from common understanding.[46] For instance, a society that does not recognise race as a marker of identity will make it almost impossible to address racial injustices. After all, racial injustice presupposes the existence of race. Consequently, the experiences of certain social groups are likely to be excluded from official knowledge. This exclusion may have prejudicial effects in that it would be difficult, if not impossible, for people

41 Fricker M *Epistemic injustice: Power and the ethics of knowing* New York: Oxford University Press (2007) at 1.
42 McKinnon R "Epistemic injustice" (2016) 11 *Philosophy Compass* 437 at 437.
43 Fricker (2007) at 42; Byskov M "What makes epistemic injustice an 'injustice'?" (2021) 52 *Journal of Social Philosophy* 116 at 120.
44 Fricker (2007) at 1.
45 See Morgan-Olsen B "Conceptual exclusion and public reason" (2010) 40 *Philosophy of the Social Sciences* 213 at 215.
46 Fricker (2007) at 154.

to come forward with claims of discrimination.[47] Effectively, their access to justice will have been compromised.

Access to justice is an important area of social experience. The law's function is to bring a sense of order and certainty in a world of scarcity, uncertainty and inevitable disagreement.[48] As suggested earlier, this offers a compelling basis to prohibit dispute resolution by arbitrary means or self-help. However, the legal order needs the people's confidence to sustain its legitimacy.[49] Therefore, if the law purports to regulate the body politic in an orderly fashion, it is equally necessary to assure its members of their standing to bring, address and recognise certain claims.

However, linguistic barriers in the court process undermine litigants' claims to certain experiences. Their dependence on the availability and competence of court interpreters already denies them the inherent value of independently forming statements to the best of their ability.[50] This renders the reliability of their claims dependent on the quality of the translation afforded, which, as shown earlier, is of a questionable standard. In fact, every instance of translation is different and therefore presents "different challenges where the level of interpretation required varies".[51] But since translation cannot be dispensed with under existing language policy, the fact that most litigants are not English speakers puts them at an inherent disadvantage.[52]

Effectively, not all litigants enter the legal battlefield with the assurance that their claims will be sufficiently considered and understood by court actors. According to forensic-linguistics research, the English language proves to have strategic value in adversarial litigation.[53] While nothing in this suggests illegality, it prompts critical reflection on the ethics of adversarial advocacy in linguistically and culturally diverse jurisdictions. In South Africa, legal illiteracy

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47 The example of racial discrimination was adapted from that of sexual harassment used by Fricker (2007) at 149.

48 Kleyn et al. (2019) at 1–3.

49 Kleyn et al. (2019) at 4.

50 It must be noted that in criminal cases, litigants have the right to have their trial conducted in a language they understand and, if this is not practicable, "to have the proceedings interpreted in that language" – see section 35(3)(k) of the Constitution.

51 See Docrat (2022) at 1719.

52 Even allowing for bilingual or multilingual proficiencies, one accepts the inevitability of translation. However, I am in sympathy with the points of departure for an appropriate language policy proffered by Malan (2016) at 22–23, namely that courts are there for the people and must therefore respond to the distinctive needs of South African communities on the principle that "members of all communities must enjoy maximum and equal access to the courts". Hence, this article adopts the view that courts must prefer giving effect to language rights and procedural rights over translation, but if translation is indispensable to such rights, then stronger oversight and improved quality of translation should be of equal necessity.

53 Docrat (2022) at 1718.

is pervasive in disadvantaged communities.[54] To the extent that law and the court process operate largely on an English basis, it is not difficult to see litigants' participation being thereby compromised.

Unfortunately, this social experience of litigants facing linguistic barriers is excluded from public knowledge. It is conceivable that barriers to access to justice are understood commonly as the inability to afford litigation. In fact, the Legal Practice Act 28 of 2014 aims to broaden access to justice by regulating legal fees and providing for community service to be rendered by legal practitioners and candidate legal practitioners.[55] It is commendable that these aims seek to expand access to justice to the indigent.[56] However, the predominant focus on providing legal aid can cause the linguistic dimension of the court experience to be neglected in discussions about access to justice.[57]

This conceptual under-representation of linguistic barriers to access to justice can weaken efforts to expose and address them. First, English as the only language of record has some justification laid down in *S v Damoyi*, which found that the international status of English lends support for its adoption in the justice system.[58] Secondly, *S v Matomela* deems practical considerations more important than satisfying the constitutional demand for linguistic parity of esteem.[59] Thirdly, the provision of an interpreter is a ready response to a litigant who requires one. While these "defences" are not unfounded, they risk creating the perception that linguistic barriers to access to justice either do not exist or are insufficiently important.

Consequently, linguistic barriers in the court process provide fertile ground for litigants to suffer hermeneutic injustice. Their right of access to justice appears to be compromised by an insufficient understanding of the English language. As the status of the only language of record is readily supported by the foregoing defences, the social experience of these litigants is under-represented in common understandings of access to justice and barriers to it. In effect, their claims to certain experiences may be obscured in the process of mutual sense-making. As shown below, this obscurity can affect a speaker's credibility in ways that invite the operation of another type of epistemic injustice, namely "testimonial injustice".

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54 Durojaye et al. (2020) at 226.
55 See section 3(b)(i)-(ii) of the Legal Practice Act 28 of 2014.
56 As seen in the establishment of Legal Aid South Africa and availing of university law clinics.
57 I am not suggesting that linguistic barriers need to be addressed at the expense of legal assistance to the indigent. Instead, I am sympathetic to the idea that addressing linguistic barriers should form part of efforts aimed at expanding access to justice.
58 For such recognition, see *S v Damoyi* 2004 (2) SA 564 (C) at para 18.
59 *S v Matomela* 1998 (2) SA 1 (Ck) at para 4.

4.2 Testimonial injustice and the court process

Testimonial injustice is a form of epistemic injustice that occurs when a speaker receives little credibility due to certain prejudices held by the hearer.[60] In *Minister of Police v Skosana*, the deceased, while in custody following a motor vehicle accident, had complained of pain in his ribs and abdomen the next morning, requesting to see a medical doctor.[61] The constables on duty did not attend to him since complaints had been mostly trivial and they assumed the deceased was merely sobering up from his alcohol intake of the previous night.[62] Nonetheless, the court held that the constables were negligent in their failure to urgently attend to the deceased's complaint, thereby causally contributing to events that affected legal interests of the deceased.[63] This case serves to demonstrate how certain prejudices can cause a speaker to receive less credibility than he or she should.

In discussions of testimonial injustice, it should be recognised that prejudices cannot simply be wished away. Consider that adjudication involves the activity of assigning meaning to a legal text and the values it embodies.[64] This assignment requires the making of value judgments regarding, for instance, what would count as "just", "reasonable" and "equitable" in the circumstances.[65] These concepts invite the jurist to engage with principles at an extra-legal level.[66] In *In re JP Linahan*, Frank J correctly argues that "[t]he human mind, even at infancy, is no blank piece of paper".[67] Therefore, preconceptions will always exist.

However, it must also be recognised that bias can negatively affect the level of credibility a speaker receives. For example, there is evidence to suggest that people are susceptible to regarding the statement of a white man as more credible than that of a black woman.[68] With due exception to the presumption of judicial impartiality, it is conceivable that other actors in

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60 Fricker (2007) at 1 construes this level of credibility as "more or less" in degree. This article rejects the view that a person suffers epistemic injustice when she receives more credibility than she should. A speaker who receives more credibility because she, for example, went to an elite school is precisely enjoying an advantage regarding her knowledge. It is uncharacteristic of such a case to fit the properties of epistemic injustice enunciated in this article. Thus, this article limits Fricker's definition of testimonial injustice to apply only to those cases where a speaker receives *less* – rather than more – credibility.

61 *Minister of Police v Skosana* 1997 (1) SA 31 (A) at para 7.

62 *Minister of Police v Skosana* 1997 (1) SA 31 (A) at paras 7–9.

63 *Minister of Police v Skosana* 1997 (1) SA 31 (A) at paras 5–6.

64 See Fiss O "Objectivity and interpretation" (1982) 34 *Stanford Law Review* 739 at 739.

65 Zimri M "Judicial independence on a short leash: The unavoidability of second-order considerations" (2023) *Judges Matter* at https://www.judgesmatter.co.za/wp-content/uploads/2023/12/Judges-Matter-essay-McNiel-Zimri.pdf (accessed 8 March 2025).

66 Zimri (2023).

67 *In re JP Linahan* 138F 2d 650 at 652.

68 McKinnon (2016) at 438.

court proceedings may unknowingly succumb to prejudices regarding a speaker's accent, socio-economic status, literacy level, and – above all – language proficiency.

Proceedings during which litigants experience language barriers are themselves a breeding ground for prejudice. The empirical study alluded to earlier found several examples of interpreters siding with the prosecution against an accused person who was not proficient in English.[69] Interpreters would comment negatively on the credibility of witnesses and translate their statements in a belittling manner.[70] In one case, the judicial officer and prosecutor accepted the interpreter's assessment of such credibility and entertained the interpreter's belittling antics in another.[71] It is therefore conceivable that speech difficulty and articulation levels in courtroom discourse can induce value judgments and negative attitudes in a way that undermines the credibility of non-English speaking witnesses.

Such linguistic prejudice – the kind of prejudice suffered by a person who lacks English proficiency – can manifest itself in three forms. First, interlocutor A may lack lexical items during communication.[72] For instance, she is unable to express her thoughts in English. Next, interlocutor B "lacks appropriateness", displayed through linguistic and cultural insensitivity in her interaction with interlocutor A.[73] Finally, interlocutor B makes certain value judgements about the statements of interlocutor A.[74] These can include subjective assessments of a person's credibility or, at least, the extent to which one should take a speaker seriously.

The Senzo Meyiwa murder trial illustrates the operation of linguistic prejudice. Here, the advocate of four accused struggled to cross-examine a forensic detective in English; he lacked the lexical items of the English language to convey his thoughts, which were formulated and expressed in isiZulu.[75] (Even though the advocate was not the litigant or witness himself, his lack of English proficiency may well reflect the courtroom experience of most litigants in South Africa.) The presiding officer displayed insensitivity by laughing at the advocate's frustration

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69 Steytler (1993) at 217.
70 Steytler (1993) at 217.
71 Steytler (1993) at 217.
72 See Docrat Z & Kaschula R "Cultural and linguistic prejudices experienced by African language speaking witnesses and legal practitioners at the hands of judicial officers in South African courtroom discourse: The Senzo Meyiwa Murder Trial" (2024) 37 *International Journal for the Semiotics of Law* 1309 at 1310.
73 See Docrat & Kaschula (2024) at 1310. Admittedly, this insensitivity can arise out of ignorance, but even so, we should also account for those instances where the insensitivity comes from interlocutors whom one may legitimately expect to know better. In either case, one of the three forms of linguistic prejudice will have obtained.
74 Docrat & Kaschula (2024) at 1310.
75 Docrat & Kaschula (2024) at 1315.

in not finding the appropriate lexical items and instructed him to address the court in English.[76] This overlaps with the earlier observation that interpreters sometimes ridicule witnesses for their inarticulacy – an antic noted to have been enjoyed by judicial officers and legal professionals alike.

In courtroom discourse, litigants (and their witnesses) may receive less credibility due to such linguistic prejudice. It is no historical accident that the English language enjoys a status superior to its indigenous counterparts. This is reflected in behaviour that otherwise still exhibits the false belief that a person's English proficiency reflects his or her intelligence, capacity for professionalism, or level of education. As court proceedings do not occur in isolation from society, it is conceivable that a speaker inarticulate in English would receive limited credibility due to such false beliefs. Perhaps this sort of behaviour is atypical of the prudent legal professional, but linguistic and cultural insensitivity may have the effect of discrediting the concepts and arguments that non-English speaking litigants and witnesses intend to convey.

Since linguistic prejudices can deflate the credibility of a speaker, it follows that language barriers in the court process provide ground for litigants to suffer testimonial injustice. They may receive less credibility than they should – not only because of inaccurate statements conveyed or omissions made by an interpreter, but because the communication gap between speakers of different languages invites reliance on body language, cues and perhaps cultural knowledge, in the meaning-making process. This suggests an unavoidable element of subjectivity in court proceedings, which, if left unchecked, can operate to deny speakers the levels of credibility they deserve.

5 LEGAL COMMENTARY ON THE PHENOMENON OF EPISTEMIC INJUSTICE

5.1 Analysis

A potential misconception must be clarified: the existence of linguistic barriers does not automatically mean the presence of epistemic injustice. Whether someone suffers epistemic injustice depends on, for instance, disadvantage, prejudice and social injustice underlying the interaction between speakers of a different language.[77] The dominant status of English

[76] Docrat & Kaschula (2024) at 1315. Granted, it could simply be that a statement has an amusing connotation in a way that renders its response harmless, but the scholarly work on which these examples are based did not focus on this possibility.

[77] For more on the conditions of epistemic injustice, see Byskov (2021) at 119–129.

undeniably has a colonial history.[78] For most litigants in South Africa, English is not the primary spoken language.[79] Bearing South Africa's high levels of poverty, inequality and illiteracy in mind, it is a reasonable inference that linguistic barriers in the court process provide scope for epistemic injustice to occur.

Where epistemic injustice does occur due to linguistic barriers, it is implausible that this occurrence could be justified by limiting the constitutional right of access to the courts. The practical, financial and administrative constraints emphasised in *Matomela* and *Damoyi* may already provide legal impetus for limiting the right of access to the courts. However, it does not follow that the epistemic injustices to which linguistic barriers give rise should also qualify as proper limitations on access to justice. Epistemic injustice is not even a recognised concept in South African law.[80] Additionally, just because the Constitution permits rights limitations, it does not mean that access to justice may be undermined by default – the limitation of a right is a qualified activity.[81] Therefore, whether epistemic injustice should count as a reasonable and justifiable limitation on constitutional rights, particularly the right of access to the courts, requires innovative argument.

Yet, it is not possible for such an innovation to succeed. The primary harm of epistemic injustice is the "degradation of one's status as a knower".[82] This means a knower is "wrongly excluded from participation in knowledge production and transmission" during legal proceedings and potentially even beyond.[83] By extension, the harm symbolises his or her degradation as a human.[84] If this holds, then epistemic injustice cannot reasonably and justifiably limit the right of access to justice, since doing so would allow contravention of the fundamental right to human dignity.[85] It is unreasonable and unjustifiable to forego this right in an open and democratic society founded on human dignity, equality and freedom.[86]

Therefore, avoiding epistemic injustice is non-negotiable in the court process. The practical, administrative and financial constraints within which linguistic barriers are addressed already

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78 The English legal system pervaded the Cape colony since 1795 and 1806, although the Dutch ruled from 1652–1795. See Rautenbach C *Introduction to legal pluralism in South Africa* 5th ed LexisNexis (2018) at 3.
79 See Legal Aid South Africa (2017) at 151 and 153.
80 A search of "epistemic injustice" in LexisNexis South Africa and JutaStat reveals as much.
81 See s36 of the Constitution.
82 Dieterle JM "Other-oriented hermeneutical injustice, affected ignorance, or human ignorance?" (2023) 37 *Social Epistemology* 852 at 854.
83 See Dieterle (2023) at 854.
84 Fricker (2007) at 44.
85 As provided for in section 10 of the Constitution.
86 See section 1(a) of the Constitution.

limit the right of access to the courts. To the extent that the concept of epistemic injustice lacks recognition in legal vocabulary, it appears to be difficult to justify it as a further limitation on section 34 of the Constitution. As it appears to be impossible to justify the occurrence of epistemic injustice in legal proceedings, it should be avoided. The next subsection offers some suggestions as to how this could be accomplished.

5.2 Recommendations

First, the status of English as the only language of court record must be revised. The practice of monolingualism can be relaxed to maximise formal participation of other official languages in the court process. Not only does *Damoyi* suggest that this may become a practice among South African lower courts that this is already a practice among South African lower courts; it is also a stronger attempt at satisfying the constitutional demand for treating all official languages equitably and "with parity of esteem".[87] Revising the judicial status of English can serve to promote the avoidance of linguistic – and hence conceptual – exclusion in the court process.

Secondly, the legal profession should advocate for the regulation of the court interpreters' occupation. Although cases like *S v Tembani* suggest that regulated professions (such as the medical profession) do not consistently guarantee the best offering (for instance, due to the state of South Africa's health-care system), this is not an argument against regulation: the remarks of Cameron J were directed at the chain of causation in that case, not at whether a profession needs less or more regulation.[88] Professionalising the occupation of court interpreters can incentivise appropriate training. Moreover, legal professionals are in a position to mobilise support for meaningful intervention in the occupation of court interpreters.

Thirdly, legal professionals involved in the court process should partner with forensic linguists in proceedings where complicated translations are required. The earlier debate on linguistic barriers to access to justice shows that efforts to address these barriers invite interdisciplinary partnership. Forensic linguists provide expertise on the nuances of language practices in legal contexts.[89] They ought, therefore, to play a consultative role or be requested to give evidence

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87 As required by section 6(4) of the Constitution.

88 *S v Tembani* 2007 1 SACR 355 (SCA) at paras 27–30.

89 Johnson A & Coulthard M "Introduction: Current debates in forensic linguistics" in Johnson A & Coulthard M (eds) *The Routledge handbook of forensic linguistics* (2010) 5.

about, for instance, trial narration and the social-pragmatic aspects of legal discourse, especially where complicated levels of translation are required.

Fourth, discourse about access to justice should more frequently include the linguistic and epistemic dimensions of the legal experience. In South Africa, legal information is available mainly in English and, to some extent, Afrikaans.[90] Yet, these languages may not be the primarily spoken language for most South Africans. It is therefore questionable whether such languages properly effect the publicity principle pronounced in *President of the Republic of South Africa v Hugo*, in terms of which the law should enable ordinary persons to regulate their own behaviour.[91] Advocacy for access to justice should therefore extend to showcasing the impact of linguistic barriers on the legal process and to mobilising awareness of the epistemic injustices to which such barriers give rise.

Finally, the status of the concept of epistemic injustice needs to be elevated in legal curricula and South African legal discourse. As it stands, it remains an under-recognised concept. Module offerings such as jurisprudence and/or legal ethics can incorporate research on epistemic injustice and its interaction with the law. In this way, law students would be exposed to the idea of epistemic injustice and how it manifests itself in practice. Workshops for legal professionals can include the topic of epistemic injustice, which may sensitise them to the interplay between language and law. The importance of the concept has been clarified as follows:

> The concept of epistemic injustice has the potential to elucidate and clarify several aspects of socioeconomic injustice and is thus an important concept not just for ethical and moral theory but also for political theory since it concerns the exercise of power, the design of public institutions, such as schools, universities, courts, healthcare, as well as public discourse. Hence, by identifying the conditions for epistemic injustice it is possible to systematically identify and evaluate claims of harm against knowers, perpetrated either or both by individuals and/or institutions, and how individuals and institutions can avoid creating epistemic (dis)advantages and reproducing existing socioeconomic inequalities.[92]

6 CONCLUSION

This article has attempted to highlight the relationship between epistemic injustice and linguistic barriers to the right of access to justice in South Africa. It argued that linguistic obstacles to access to justice provide fertile ground for litigants to suffer epistemic injustice.

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90 Leach (2019) at 131.

91 *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) at para 102.

92 Byskov (2021) at 118.

While the South African court system has a largely adversarial character, nothing suggests that the findings of this study could not apply as well to inquisitorial proceedings and alternative forms of dispute resolution. How the law and the legal profession can address both linguistic barriers to access to justice and the occurrence of epistemic injustice in the legal system is an avenue for further research.

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