

THE DEVELOPMENT AND USE OF
SIGN LANGUAGE IN SOUTH AFRICAN
SCHOOLS: THE DENIAL OF
INCLUSIVE EDUCATION*Willene Holness****Summary**

The lobbying and advocacy predating, and litigation in Springate v Minister of Basic Education Case no 4846/2009 (PMB HC) culminated in a victory for South African deaf learners, namely, to study sign language as a language subject for matriculation in schools. This article discusses the litigation in Springate, focusing on South African sign language as a school subject, and the silence of the Pan-South African Language Board in the litigation, curriculum development and monitoring, enforcement and advocacy by relevant institutions (the South African Human Rights Commission and the Commission on the Rights of Cultural, Religious and Linguistic Communities), the media and civil society. The rationale for legislative and policy choices distinguishing between sign language as a disability right or linguistic minority right is considered, as well as litigation and law reform for the recognition and use of sign language in education and the provision of sign language interpreters in select jurisdictions. It is concluded that the protection of sign language in domestic law and policy, though fragmented, should be read within the growing acceptance globally that sign language is both a right accruing due to disability accommodations, and due to the linguistic and cultural minority status of deaf users of sign language. The current offering of sign language as a language subject in mainstream or full service schools in South Africa is considered to be constrained by the 'reasonable practicable' standard, contrary to the notion of full inclusive education. The continual monitoring of the linguistic and cultural rights of sign language users will hopefully address the shortcomings in the education system, but this will need dedicated funding and political will.

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That we are here launching New Zealand sign language into the New Zealand curriculum offers a greater hope of that ordinary life – not only for the deaf community, but for all disabled New Zealanders. And I'm proud to be part of a government that is working to ensure New Zealanders have the tools and support to realise their potential ... having these guidelines boosts the recognition of New Zealand sign language as a native language... But, critically, it removes sign language from the realms of special education. It firmly places New Zealand sign language within the mainstream, where hearing students will have the access to the language and culture of the deaf; where someday its use will become unremarkable – just another facet of ordinary life.¹

I am very pleased that learners across the country will now have the opportunity to receive an education in their home language of choice – sign language. And I am proud of the role the Western Cape government, the WCED and our schools, particularly De La Bat, have played in making this dream a reality for our deaf learners. I am hopeful that, in future, we will be able [to provide this] option in hearing schools, particularly in our full-service schools where this is reasonably practicable. However, a lot more work lies ahead of us, and the rest of the country, before this can be implemented.²

1 Introduction

Despite the recognition by the South African Schools Act (SASA) that sign language has been utilised in the teaching and learning of deaf learners in public schools since 1996, there was no approved sign language curriculum for learners until 2014.³ Whilst in New Zealand, for example, sign language is a recognised official language and provided in mainstream schools to allow language acquisition and cultural acceptance of sign language and deaf culture, in South Africa sign language is not an official language and currently is taught only in special schools for the deaf. South African sign language (SASL) is a unique language and is not linguistically related to spoken languages in South Africa (English or isiZulu, for example). Rather, it is a distinct, 'rule-governed, grammatical, systematic, and non-arbitrary communication system which is similar in nature to other natural sign languages'.⁴ The lack of recognition of SASL and curriculum development in practice has for generations denied learners

1 Ruth Dyson, New Zealand's Minister of Disability Issues, Address to the launch of New Zealand sign language in the New Zealand curriculum (15 March 2007) <http://www.beehive.govt.nz/speech/address-launch-new-zealand-signlanguage-new-zealand-curriculum>, cited in JH Cripps & SJ Supalla 'The power of spoken language in schools and deaf students who sign' (2012) 16 *International Journal of Humanities and Social Science* 86-94.

2 Donald Grant, Minister of Education, Western Cape Province, statement 'Promoting the use of sign language in schools' 11 September 2013 <https://www.westerncape.gov.za/news/promoting-use-sign-language-schools> (accessed 1 December 2015).

3 Sec 6(4) of the South African Schools Act 84 of 1996.

4 C Penn 'Signs of the times: Deaf language and culture in South Africa' (1993) 40 *South African Journal of Communication Disorders* 11-23; C Penn 'The sociolinguistics of South African sign language' in R Herbert (ed) *Language and society in South Africa* (1992) 277.

educational and employment opportunities. This lack of recognition may also be traced to the preference for special schools rather than mainstream schools for children with hearing impairments, which means that SASL and its development has not been prioritised by the relevant state bodies. The move towards inclusive education has not been uncontroversial and, at times, has been jeopardised by exclusionary state policy and skewed funding priorities.⁵

In 2009, Kyle Springate, a matric pupil at a prestigious 'mainstream' school, Westville Boys High School, challenged the Department of Education in the High Court of Pietermaritzburg for being refused to be examined in sign language, a subject he had taken throughout high school. Kyle attended a mainstream high school, despite his hearing impairment, primarily because his communication skills were aided by his ability to lip read and the use of a hearing aid.⁶ Because Kyle's hearing loss was progressive, he required to be proficient in sign language to mitigate his hearing loss in the future:

I simply feel that proper knowledge of SASL is a vital skill that will be of great use for the rest of my life. Over the last few years, I have experienced a reduction in my ability to hear. My mother has arranged for me to have the most powerful hearing aid on the market, but it cannot prevent the degeneration in hearing that I am experiencing. In due course, my ability to lip read will be diminished and I will need to use SASL as my way of communicating.⁷

The threat of litigation brought by Kyle and two disabled persons' organisations (DPOs), DeafSA and the KwaZulu-Natal Blind and Deaf Society (KZNBDS), against the Department of Education resulted in the curriculum development of South African sign language (SASL) after 14 years of advocacy by the deaf community. The constitutionally-mandated body responsible for language development, the Pan-South African Language Board (Language Board) was not a key party in the litigation, despite being cited as a respondent, nor was it an active participant in the preceding advocacy by DPOs and lobbying of government departments to have sign language recognised.

The article considers the advocacy and litigation in *K Springate v Minister of Education & Others*,⁸ which culminated in a victory for deaf learners to study sign language as a language subject for matriculation in

5 *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC). Cf C Ngwena 'Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education' (2013) 1 *African Disability Rights Yearbook* 139; P Kruger 'A critical appraisal of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 97 (CC)' (2015) 18 *Potchefstroom Electronic Law Journal* 756-773.

6 Kyle's hearing loss was established at that time at 91%.

7 K Springate, confirmatory affidavit filed on 8 June 2009 para 3 (copy with the author).

8 Case 4846/2009 (PMB HC).

schools. Section 2 provides a brief overview of the recognition of South African sign language and inclusive education in South Africa. Section 3 discusses the litigation in *Springate*, focusing on SASL as a school subject, the silence of the Language Board in the litigation, the curriculum development following the litigation, and the monitoring, enforcement and advocacy by relevant institutions, such as the South African Human Rights Commission (SAHRC) and the Commission on the Rights of Cultural, Religious and Linguistic Communities (CRL Commission), the media and civil society. Section 4 briefly outlines the rationale for legislative and policy choices distinguishing between sign language as a disability right or a linguistic minority right. Section 5 is an overview of selected jurisdictions: litigation and law reform for the recognition and use of sign language in education and the provision of sign language interpreters. Such examples provide scope for further advocacy and litigation to promote the recognition of sign language as an official language and its development and utilisation in the private and public spheres. It will also inform the choice for states' legislative and policy frameworks between viewing the recognition of sign language as a disability right or a linguistic minority right. Such a deliberate choice is important, because

[e]ven in industrialised countries, the majority of current deaf education programmes do not respect the linguistic human rights of deaf children. Indeed, most deaf education programmes fall in to the language deprivation category described in theoretical models of education of linguistic minorities. 'Language deprivation' for deaf people means ignoring the use of sign language as a basic communication means, as a language of instruction and as a school subject. Following this, the linguistic human rights of deaf children are grossly violated in educational programmes all over the world.⁹

Grobbelaar-Du Plessis has bemoaned the lack of disability-specific legislation in South Africa, commenting that its absence means that the current fragmented legislation may promote some rights at the expense of others, and also affects the accessibility of the law, and the rights flowing therefrom.¹⁰ The legislature should, therefore, be cognisant of the implications of legislative choices regarding the recognition of SASL, for example, if SASL is to be recognised as a twelfth official language, just as the Department of Education should be aware of its policy implications when developing curricula to teach SASL in schools for the deaf and not in *all* schools. Section 6 is the conclusion.

9 World Federation of the Deaf *Policy on Education Rights for Deaf Children* (2007) ii.

10 I Grobbelaar-Du Plessis 'Gestremdeheidsreg: 'n Internasionaal regtelike en regsvergelikende analise' unpublished LL.D thesis, University of Pretoria, 2010 565-566 <http://repository.up.ac.za/bitstream/handle/2263/28549/Complete.pdf?sequence=10> (accessed 1 December 2015).

2 Brief overview of South African sign language recognition and inclusive education in South Africa

During the apartheid era, disability rights issues were not prioritised by lawyers, policy and lawmakers, particularly as civil and political rights were most under threat. Because of the unequal education system, segregated according to race, persons with disabilities were marginalised, and by and large were functionally illiterate.¹¹ Dube explains that '[t]he lived experiences of black and white disabled people under apartheid were very different, and reflected the general inequalities between white and black people in South Africa'.¹² Inclusive education has been the preference following the constitutional dispensation at a policy level but, in reality, particularly the hearing impaired are still segregated into special schools without the equal recognition of their language of communication and learning.

2.1 Apartheid context and mobilisation by the disability community

During the apartheid era, language planning and policy, not only the use of spoken languages, but also sign language, supported Afrikaner nationalist objectives and as a 'pillar of ethnolinguistically separate education', and has remained divisive since the dawn of democracy.¹³ Deep-seated inequality of resources on the basis of race followed.¹⁴ Manual codes (a form of English) were used in schools for the black deaf, with oral and written manuals, whilst schools for the white deaf followed oral education methods, offering hearing aids and intensive speech and language therapy.¹⁵ 'Oralism' was the overarching approach in an attempt to 'cure' the deaf child, requiring children to lip-read and speak.¹⁶ Towards the end of the apartheid era, the total communication approach was used, involving the simultaneous use of spoken language and signs, in a single

11 DeafSA *Deaf education position paper* (2006) 11 (copy with the author).

12 AK Dube 'The role and effectiveness of disability legislation in South Africa' (2005) *Disability Knowledge and Research* 14.

13 T Reagan 'South African sign language and language-in-education policy in South Africa' (2008) 38 *Stellenbosch Papers in Linguistics* 165. For a historical account of education of the deaf in South Africa, see C Storbeck et al 'Education of the deaf in South Africa' in DF Moores & M Miller (eds) *Educational and social perspectives of deaf people around the world* (2009) 133.

14 *Hoërskool Ermelo v Head of the Mpumalanga Department of Education* 2010 (2) SA 415 (CC) para 2.

15 Storbeck et al (n 13 above) 133; RMT Simmons 'The role of educational systems and deaf culture in sign language in South Africa' in C Erting et al (eds) *The deaf way: Perspectives from the international conference on deaf culture* (1994) 80-83.

16 EL Peel 'Inclusive practice in South Africa: A deaf education perspective' unpublished Master of Education thesis, University of Witwatersrand (2004) 14.

education system for all students.¹⁷ Thereafter, a more bilingual-bicultural approach to deaf education was followed in line with the prevailing educational language policy.¹⁸

Within the disability sector, mobilisation by the disability community on rights issues were primarily coloured by the welfare or charity model,¹⁹ as well as the medicalised understanding of disability, with the result that the focus was on rehabilitation, namely, curing the defect, such as cochlear implants for deaf children. As in the rest of the world, DPOs were mainly constituted of able-bodied persons, managing the organisations *for* persons with disabilities.²⁰ The agency of persons with disabilities was, thus, not evident in community organisations, nor in policy and law making.

During the 1980s to 1990s, DPOs moved towards a human rights approach, greatly influenced by the political environment, and organisations became more and more representative *of* persons with disabilities.²¹ As a result, the movements' efforts at macro-level were in line with the social model of disability, based on the claim 'that disability is caused wholly or substantially by social and environmental barriers that prevent disabled people from living independently and from participating in their communities'.²² This signals a socio-cultural perspective that advances a two-fold role of sign language for the deaf community: acting as the community's vernacular language, and as an indicator of cultural group membership.²³ Competence in a particular sign language is required for deaf cultural identity.²⁴ In South Africa, research on the nature and characteristics of SASL points to the recognition of SASL as a 'distinct language in its own right, not a derivational, pidgin or contact language. It is a rule-governed, grammatical, systematic and non-arbitrary

17 E Smuts 'Schools: Deciding on a school for the deaf' in R Hugo & T Blumberg (eds) *Challenges and choices: An aid for parents of children with hearing loss* (2010) 51, cited in Peel (n 16 above) 18.

18 PAO Akach 'Teachers attitudes towards the medium of instruction: An empirical study (a case study of two schools) in South Africa' in DO Orwenjo et al (eds) *Multilingualism and education in Africa: The state of the state of art* (2014) 286 298.

19 S Philpott & W Sait 'Disabled children: An emergency submerged' in M Priestly (ed) *Disability and life course: Global perspectives* (2001) 151 165.

20 K Jagoe 'The disability rights movement: Its development in South Africa' (undated) Living Institute <http://www.independentliving.org/toolsforpower/tools6.html> (accessed 1 December 2015).

21 C Howell et al 'A history of disability rights movement in South Africa' in B Watermeyer et al (eds) *Disability and social change: A South African agenda* (2006) 58.

22 M du Plessis 'The social model of disability, rights discourse and the impact of South Africa's Education' White Paper 6 on access to the basic education system for persons with severe or profound intellectual impairments (2013) 17 *Law, Democracy and Development* 202 208.

23 Reagan (n 13 above) 169.

24 Reagan (n 13 above) 170.

communication system similar in nature to other natural sign languages'.²⁵

2.2 Democratic imperatives

Not only had the global paradigm shifted from the medical model (or clinical-pathological model) to the social-cultural model (or bilingual-bicultural approach to sign language), but the democratic transition in South Africa brought recognition of the status of children with disabilities as equal to their non-disabled peers. This is considered from the perspective of constitutional changes, international law imperatives and legislative and policy changes.

2.2.1 Constitutional provisions

The rights to equality, language, culture and education comprise the matrix of sign language protection in the South African Constitution. In the democratic era, the anti-discrimination clause²⁶ in the Constitution was the most significant gain made by the disability community and would prove to provide impetus for policy and legislation to address the unequal treatment of persons with disabilities, to the extent that persons with disabilities are a designated group for the purposes of employment equity and affirmative action.²⁷ The clause prohibits unfair discrimination, *inter alia* on the basis of disability, culture and language.

The Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000 (Equality Act) was enacted to comply with the constitutional requirement for national legislation to prevent or prohibit unfair discrimination.²⁸ The Equality Act lists unfair discrimination on the basis of disability as including the denial of or removal from any person who has a disability, any supporting or enabling facility necessary for their

25 Reagan (n 13 above) 173, citing D Aarons & P Akach 'South African sign language: One language or many? A socio-linguistic question' (1998) 31 *Stellenbosch Papers in Linguistics* 1. Cf D Aarons & L Reynolds 'South African sign language: Changing policies and practice' in L Monaghan et al (eds) *Many ways to be deaf: International variation in deaf communities* (2003) 194; C Penn & T Reagan 'Implications of the study of South African sign language for the education of the deaf in South Africa' (1995) 15 *South African Journal of Education* 92; C Penn 'Signs of the times: Deaf language and culture in South Africa' (1993) 40 *South African Journal of Communication Disorders* 11; C Penn & T Reagan 'Toward a national policy for deaf education in the "new" South Africa' (1991) 38 *South African Journal of Communication Disorders* 19; C Penn & T Reagan 'How do you sign "apartheid"? The politics of South African sign language' (1990) 14 *Language Problems and Language Planning* 91.

26 Sec 9 of the Constitution, particularly sec 9(3): 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth' (my emphasis).

27 Sec 9(2) of the Constitution and Employment Equity Act 55 of 1998.

28 Sec 9(4) of the Constitution.

functioning in society;²⁹ and the failure to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.³⁰ Failing to provide reasonable accommodation constitutes unfair discrimination. Examples of illustrative practices in education amounting to unfair discrimination were not left to the imagination of lawyers but listed in Schedule 1 of the Equality Act, including the unfair exclusion of learners, including learners with special needs, from educational institutions; and the failure to reasonably and practically accommodate diversity in education.³¹ The Equality Act explicitly lists as a factor in determining the fairness of the discrimination the question as to whether the applicant has taken reasonable steps to accommodate diversity.³² The state is further enjoined to take positive steps to eliminate discrimination on the basis of disability through, for example, auditing laws, policies and practices with a view to eliminating all discriminatory aspects and to enact appropriate laws; to develop progressive policies and initiate codes of practice in order to eliminate unfair discrimination on the basis of disability; to adopt viable action plans to promote and achieve equality in respect of disability; and to give priority to the elimination of unfair discrimination and promotion of equality in respect of disability.³³ The Equality Act is, therefore, a vehicle for obtaining reasonable accommodation and support measures and for removing barriers to equal opportunities for deaf learners for education in schools.

Whilst not recognised as an official language, sign languages are explicitly protected by the Constitution as it recognised the need for the establishment of a Language Board to, *inter alia*, promote and create conditions for the development of all official languages and sign language.³⁴ With regard to the protection of linguistic rights, sections 30 and 31 are significant.³⁵ the former referring to the rights of individuals to

29 Sec 9(a) of the Equality Act.

30 Sec 9(c) of the Equality Act.

31 Items 2(a) and (c) of Schedule 1: Illustrative list of unfair practices in certain sectors.

32 Sec 14(3)(i)(ii) of the Equality Act.

33 Secs 28(3)(b)(i) to (iv) of the Equality Act. Similarly, the suspect grounds of race and gender are elevated to needing special measures to promote equality. Unfortunately, the date of commencement of this proactive provision is still to be proclaimed.

34 Sec 6(5) of the Constitution provides that a Pan-South African Language Board is to be established by national legislation to *inter alia* promote and create conditions for the development of all official languages and sign language. The Pan-South African Language Board Act 59 of 1995, amended by Act 1999, established the Board.

35 Sec 30 of the Constitution provides: 'Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.' According to sec 31: '(1) Persons belonging to a cultural or linguistic community may not be denied the right, with other members of that community – (a) to enjoy their culture and use their language; and (b) to form, join and maintain cultural and linguistic associations and other organs of civil society. (2)The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.'

participate within their cultural and linguistic communities; the latter protecting the interests of the community.³⁶

The right to basic education is an unqualified right.³⁷ For educational purposes, section 29(2) guarantees that '[e]veryone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable'. The limitation for linguistic protection, however, is the standard of 'reasonably practicable'. Reasonable alternatives, which include single-medium schools, should be considered by the state in implementing this right.³⁸ Factors that should be considered include equity, practicability and the pressing need to redress the results of the racially discriminatory laws and practices of the past.³⁹ Following a number of court decisions⁴⁰ that have delineated the scope of this right, the Department of Education has described their obligation as follows:

In recognising the right of a learner to receive education in an official language or in a language of one's choice, the state is duty-bound to ensure effective access to the right to be taught in the language of one's choice. This duty is coupled with the obligation on the state to ensure that there are sufficient school places for every child living in a province, as well as with the duty to ensure that a public school admits learners without unfair discrimination against them in any way.⁴¹

The right of language choice is, therefore, not absolute but tempered by considerations of equality – particularly equal access to education for all children.⁴² The best interests of the child is the standard against which all decisions regarding children are measured.⁴³ Underpinning the right to education, as most rights, is non-discrimination and equal treatment, but also equality of access, resources and opportunities.⁴⁴ The use of an inappropriate language of learning and teaching, such as reliance on a

36 S Woolman 'Community rights: Language, culture and religion' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (original service 2007) 58-49.

37 Sec 29(1) of the Constitution.

38 Sec 29(2) of the Constitution.

39 Secs 29(2)(a) to (c) of the Constitution.

40 Including *Matukane & Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T) and *Hoërskool Ermelo v Head of the Mpumalanga Department of Education* 2010 (2) SA 415 (CC).

41 Department of Basic Education 'The status of the language of learning and teaching in South African schools: A quantitative overview' (2010) 9 <http://www.education.gov.za/LinkClick.aspx?fileticket=wuoS4v3cIkg%3D&tabid=358&mid=2597> (accessed 23 September 2015). This statement is taken virtually *verbatim* from the decision in *Hoërskool Ermelo* (n 40 above) para 76.

42 Cf S Woolman 'Defending discrimination: On the constitutionality of independent schools that promote a particular, if not comprehensive, vision of good life' (2007) *Stellenbosch Law Review* 31; B Fleisch & S Woolman 'On the constitutionality of single-medium public schools' (2007) *South African Journal on Human Rights* 34 38; S Woolman & M Bishop 'Education' in S Woolman & M Bishop *Constitutional law of South Africa* (original service 11-07) 57-42 to 57-78.

43 Sec 28(2) of the Constitution.

44 T Boezaart 'A constitutional perspective on the rights of children with disabilities in an educational context' (2012) 7 *South African Public Law* 460.

spoken language at the detriment of SASL, for example, violates the right to equal access to education.⁴⁵

2.2.2 International law

International law arguably perceives users of sign language as a linguistic and cultural minority, but more forcefully protects the rights to language, culture and education of children with hearing impairments as individual, not group rights,⁴⁶ in a number of instruments. The Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (Standard Rules) stress the need for states to consider the use of sign language in educating deaf children.⁴⁷ Whilst acknowledging that the communication needs of the deaf may require the provision of schooling in 'special classes and units in mainstream schools', the Rules emphasise attention to be paid to 'culturally sensitive instruction that will result in effective communication skills and maximum independence for people who are deaf or deaf/blind'.⁴⁸

Users of sign language, arguably, comprise a minority as they are numerically inferior, possessing linguistic characteristics different from the rest of the population, and showing a sense of solidarity in preserving their culture and language.⁴⁹ Article 27 of the International Covenant on Civil Political Rights (ICCPR) informs section 31 of the Constitution and protects the rights of linguistic minorities to enjoy their own culture or to use their own language.⁵⁰ The Convention on the Rights of the Child (CRC), similarly, protects this minority cultural and linguistic right.⁵¹ This recognition would require positive steps to be taken by the state to develop

45 S Pendlebury 'Meaningful access to basic education' in S Pendlebury et al (eds) *South African child gauge* (2009) 24 26.

46 A Kusters et al *On diversity and inclusion: Exploring paradigms for achieving sign language people's rights* (2015) MMG Working Paper 15-02 Max Planck Institute for the Study of Religious and Ethnic Diversity, Göttingen, 1 8; S Batterbury et al 'Sign language peoples as indigenous minorities: Implications for research and policy' (2007) 39 *Environment and Planning* 2899.

47 Rule 5(7) on accessibility, Standard Rules on the Equalisation of Opportunities for Persons with Disabilities A/RES/48/96 (4 March 1994).

48 Rule 6 on education of the Standard Rules (n 47 above).

49 This complies with the definition of minority proffered by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities E/CN.4/Sub.2/384/Rev.1 para 568.

50 See also arts 1(1), 2(1), 2(5), 3(1), 3(2) and 4(1) of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, General Assembly Resolution 47/135 (18 December 1992). The multiple discrimination faced by linguistic minorities, eg on the basis of disability as well as language, is recognised in United Nations Minority rights: International standards and guidance for implementation (2010) HR/PUB/10/3 3 http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf (accessed 1 December 2015).

51 Art 30 of the CRC.

their linguistic identity.⁵² Some commentators have argued that linguistic genocide has occurred where spoken languages are preferred over sign languages, and where one sign language dominates, attaining official status, to the detriment (or 'death') of other sign languages practised in a given country.⁵³ The genocide of sign language in this context also meets the understanding of linguistic genocide interpreted from the definition of 'genocide'⁵⁴ in the UN Convention on the Prevention and Punishment of the Crime of Genocide.⁵⁵ Three treaties that have explicit provisions dealing with the education of children with disabilities, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the CRC and the CRPD are now discussed.

South Africa only recently ratified the ICESCR, in January 2015, 20 years after signature, but subject to a reservation that some commentators argue may be unconstitutional.⁵⁶ The reservation provides:

The government of the Republic of South Africa will give progressive effect to the right to education, as provided for in article 13(2)(a) and article 14, within the framework of its national education policy and available resources.

Even though the right to education is unqualified in the Constitution,⁵⁷ the government attempts to make this right subject to progressive realisation and available resources and, most disquieting, subjects this constitutional right to policy. The implications of resource allocation and much-needed political support for the provision of sign language education in *all* schools are distressing. The right to culture, however, is not subjected to a reservation. The ICESCR recognises the right of everyone to practise their culture.⁵⁸ The UN Committee on Economic, Social and Cultural Rights

52 General Comment 23, art 27 of the International Covenant on Civil Political Rights (1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1 (1994) 38. Paras 6.1 and 6.2 oblige states to take positive measures to protect the identity of the minority and to enable them to enjoy and develop their culture and language, in community with the other members of their group.

53 T Skutnabb-Kangas *Linguistic genocide in education- Or worldwide diversity and human rights?* (2000) 227 348 376.

54 T Skutnabb-Kangas 'Linguistic genocide and the deaf' (undated) http://www.deafzone.ch/file/file_pool/action/download/file_id/1379. Cf J Lubbe et al (eds) *South African language rights monitor 2003* (2011) 20.

55 Convention on the Prevention and Punishment of the Crime of Genocide Assembly Resolution 260 A (III) of 9 December 1948. Art II(e) considers it genocide when there is an instance of forcibly transferring children of the group to another group; and art II(b), when it causes serious bodily or mental harm to members of the group.

56 Joint statement by Section27, Equal Education, the Centre for Child Law, the Legal Resources Centre and Equal Education Law Centre 'SA government's declaration on education clause mars the welcome ratification of the International Covenant on Economic, Social and Cultural Rights' <http://www.lrc.org.za/press-releases/3359-joint-statement-sa-government-s-ratification-of-the-icescr> (accessed 14 February 2016).

57 Sec 29(1)(a) of the Constitution; *Governing Body of the Juma Masjid Primary School & Others v Essay NO & Others* 2011 (8) BCLR 761 (CC) para 37.

58 Art 15 of the International Covenant on Economic, Social and Cultural Rights General Assembly Resolution 2200A (XXI) of 16 December 1966.

(ESCR Committee) has commented that the right to take part in cultural life is

characterised as a freedom. In order for this right to be ensured, it requires from the state party both abstention (ie, non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).⁵⁹

It appears as if this positive action may have been lacking on the part of the South African government. The cultural rights of particular groups are protected, including children, persons with disabilities and minorities. Particularly, the rights of persons with disabilities in cultural life will require the state to take positive measures to provide for them to have, *inter alia*, the recognition of their specific cultural and linguistic identity, including sign language and the culture of the deaf.⁶⁰

The right to education is not the only entry point for holding the South African government to account; the right to cultural and linguistic identity, as described by the ESCR Committee, may also prove helpful.

The CRC does not explicitly recognise the use of sign language, but one of the aims of education is to develop respect for the cultural identity and language of children.⁶¹ The right to education is conceived as progressively realisable, and to be achieved on the basis of equal opportunity.⁶² For children with disabilities, their special needs may require assistance to ensure that the child has 'effective access to and receives education' in a way conducive to his or her 'fullest possible' social integration and individual development, including cultural development.⁶³ Cultural development should include the protection and development of the deaf culture. This, in turn, would also link with the aim of developing respect for a child's cultural identity (deaf) and language (sign language). The Committee on the Rights of the Child (CRC Committee) has commented that the main aim of article 23 is a child's inclusion in society, which would extend to maximum inclusion in education.⁶⁴ Such quality education recognises that children with disabilities are not homogenous and that they have different needs, requiring teachers and professionals to assist a child as individual to

59 ESCR Committee General Comment 21 Right of everyone to take part in cultural life (art 15 para 1(a) of the International Covenant on Economic, Social and Cultural Rights) 21 December 2009, E/C.12/GC/21, clause 6. Cf A Barratt & A Afadameh-Adeyemi 'Indigenous peoples and the right to culture: The potential significance for African indigenous communities of the Committee on Economic, Social and Cultural Rights General Comment 21' (2001) 1 *African Human Rights Law Journal* 560.

60 ESCR Committee General Comment 21 (n 59 above) clause 31.

61 Art 29(1)(c) of the CRC.

62 Art 29(1)(a) of the CRC.

63 Art 23(3) of the CRC.

64 CRC Committee General Comment 9 The rights of children with disabilities (2006) 27 February 2007, CRC/C/GC/9 para 11.

'develop his or her ways and skills of communication, language, interaction, orientation and problem solving which best fit the potential of the particular child'.⁶⁵ Such an individualised understanding of education may necessitate personal assistance, which should include 'teachers trained in methodology and techniques, including appropriate languages, and other forms of communication, for teaching children with a diverse range of abilities, and who are capable of using child-centred and individualised teaching strategies, and appropriate and accessible teaching materials, equipment and assistive devices'.⁶⁶ However, the rider on inclusive education is an acknowledgment that, in the short term, '[a] continuum of services and programme options must be maintained in circumstances where fully inclusive education is not feasible to achieve in the immediate future'.⁶⁷ This rider⁶⁸ is inconsistent with the Committee's further explication of 'inclusive education' as not merely integration into mainstream classes.⁶⁹

The CRPD explicitly enjoins states to provide for sign language in many aspects of life, listing its inclusion in five articles:

- inclusion in the definition of 'language';⁷⁰
- linguistic access;⁷¹
- freedom of expression and opinion;⁷²
- education;⁷³ and
- participation in cultural life, recreation, leisure and sport.⁷⁴

65 CRC Committee General Comment 9 (n 64 above) para 43.

66 CRC Committee General Comment 9 (n 64 above) para 45 on early childhood education.

67 As above.

68 LN Murungi 'Inclusive basic education in South Africa: Issues in its conceptualisation and implementation' (2015) 18 *Potchefstroom Electronic Law Journal* 3160 3170.

69 CRC Committee General Comment 9 (n 64 above) para 66 notes: 'The manner and form of inclusion must be dictated by the individual educational needs of the child, since the education of some children with disabilities requires a kind of support which may not be readily available in the regular school system ... However, the Committee underlines that the extent of inclusion within the general education system may vary. A continuum of services and programme options must be maintained in circumstances where fully inclusive education is not feasible to achieve in the immediate future.' In para 67 the Committee continues to explain that the goal of inclusive education can be achieved by different organisational means which respect the diversity of children: 'Inclusion may range from full-time placement of all students with disabilities into one regular classroom or placement into the regular class room with varying degree of inclusion, including a certain portion of special education. It is important to understand that inclusion should not be understood nor practised as simply integrating children with disabilities into the regular system regardless of their challenges and needs.'

70 Art 2 of the CRPD.

71 Art 9 of the CRPD.

72 Art 21 of the CRPD. Persons with disabilities have the right to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice.

73 Art 24 of the CRPD.

74 Art 30 of the CRPD.

The latter provision entitles persons with disabilities, on an equal basis with others, 'to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture'.⁷⁵ During the negotiations for the drafting of the CRPD, the South African contingent supported other lobbyists for the inclusion of sign language, particularly for full access to information in sign languages and education in sign language, as well as linguistic human rights for the deaf community.⁷⁶ Article 9, on accessibility, obligates states to take appropriate measures, including the identification and elimination of obstacles and barriers to ensure equal access to facilities, including schools, medical facilities, information, communication and emergency services. Significantly, it also requires that appropriate measures should be taken 'to provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public'.⁷⁷

The vision of the CRPD for the education of learners with disabilities, set out in article 24, is inclusive education, within the general education system, in other words, that segregation into special schools is generally not supported. Three components are related to the rights of learners with hearing impairments: first, the guarantee of inclusive education, on an equal basis with others, which includes free primary education, within the general education system, in the communities where they live, with the necessary support measures or reasonable accommodation being made.⁷⁸ This right to education pertains to inclusive education at all levels, including life-long learning.⁷⁹ In other words, the value of education throughout the life span of the person is considered so that the person can develop their personality, talents, creativity, mental and physical abilities, and participate effectively.⁸⁰ A lack of competence in a person's vernacular would obliterate any meaningful development of these abilities, and would put the person at a distinct disadvantage compared to able-bodied persons competent in their spoken mother tongue.

Second, the learning of life and social skills that able-bodied peers may take for granted is guaranteed to allow full and equal participation in education and within the broader community, necessitating the state to take measures to facilitate 'the learning of sign language and the promotion of the linguistic identity of the deaf community'.⁸¹ Education should be delivered in the most appropriate language or modes and means of communication for an individual child, and this should be in an

75 Art 30(4) of the CRPD.

76 SCE Batterbury 'Language justice for sign language peoples: The UN Convention on the Rights of Persons with Disabilities' (2010) 11 *Language Policy* 253 262.

77 Art 9(e) of the CRPD.

78 Arts 24(1) & (2) of the CRPD.

79 Art 24(1) of the CRPD.

80 Arts 24(1)(b) and (c) of the CRPD.

81 Art 24(3)(b) of the CRPD.

environment which maximises his or her academic and social development.⁸² The CRPD anticipates the crucial role of teachers qualified in sign language, including those with disabilities.⁸³ The deaf culture and linguistic identity are best learnt from positive role models with the same culture and identity. The state is, therefore, bound to take measures to allow children to learn sign language from teachers qualified to teach it.

Third, according to Murungi, in articles 24(2)(d) and (e) a 'choice' is evident between alternative locations: general education and special schools.⁸⁴ The author's analysis of this provision concludes that the CRPD views freedom of choice in education not as the usual choice between public or private schools, or schools that represent moral or religious convictions, as extended in other international instruments, but in the context of children with disabilities, as a choice between mainstream and special schools.⁸⁵ Absolutely providing equal rights and, therefore, an equal and real choice to parents and children, would mean that states would have to properly equip special schools, with a serious cost implication that may not be sustainable.⁸⁶ However, policy implementation, evidenced in the case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* case, does not really provide an equal choice for learners with disabilities. Whilst this case dealt with education for children with severe and profound disabilities, it exposes the lack of political will to provide education for all children with disabilities on an equal basis with others.⁸⁷ De Beco indicates that 'environments that maximise academic and social development' in article 24(2)(e) could be understood as referring to special schools. However, article 24(2)(e) requires support measures consistent with the goal of full inclusion, which more likely refers to a 'mixed form of education as opposed to special education'.⁸⁸ This may be similar to the 'full service schools' provided for in White Paper 6.

Ngwena, on the other hand, indicates that articles 24(2)(d) and (e) are commensurate with the notion of 'full inclusion'; in other words, it

82 Art 24(3)(c) of the CRPD.

83 Art 24(4) of the CRPD.

84 Art 24(2)(d) provides: 'Persons with disabilities receive the support required, within the general education system, to facilitate their effective education.' Art 24(2)(e) provides: 'Effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion.'

85 Murungi (n 68 above) 3184.

86 As above.

87 Ngwena (n 5 above) 139.

88 G de Beco 'The right to inclusive education according to article 24 of the UN Convention on the Rights of Persons with Disabilities: Background, requirements and (remaining) questions' (2014) 32 *Netherlands Quarterly of Human Rights* 263 282.

conceives of individualised support to enable learners to receive effective education and to maximise their academic and social development.⁸⁹ This individualised support to be rendered to learners means that the CRPD requires states to accommodate the difference within the general education system. A holistic reading of article 24 is more in line with the idea of full inclusion than the idea of offering a 'choice' to children between mainstream and special schools. Article 24(1), for example, supports inclusive education as 'the principle', with special education as 'the exception'.⁹⁰

A special status is accorded to children who are deaf, but who are exempted from the principle of mainstream schooling and may be educated in special schools. This option, however, may 'not prevent them from requesting to participate in the general education system'.⁹¹ Generally speaking, there is a compromise in article 24, that children with disabilities should generally be educated in the regular education system. However, deaf children may be taught in 'environments which maximise academic and social development', in other words, where a special school will maximise such development. This does not mean that they cannot be taught in mainstream schools where it will maximise their development.

The African Charter on the Rights and Welfare of the Child (African Children's Charter) does not explicitly refer to sign language, but recognises the special measures needed to meet the physical and moral needs of children with disabilities 'under conditions which ensure their dignity, and promote self-reliance and active participation in the community'.⁹² Non-discrimination on the basis of a child's disability is guaranteed.⁹³ Assistance is to be provided to the child to have 'effective' access to training, preparation for employment, and so on, to allow social integration, individual development and cultural and moral development at the 'fullest possible' level.⁹⁴ Whilst the education of children with disabilities is not clearly identified, it is implicit in the requirement that states take special measures for 'disadvantaged children, to ensure equal access to education for all sections of community'.⁹⁵

The recognition of sign language and the deaf culture, especially in educational settings, is therefore an imperative under international law.

89 C Ngwena 'Human right to inclusive education: Exploring a double discourse of inclusive education using South Africa as a case study' (2013) 31 *Netherlands Quarterly of Human Rights* 473 479.

90 De Beco (n 88 above) 274.

91 De Beco (n 88 above) 286.

92 Art 13(1) of the African Children's Charter.

93 Art 2(1) of the African Children's Charter.

94 Art 13(2) of the African Children's Charter.

95 Art 11(3)(e) of the African Children's Charter.

2.2.3 Legislative and policy framework

In the mid and late 1990s, a profusion of legislative drafting ensued, providing for equal rights, especially after the Integrated National Disability Strategy White Paper⁹⁶ was adopted in 1997, which considered the ‘blueprint’⁹⁷ for inclusion and integration of disability in both policy and legislation. The policy recommended that the Department of Education, in consultation with the Department of Arts and Culture, DeafSA and other stakeholders, facilitate a process for the development of a comprehensive education policy to ‘promote and protect equal education opportunities for children with communication disabilities and to protect their language medium’.⁹⁸

In the education setting, the legislative framework consists primarily of the South African Schools Act of 1996 (SASA) and the National Education Policy Act 27 of 1996 (Policy Act), whilst the policy framework includes the Language in Education Policy, the Norms and Standards regarding Languages and the White Paper 6 on Special Needs Education (White Paper 6).⁹⁹ SASA particularly refers to SASL in the provision relating to language policy in government schools and explicitly acknowledges that ‘a recognised sign language has the status of an official

96 Integrated National Disability Strategy White Paper (1997) http://www.gov.za/sites/www.gov.za/files/disability_2.pdf (accessed 1 December 2015).

97 S Mitra ‘The recent decline in the employment of persons with disabilities in South Africa, 1998-2006’ (2008) Discussion Paper 2008 12 July 2008, Fordham University Department of Economics Discussion Paper Series 3.

98 Regulation 9(b) of the INDS (n 96 above) 68.

99 Department of Education *White Paper No 6: Special Needs Education* (2001) 49. The Department of Social Development’s *White Paper on the Rights of Persons with Disabilities* (2016) emphasises the importance of sign language in a number of instances, including for purposes of changing attitudes and behaviour: ‘disability rights awareness training programmes must be integrated into the curricula of all education and training programmes. This must include training in all forms of alternate communication. For example the teaching of South African Sign Language and the availability of Braille at schools, post school education and training institutions and at work places’ (51); access to information and communication: ‘Promote South African Sign Language (SASL) and train SASL Interpreters. A costed plan must be developed for promoting SASL through a number of interventions. The strategy and plan must include the training of SASL interpreters. Adequate budget must be provided for implementation of the plan’ (56); and life-long education and training, which requires implementation of specific programmes, including ‘facilitating the learning of South African Sign Language and the promotion of the linguistic identity of the Deaf community; ensuring that the education of persons, and in particular children, who are blind, deaf, hearing impaired, non-speaking autistic or deaf-blind is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development; employing teachers, including teachers with disabilities, who are qualified in South African Sign Language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities (84)’. Cf Department of Social Development’s *White Paper on the Rights of Persons with Disabilities: Implementation Matrix 2015-2030* (2015) 1.1.2; 1.1.3; and 1.4.4 identifying implementation measures and stakeholders, as well as timeframes for implementing the policy directives.

language for purposes of learning at a public school'.¹⁰⁰ SASA supports the notion of inclusion as integration,¹⁰¹ insofar as it stipulates that education for learners with disabilities should be provided in ordinary public schools, with the necessary support provided to these learners in such mainstream schools.¹⁰² The concept of integration is synonymous with 'location', in other words, geographically separate schools (mainstream versus special schools) are eschewed in favour of all learners, including those with disabilities, placed in mainstream schools.¹⁰³

The Policy Act guarantees the right to be instructed in the language of choice.¹⁰⁴ A policy for language in education under the Policy Act¹⁰⁵ has been developed: the short Language in Education Policy of 1997 within one year of the promulgation of the enabling legislation. The Policy Act includes in its aims three imperatives: supporting teaching and learning of SASL, as well as alternative and augmentative communication; countering the disadvantages arising from disparities between home language and languages of learning and teaching; and developing programmes to redress the historical injustices visited upon 'previously disadvantaged languages'.¹⁰⁶ However, the policy stipulates that languages of learning and teaching in public schools must be an official language. Fortunately, the recognition by SASA of SASL as an official language means that it is not excluded from languages of learning and teaching. The norms and standards regarding language policy, required by section 6(1) of SASA, explicitly recognises SASL as an official language for purposes of learning and teaching.¹⁰⁷ Diversity is considered a 'valuable asset' and, accordingly, the language goals in school education are considered to include (i) the protection, promotion, fulfilment and extension of the individual's language rights and means of communication in education; (ii) the facilitation of national and international communication through promotion of bi- or multilingualism through cost-efficient and effective mechanisms; and (iii) redressing the neglect of historically disadvantaged languages in school education.

The first goal embraces individual choice as a key component. The norms and standards set out the protection of an individual's right to language in schools, and the concomitant rights and duties of the school

100 Sec 6(4) of SASA.

101 Murungi (n 68 above) 3172.

102 Sec 12(4) of SASA.

103 Murungi (n 68 above) 3170.

104 Sec 4(a)(v) of the Policy Act. Cf sec 4(1) of the KwaZulu-Natal School Education Act 3 of 1996 which provides that every learner has the right to be educated in the language of his or her choice and that the education be provided in accordance with the child's aptitude, ability, needs and interests.

105 Sec 3(4)(m) of the Policy Act.

106 Items 5(5), (6) and (7) of the Language in Education Policy.

107 Item 3(4) of the National Norms and Standards regarding language policy defines language as all official languages recognised in the Constitution, and also South African sign language, as well as alternative and augmentative communication.

and provincial education departments. A learner has a choice of language of learning when being admitted to a school, and may request the provincial department to provide instruction in a chosen language where it is not offered within the district.¹⁰⁸ In reality, the choice is not as simple. A deaf learner rarely enrolls in a mainstream school with the expectation of being taught in SASL. Rather, the choice is much simpler. A deaf learner either enrolls in a special school for the deaf, where a sign language is used as language of teaching and learning, but not examined as a language subject and not standardised; or could enrol in a mainstream school where only official spoken languages would be the language of teaching and learning and recognised as language subjects. The third goal set out by the norms and standards emphasises redress for historically-disadvantaged languages, similar to the refrain in the policy, and may be interpreted to include SASL.

The obvious gap in the norms and standards is that the so called individual right of language choice is facially neutral, which disregards the particular need for the development and use of SASL as a language of teaching and learning. Therefore, the acquisition of SASL as a home language or mother tongue and as the language of learning and teaching was only offered in special schools for the deaf, without official recognition of SASL in the curricula of the Department of Education. Also, the need to redress the historical discrimination against SASL, in that spoken languages were preferred over sign languages, is not evident in the policies. The norms and standards inadequately deal with the development and use of SASL in schools. Simbo has called on the Minister of Education to regulate the use of languages in two ways: by ensuring that learners can communicate effectively with their teachers; and by the acquisition of basic learning needs.¹⁰⁹ Both these aims are vital for deaf learners. Simbo further suggests that this regulation of the use of languages should acknowledge the relationship between language and culture so that mother tongue usage may be promoted, including sign language, and, similarly, that the culture of the child be supported.¹¹⁰ As such, this would require the recognition of SASL as both a linguistic and cultural right of learners with hearing impairments.

White Paper 6 recommended that the Department of Education should ensure that all curriculum development, assessment and instructional development programmes address barriers to learning arising from language and the medium of learning and instruction. However, this goal is subject to the phased implementation plan of the White Paper, which made the conversion of special schools to full service schools

108 Items 4(2) to (4) of the Norms and Standards regarding language policy.

109 C Simbo 'The right to basic education, the South African Constitution and the *Juma Masjid* case: An unqualified human right and a minimum core standard' (2013) 17 *Law, Democracy and Development* 477 498.

110 Simbo (n 109 above) 498.

conditional on the need and availability of resources.¹¹¹ The view of the White Papers of inclusive education as progressively realisable is at odds with the Constitution and international law requirements.¹¹²

There is, therefore, a divergence between the policy position for basic education in South Africa, considered immediately realisable,¹¹³ whereas inclusive education is considered progressively realisable. Priorities in the promotion of languages in schools have followed this distinction, with the need to provide education in official languages as an immediate goal, whilst education in SASL and the development of the language were relegated to a progressive goal.

2.3 Denial of recognition of South African sign language

SASL is still not being used as a language of instruction in all schools. Even though sign language is the official means of instruction for educating deaf learners, very few learners and teachers are using it.¹¹⁴ Not utilising SASL as a medium of instruction or school language subject has also had repercussions for the qualifications of teachers at schools for the deaf. Until 1997, for example, there had been no formal training of sign language interpreters and the sign language skills of children of deaf adults were relied on for interpretation.¹¹⁵ As explained earlier, manual coding of sign language was initially used by teachers at schools for the deaf. However, the preference has changed towards a bilingual, bicultural approach, where both sign language and one spoken language are utilised to allow children to function in both the deaf and the hearing world.¹¹⁶

Storbeck et al highlight two important challenges facing the acquisition of SASL and the training of teachers. First, teachers enter the educational setting without the ability to sign and learn on the job as a result. Second, short-term training is not a substitute for exposure to the academic level of SASL required to deliver curriculum to deaf learners. The curriculum is, therefore, delivered based on a basic social competency in SASL.¹¹⁷ Merely having SASL recognised as a language subject in schools for the deaf is not enough. The advantages of having SASL recognised in schools are that teachers are properly qualified in SASL and that appropriate support services are provided in mainstream schools

111 White Paper 6 (n 99 above) 22-23.

112 Murungi (n 68 above) 3181.

113 J van der Vyver 'Constitutional protection of the right to education' (2012) 27 *South African Public Law* 331.

114 P Akach & R Morgan 'Sign language interpreting in South Africa' in M Erasmus (ed) *Liaison interpreting in the community* (1999) 67; MN Ganiso 'Sign language in South Africa: Language planning and policy challenges' unpublished MA thesis, Rhodes University, 2012 32.

115 Ganiso (n 114 above) 27.

116 Ganiso (n 114 above) 31.

117 Storbeck et al (n 13 above) 142.

where inclusive education is provided. The latter will require research into what exactly inclusion should entail for deaf learners in the South African context, together with the necessary support services to achieve this.¹¹⁸ The World Federation for the Deaf provides some insight into the way in which this should be accomplished, recommending that deaf learners in mainstream schools have access to the services of educated, trained and qualified sign language interpreters, other needed support services, deaf peers and role models, and full participation in both the educative and co-curricular processes.¹¹⁹

In reality, deaf learners have three options of study after completing Grade 9 (the General Education and Training phase). Glaser and van Pletzen explain these choices, namely, to leave formal education; to complete Grades 10 to 12 at mainstream schools in order to obtain a National Senior Certificate, possibly allowing entrance into tertiary education; or study at a further education and training (FET) college towards a National Certificate Vocational.¹²⁰ Unfortunately, while deaf users of SASL theoretically have the same options, very few schools for deaf students offer Grades 10 to 12. Thus, in practice, deaf students have the choice of studying for Grades 10 to 12 at hearing schools, changing to FET colleges, or attending special programmes for deaf people, where these exist. Kyle unwittingly chose to be schooled in mainstream schools, where SASL was not recognised.

Magongwa argues that the exclusion of sign language in education impinges on the language rights of hearing-impaired and deaf students:

The issue of sign language as used by Deaf and hard-of-hearing students is a human right and not one to be considered within welfare or health. The issue correctly belongs within the realm of human rights, language, and communication. It is the human right of Deaf and hard-of-hearing students to use the language to which they have the most access. Deaf people cannot hear but see sign language ... It is a violation of their human rights not to be allowed to have access to information through their most accessible language. Deafness becomes a communication disorder when sign language is not recognised.¹²¹

118 Storbeck et al (n 13 above) 143.

119 World Federation of the Deaf Education rights for deaf children (2007) http://www.wfdeaf.org/wp-content/uploads/2011/03/EducationRightsforDeafChildren_July-2007.pdf (accessed 1 December 2015).

120 M Glaser & E van Pletzen 'Inclusive education for deaf students: Literacy practices and South African sign language' (2012) 30 *Southern African Linguistics and Applied Language Studies* 25-28.

121 L Magongwa 'Deaf teachers' experiences of being students at the University of the Witwatersrand' unpublished Master's degree dissertation, University of the Witwatersrand, 2008 <http://wiredspace.wits.ac.za/bitstream/handle/10539/5926/Lucas%20Magongwa%20dissertation%20208910575A.pdf?sequence=1> (accessed 23 September 2015).

Not recognising SASL as a linguistic and cultural right *per se* has meant that other rights are denied, for example, the rights to a fair trial, political representation, access to information, freedom of expression and maintenance of cultural heritage.¹²² The non-recognition of SASL is thus perceived as a rights issue, not a medicalised issue. The litigation in *Springate*, as cases from other jurisdictions, brought to the fore the divide between the medical and social (or human rights) models of disability. Magongwa stressed that the nonsensical situation where students are taught in SASL at schools for the deaf, but may not officially study SASL as a language subject in schools, profoundly affected deaf persons on an educational, psychological and emotional level.¹²³

DPOs, such as DeafSA, certainly followed the rights approach in lobbying for the recognition of SASL, and this agency has been a catalyst for litigation as a strategy, not merely lobbying and protesting, based on the reframing of disability as an identity:

When the identity associated with the notion of disability is prescribed in this way, the expansion of rights (as opposed to charity or health or welfare policy) becomes the most appropriate way of combating disability discrimination and, by extension, litigation becomes one of the most appropriate forms of enforcement.¹²⁴

The reframing of disability based on the social model may be one of the reasons why DeafSA became a litigant in the *Springate* matter. Strategy choices are informed by the models of education preferred by particular interest groups. Snodden explains how the refuted separate underlying proficiency (SUP) model is still being utilised in deaf education.¹²⁵ This model translated into 'forbidding the use of ... native signed languages of the Deaf community in the education system, owing to conceptions that learning of a signed language will interfere with the development of spoken and written language skills'.¹²⁶ Since deaf children lack access to the same auditory base for the acquisition of spoken language as hearing children, depriving them of signed language can result in delayed or incomplete first language acquisition.¹²⁷ This lends further credence to the argument that forbidding the use of sign language, or the insufficient protection and development thereof, may constitute linguistic genocide, as discussed earlier.

122 T Skutnabb-Kangas & R Phillipson (eds) *Linguistic human rights: Overcoming linguistic discrimination* (1995) 32.

123 L Magongwa 'Deaf education in South Africa' (2010) 155 *American Annals of the Deaf* 493-496.

124 L Vanhala 'Anti-discrimination policy actors and their use of litigation strategies: The influence of identity politics' (2009) 16 *Journal of European Public Policy* 738 746.

125 K Snoddon 'Equity in education: Signed language and the courts' (2009) 10 *Current Issues in Language Planning* 255 256.

126 Snoddon (n 125 above) 256.

127 Snoddon (n 125 above) 256, citing J Morford & R Merry 'A re-examination of "early exposure" and its implications for language acquisition by eye' in C Chamberlain et al (eds) *Language acquisition by eye* (2000) 111.

The bilingual bicultural education model preferred today focuses on the native signed language of a particular country, as well as the language of the majority in the country,¹²⁸ for example Australian sign language (Auslan) and English, respectively. The implementation of these programmes has not been without challenges, including a lack of support for the signed language in the school and systems of teacher education. The inadequate support of bilingual education worldwide¹²⁹ has an adverse effect on the numbers of deaf graduates from tertiary institutions, teachers and professionals, who can *both* provide *and* advocate for bilingual bicultural models of education.¹³⁰ This also applies to South Africa. It is within this policy, legislative, constitutional and international law context that the *Springate* matter arose.

3 Litigation: *Springate v Minister of Education & Others*

3.1 South African sign language as a school subject

For Kyle, exemption from another language course, with SASL substituted as a language course, would have comprised the seven subjects required for entrance to university, where he had hoped to study towards Fine Arts. However, it transpired that the lack of recognition of SASL meant that he would either have to take up a brand new subject in his final school year or matriculate merely with an endorsed certificate as a learner with a barrier to learning (deafness).¹³¹ The latter option would spell the end to his dream of tertiary education. Without prejudicing his rights, Kyle decided to take up Dramatic Arts as the alternative subject, for which he had to complete a three-year portfolio, undergoing extra tuition, to enable him to sit for the examination in this subject. This proved to be an additional burden on Kyle. Supported by his mother, Paige McClennan-Smith, in Part A of the application, Kyle sought a declaration that the failure by the national and provincial departments to allow him to be examined in sign language as a subject for his senior certificate was unconstitutional and unlawful. Kyle sought an order directing the Department to allow him to sit for the examination in sign language.¹³²

128 H Gibson et al 'Deaf bilingual bicultural education' in J Cummins & D Corson (eds) *Encyclopaedia of language and education* (1997) 231, cited in Snoddon (n 125 above) 256.

129 Snoddon (n 125 above) 257.

130 Canadian Hearing Society *Status report on deaf, deafened and hard of hearing Ontario students in post-secondary institutions: Statistics, current trends, barriers and recommendations* (2004) cited in Snoddon (n 125 above) 257 (my emphasis).

131 Letter from the Director-General of Education dated 10 March 2009, annexure P18 to the founding affidavit (copy with the author).

132 Notice of Motion filed on 8 June 2009 Part A paras 2-3 (copy with the author). Kyle submitted that the failure of the department to recognise SASL as such infringed the rights of the learners, particularly in line with the following provisions: sec 6(5)(a)(iii)

In his application, Kyle submitted that the rights of deaf and hearing-impaired learners were infringed by the education policies existing at the time.¹³³ While sign language was a medium of instruction at some schools for the deaf, it was not recognised as a language subject for the purposes of matriculation – the National Senior Certificate. In Part B to the application, Kyle sought an order more in line with public interest and that of deaf, hard-of-hearing and hearing-impaired students to have SASL, or another form of sign language, recognised as an official language for purposes of learning at public schools, and for steps to be taken to implement sign language as a language subject (similar to Afrikaans, IsiZulu, and so on), either as home language, first or second additional language in high schools.¹³⁴

Kyle based his legal argument¹³⁵ in part on the basis of unfair discrimination, relying on provisions of the Equality Act¹³⁶ prohibiting unfair discrimination on the basis of disability or language. He submitted that the Department's actions in not recognising SASL as a language of learning constituted unfair discrimination as benefits, opportunities or advantages¹³⁷ were withheld from him on the basis of his disability and language.¹³⁸

The Department opposed his application on the basis that sign language was not an accredited language subject in the further education and training (FET) phase, but only in the general education and training (GET) phase. The Language Board was also cited as a respondent, being responsible for the promotion and creation of conditions for the development and use of sign language.¹³⁹

The *Springate* court application was supported by DeafSA and the KwaZulu-Natal Blind and Deaf Society (KNBDS) who brought the application in the public interest.¹⁴⁰ DeafSA, founded in 1929, represents the rights of more than 1,6 million deaf persons in South Africa. The KNBDS, established in 1936, provides rehabilitative services, such as

(PanSALBs role in developing SASL); sec 9(3) (right to equality); sec 28 (rights of children); sec 29 (right to basic education); sec 30 (right to language and cultural life of choice); and sec 31 (right of linguistic community to enjoy the use of their language) of the Constitution, as well as sec 6 of SASA (sign language has the status of an official language for purposes of learning at public schools). Furthermore, sec 4(1) of the KwaZulu-Natal School Education Act 3 of 1996 (children's right to be educated in the language of their choice).

133 Sec 4(a)(v) of the Policy Act (right of children with disabilities to be instructed in the language of their choice). In particular, the submissions are contained in para 87 of the founding affidavit averring that the policy is *ultra vires* the relevant empowering legislation (SASA).

134 Notice of Motion filed on 8 June 2009 Part B paras 2-4.

135 Founding Affidavit of P McLennan-Smith paras 61-62 (copy with the author).

136 Secs 6, 9 & 28(3) of the Equality Act.

137 Definition of discrimination in sec 1 of the Equality Act.

138 Founding Affidavit (n 135 above) para 68.4.

139 Sec 6(5)(a)(iii) of the Constitution.

140 Sec 38(d) of the Constitution.

counselling, audiometric assessments, braille literacy and sign language training in the province of KwaZulu-Natal. The KNBDS remarked that its own meetings with the Department to have sign language recognised in schools had not been fruitful and, accordingly, it supported Kyle in his court application.¹⁴¹ More vociferous was the struggle of approximately 13 years, through advocacy and lobbying, by DeafSA to have sign language recognised in South African schools as a language and school subject, also without success.¹⁴² In 2003, DeafSA, together with Disabled People South Africa (DPSA), marched and handed over a memorandum to the national and provincial Departments of Education. The memorandum demanded

That South African Sign Language (SASL) be recognised and implemented as an official language subject in the education of Deaf learners in general education and training (GET) and further education and training (FET);

That SASL be fully implemented as the official [language of learning and teaching] for Deaf learners in all special schools for deaf learners;

That all educators of Deaf learners receive compulsory in-service training in SASL;

That SASL teaching and learning materials be developed.¹⁴³

In the meantime, the KZNBDS (together with other institutions) also advocated for the recognition of SASL. In 2005, a memorandum was handed to the Minister and the MEC for Basic Education, requesting clarity regarding the development of sign language resources, and identifying the need for SASL to be recognised as first language and examinable language subject in schools.¹⁴⁴ The response from the MEC was that it was for the PanSALB, and not the Department, to first develop the language, and that it could not develop resources until the Language Board had achieved this. The Language Board, in turn, blamed the Department:

PanSALB regards this as a function of the Department of Education and as such [PanSALB is not responsible for curriculum development and the development of SASL in schools] ... recommends that you direct your request to the Department of Education: Directorate of Inclusive Education.

141 Jace Nair, CEO of the KNBDS, quoted in IOL News Department opposes sign language at schools 16 July 2009 <http://www.iol.co.za/news/south-africa/departement-opposes-sign-language-at-schools-1.449957#.VFt5sLccTIV>. See also 'Deaf learner gains support for court case' *IOL News* 16 July 2009 <http://www.iol.co.za/news/south-africa/deaf-learner-gains-support-for-court-case-1.449938#.VFt697ccTIV>.

142 DeafSA 'A history and struggle' (2005), annexure D1 to the confirmatory affidavit of Ingrid Parkin on behalf of the third applicant, DeafSA (copy with the author).

143 DeafSA (n 11 above) 19.

144 Supporting affidavit of the fourth applicant, Jayseelan Nair on behalf of KZNBDS, para 12 (copy with the author).

PanSALB does from time to time advise the Department of Education on curriculum issues, but that is how far it can go.¹⁴⁵

In 2006, the provincial Department of Education, at a meeting with KZNBDS, facilitated by the Language Board, undertook to ensure that SASL be introduced at schools for the deaf, but this undertaking did not materialise.¹⁴⁶ In its Education Position Paper in 2006, DeafSA remarked:

The urgency of the situation is that Deaf learners have little access to the regular curriculum for most of the time they spend in school. This is because the majority of educators in schools are not proficient in SASL. A recent survey highlighted that only 14% of educators in schools for the Deaf can sign proficiently. The negative impact on these learners in terms of any access to education is alarming.¹⁴⁷

In 2007, DeafSA handed a memorandum to parliament to recognise SASL as a twelfth official language.¹⁴⁸ It stressed the fact that the use of SASL by a deaf member of parliament to communicate required a standardised and recognised language. Unfortunately, this did not spur the government into action. Instead, the eventual recognition of SASL as a language subject in schools depended on the success of litigation. In court papers, DeafSA asserted the injustice and unfair discrimination because of the fact that the only language that can be the first language for deaf learners is not offered as a school subject in the FET phase, with the result that deaf adults are not integrated into mainstream society, due to disempowering educational experiences.¹⁴⁹ A number of schools for the deaf provided confirmatory affidavits, supporting the litigation by the two DPOs, affirming the challenges faced by both learners and teachers due to the non-recognition and standardisation of SASL.¹⁵⁰

It was asserted by the DPOs that both the Department of Education and the Language Board did not meet their legislative and constitutional mandates to vindicate the language rights of deaf learners. The Department of Education instead asserted that the parties, particularly the DPOs, did not comment on its curriculum development process for the

145 Letter from PanSALB to KZNBDS dated 6 April 2006, annexure to supporting affidavit of fourth applicant, para 16 (copy with the author).

146 Minutes of the meeting of 14 July 2006, annexure to supporting affidavit of fourth applicant, para 22 (copy with the author).

147 DeafSA (n 31 above) 5 (footnotes omitted).

148 DeafSA Memorandum towards the recognition of SASL as a 12th official language (1 February 2007) <http://www.pmg.org.za/docs/2007/070216memorandum.htm> (accessed 23 September 2015).

149 Supporting affidavit of the third applicant, deposed to by I Parkin on behalf of DeafSA, para 56 (copy with the author).

150 St Vincent School, Melrose; Fulton School for the Deaf, Gillits; Sizwile School for the Deaf, Dobsonville; Durban School for the Hearing Impaired, Amanzimtoti; VN Naik School for the Deaf, Newlands; Kwavulindlebe School for the Deaf, Havenside; and Vuleka School for the Deaf, Nkandla.

NSC in 2005, nor did the SAHRC or DeafSA indicate that SASL should have been included as a subject.¹⁵¹ The Department further denied that SASL was necessarily a recognised sign language referred to in the Schools Act, and that it was not an official language as the Constitution did not render it such, but merely required the Language Board to promote and create conditions for the development and use thereof.¹⁵² The Department threw down the gauntlet, stating that '[i]n the absence of a single version of SASL, a standardised SASL and an approved curriculum for SASL', it would be unable to recognise SASL as a subject.¹⁵³ The Department suggested that one of the options available was that a Ministerial Committee be appointed to start the process of curriculum development for SASL, with the help of the Language Board.¹⁵⁴ All applicable policies would have to be followed,¹⁵⁵ and this process could take years.

Since the Department put Kyle in the untenable situation of having to learn and pass a new subject in his final year of school, failing which he would not obtain university entrance, he launched the litigation in June 2009. In August 2009, a settlement was reached between the parties and Kyle withdrew his challenge. Accordingly, Kyle was exempted from the requirement of a seventh subject for his senior certificate and he would, therefore, qualify for an exemption to allow him to study towards a Bachelor's degree at university. As a result, Kyle's bid to have five years of study of sign language recognised was averted. The second part of his application, namely, to have sign language recognised as a language subject in schools, was postponed indefinitely. This was ostensibly used as a sword of Damocles to ensure that the Department remedy the failure to provide sign language as a language subject in schools, failing which the application would be reinstated.

3.2 Silence of the Language Board

The Language Board¹⁵⁶ was not a key player in the litigation, despite being cited as a respondent, nor was it an active participant in the preceding advocacy by DPOs and the lobbying of government departments to have sign language recognised, despite establishing a unit for SASL in 2003.¹⁵⁷ Instead of assisting the court, the Board asserted that its independence

151 Answering affidavit of the first and second respondents deposed to by P Vinjevold, para 33.3 (copy with the author). The deponent was referring to the policy document addendum to the policy document, the NSC: A qualification at level 4 on the National Qualifications Framework (NQF) regarding the National Protocol for recording and reporting grades (Grades R to 12) in *Government Gazette* 29467 of 11 December 2006; and *Government Gazette* 27607 of 24 May 2005 (which had called for public comments).

152 Affidavit of the first and second respondents deposed to by P Vinjevold, para 184.

153 Affidavit of the first and second respondents to the confirmatory affidavit of M Batchelor, deposed to by P Vinjevold, para 9.

154 Answering affidavit by P Vinjevold (n 151 above) paras 68-81.

155 Answering affidavit by P Vinjevold (n 151 above) para 165.

156 n 34 above.

157 DeafSA (n 31 above) 22 (footnotes omitted).

could be compromised should it enter the legal fray.¹⁵⁸ Its constitutional mandate included co-operation and consultation principles: to strive to promote close co-operation with any organ of state, person, body of persons or institution involved in the development and promotion of language, and to consult and work closely with any person with special knowledge or experience in South Africa's language problems, or who is in any way involved in the development and promotion of language.¹⁵⁹ Neither of these principles were heeded. The Department of Education denied being responsible for the development of sign language, submitting instead that this was the mandate of the Language Board.¹⁶⁰ The Language Board chose to comment after the settlement:

While we appreciate the settlement, as PanSALB we find it regrettable that it took a court case of this nature to sensitise the Department about the need to honour the Constitution and cater for the linguistic needs of the deaf community.¹⁶¹

Opposition parties also entered the fray on the political front. Helen Zille of the Democratic Alliance,¹⁶² using the opportunity to comment on the litigation, harshly reprimanded the Language Board for its tardiness in developing SASL.

Kyle and the DPOs were represented by the Legal Resources Centre (LRC). This litigation appears to have been reactive in that, whilst DeafSA had lobbied and advocated for the recognition of SASL, litigation was not part of its planned strategy to secure this objective. Kyle's conundrum, therefore, provided fertile ground to challenge the lack of SASL as a language subject. The litigation, however, was constrained by the urgency of Kyle's own circumstances: He needed clarity regarding his own situation in order to write his final examinations. Strategically, the public interest would have to wait for another day.

3.3 Curriculum development

The consequence of the litigation, although a 'loss' for Kyle and the deaf community, was that the Department of Education was sufficiently

158 Letter from the Language Board to the State-Attorney dated 14 July 2009, annexure to answering affidavit by P Vinjevold (n 151 above) para 154.

159 Secs 9(1) & 9(2) of the Language Board Act.

160 Answering affidavit by P Vinjevold (n 151 above) para 154.1, as well as answering affidavit to the supporting affidavit of I Parkin, para 23 (copy with the author).

161 PanSALB welcomes language settlement *SA News* 20 August 2009 <http://www.sanews.gov.za/south-africa/pansalb-welcomes-language-settlement>.

162 'We must listen to those who cannot hear - Helen Zille' *SA Today* 21 August 2009 <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71616/page71646?oid=140513&sn=Detail&pid=71646>.

pressured into developing a curriculum for sign language as a school subject,¹⁶³ which it started after the failed litigation.¹⁶⁴ The Minister appointed the Curriculum Management Team (CMT), a ministerial committee, to oversee the development and implementation of SASL as a language to be taught in schools. A writing team was subsequently appointed to develop a curriculum assessment policy statement for SASL. Both the CMT and writing team included a representative of DeafSA.¹⁶⁵ A decision was made that SASL would be developed as a home language to essentially support a parallel process for SASL to eventually attain official status in South Africa.¹⁶⁶

Further impetus was provided by a presidential proclamation that sign language be developed and standardised to be one of the 11 official languages of government.¹⁶⁷ Following submissions by DPOs at a community meeting in 2012 that deaf learners still were not being taught in SASL, the President remarked:

From today we can argue it better – whether in Parliament or Cabinet - to say that this must happen. Children with disabilities go to school and are taught by teachers who do not understand the language – you can imagine the difficulty.¹⁶⁸

As of 20 August 2014, deaf and hearing-impaired learners are allowed to choose sign language as a language subject for matriculation in schools.¹⁶⁹ However, the subject is available only at schools for the deaf, and not yet at ‘mainstream’ schools.¹⁷⁰ The DPOs have obtained victory, through continued advocacy and lobbying, and its intervention as a party to what, on the face of it, appeared to be ‘failed’ litigation.

163 The Department of Basic Education in its report explicitly mentioned the *Springate* litigation in its problem statement. Department of Basic Education Report: The development of the South African sign language curriculum for grades R-12 (2013) 2 http://www.deafsa.co.za/documents/SASL%20Report%20to%20Minister%20Aug%202013Final%20_2.pdf.

164 As above.

165 The writing team also included a representative from PanSALB.

166 Department of Basic Education National curriculum statement (NCS) curriculum assessment policy statement South African sign language: Further education and training phase grades 10-12.

167 Proclamation by the President of the Republic of South Africa 10 of 2013 in *Government Gazette* 36392 on the Use of Official Languages Act 12 of 2012 (26 April 2013). The Act commenced on 2 May 2013. See, in particular, sec 4(1)(d) of the Act.

168 Call to give South African sign language official status *SA News* 5 December 2012 http://www.southafrica.info/services/rights/disability-051212.htm#_VYfiTrcw_IU (accessed 23 September 2015).

169 Sign language approved first language *SA News* 20 August 2014 <http://www.sanews.gov.za/south-africa/sign-language-approved-first-language> (accessed 23 September 2015); Sign language included in education curriculum *SABC* 15 November 2013 <http://www.sabc.co.za/news/a/8cf88c8041d64e649eebf1c2eddf908/Sign-language-included-in-education-curriculum> (accessed 23 September 2015).

170 S Smillie & K Child ‘Deaf pupils to be taught in sign language’ *Times Live* 19 August 2014 <http://www.timeslive.co.za/thetimes/2014/08/19/deaf-pupils-to-be-taught-in-sign-language> (accessed 23 September 2015).

3.4 Monitoring, enforcement and advocacy

The monitoring of implementation of international law, constitutional, legislative and policy imperatives is vital to ensure that the promise that sign language is recognised is met. The protection of minorities in education demands adequate monitoring by relevant institutions.¹⁷¹

Key role players in the monitoring of outcomes of litigation, such as in *Springate*, and who are responsible for advocacy on the rights of sign language users include the Language Board (discussed above), and two institutions supporting democracy, the SAHRC and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission), the media,¹⁷² and civil society, such as DPOs. The gains made as a result of the *Springate* intervention have not been on the radar of the SAHRC. The DPOs involved have continued to advocate for the rights of the deaf, but have not marketed the positive aspects of the intervention, namely, that SASL is now a matric subject, through the legal intervention and continued advocacy by the deaf community. Perhaps the reason is because there was no judgment to rely on or precedent created.

The complementary oversight role of the SAHRC and CRL Commission means that, together with parliament, these institutions are watchdogs over government and they support parliament through information and reports, independent of the executive.¹⁷³ The effective utilisation by parliament of reports and recommendations of these institutions 'can greatly strengthen the culture of accountability and transparency'.¹⁷⁴ The Constitution, while acknowledging the need for independent institutions to act as a check on the branches of government to advance democracy and protect human rights, does not explicitly refer to the a disability-specific mandate of any of the Chapter 9 institutions.¹⁷⁵ The SAHRC has a specific mandate to promote and protect the rights of persons with disabilities.¹⁷⁶ In line with its obligations as the national

171 MS Mothatha & EM Lemmer 'The provision of education for minorities in South Africa' (2002) 22 *South African Journal of Education* 106 110.

172 The role of the media in promoting positive human rights norms through their reporting has been explored by N Nyika 'Media coverage as an instrument for language rights activism: The case of *Hoërskool Ermelo*' (2010) 28 *Southern African Linguistic and Applied Language Studies* 89; C de Wet 'The South African Human Rights Commission and human rights violations in education: An analysis of media reports' (2012) 10 *Journal for New Generation Sciences* 15.

173 H Corder et al 'Report on parliamentary oversight and accountability' (1999) para 7.1.2 <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/oversight&account.htm> (accessed 1 February 2016).

174 Institute for Democracy in South Africa 'The relationship between the state institutions supporting constitutional democracy and the national legislature Report to the *Ad Hoc* Committee on the Review of State Institutions Supporting Constitutional Democracy' (2007) 3 <https://pmg.org.za/committee-meeting/7772/> (accessed 15 February 2016).

175 Sec 181 of the Constitution.

176 South African Human Rights Commission Act 40 of 2013.

human rights institution (NHRI) under article 33 of the CRPD, the SAHRC is mandated, under the Constitution and its enabling legislation, to establish a framework to promote, protect and monitor the implementation of the CRPD. McClain-Nhlapo et al¹⁷⁷ noted that, despite sociological and anecdotal evidence of violations of the human rights of persons with disabilities, a dearth of complaints had been reported to the SAHRC, leaving the institution hamstrung to develop 'legislative prescriptions regarding disability rights'. The few complaints investigated to date include that of the non-admission of a learner with physical disabilities to a private school in an Equality Court case,¹⁷⁸ inaccessible airlines; the lack of reasonable accommodation in prisons; and the lack of rehabilitation for a child with a physical disability.¹⁷⁹ The SAHRC has conducted site visits to some special schools with no reports or further investigations emanating from these visits.¹⁸⁰ The SAHRC has reported on disability issues on two occasions, neither of which touched on the issue of sign language and/or education.¹⁸¹ The Commission has to date received no complaints about the usage of sign language, whether in schools or in the public sphere.

Holness and Rule have commented that media sensitisation and advocacy following litigation 'provide[s] spaces for the public, government and persons with disabilities to continue to advance the equality of persons with disabilities on equal basis with others'.¹⁸² Such initiatives should follow court interventions, such as *Springate*, to ensure that the public and government are made aware of not only legal victories, but also of the rights, values and principles at stake.

Aarons and Reynolds have argued that recognition of the deaf community, in particular sign language users, as a linguistic and cultural community would bring them under the protective rubric of the CRL Commission.¹⁸³ This Commission,¹⁸⁴ mandated with promoting respect

177 C McClain-Nhlapo et al 'Disability and human rights: The South African Human Rights Commission' in Watermeyer et al (n 21 above) 99-102.

178 *LH Oortman v St Thomas Aquinas Private School* (EqC) unreported Case 1/2010, Witbank.

179 Discussed in McClain-Nhlapo et al (n 177 above) 103-106.

180 SAHRC (undated) Commissioner Malatji conducts inspections of special needs schools to observe if compliance with the Convention of Rights of Persons with Disabilities <http://www.sahrc.org.za/home/index.php?ipkArticleID=311> (accessed 23 September 2015).

181 SAHRC *Towards a barrier-free society: A report on accessibility and built environments* (2002) http://www.sahrc.org.za/home/21/files/Reports/towards_barrier_free_society.pdf2002.pdf (accessed 23 September 2015); L Swartz 'Disability and equity in South Africa' in SAHRC *SAHRC Equality Report: Commentaries on equality: Race, gender, disability and LGBTI issues* (2012) 33-42 <http://www.sahrc.org.za/home/21/files/Equality%20Report%2020%20Oct%202012%20Final.pdf> (accessed 23 September 2015).

182 W Holness & S Rule 'Barriers to advocacy and litigation in the equality courts for persons with disabilities' (2014) 17 *Potchefstroom Electronic Law Journal* 1907-1925.

183 Aarons & Reynolds in Monaghan et al (n 25 above) 208.

184 Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002; secs 185 and 186 of the Constitution.

for the rights of cultural, religious and linguistic communities,¹⁸⁵ has to date not dealt with complaints regarding discrimination against sign language users. There have been calls for the rationalisation of the various Chapter 9 institutions with overlapping mandates, and the continued role of the CRL Commission, particularly, has been questioned.¹⁸⁶

The advocacy of DPOs, such as DeafSA, continues. In the Western Cape, through a pilot project, sign language has been introduced as a subject from Grade R to Grade 3, as well as from Grade 9,¹⁸⁷ at schools for the deaf. However, DeafSA has intimated that they have not been involved in the process, and that, therefore, there are concerns as to the roll-out of the new curriculum. Other members of the deaf community have cautioned that the Department is not ready for the roll-out because, while the curriculum has been developed, there is still a lack of specialists in SASL, and a lack of qualified deaf teachers and first language SASL users.¹⁸⁸

The role of the Language Board in developing sign language has been woefully inadequate. Financial difficulties may play a role here.¹⁸⁹ However, as in the case of the CRL Commission, it is possible that violations relating to particular cultural and language groups are prioritised over others due to the nature of complaints received (mostly from cultural and language groups with 'official' language or ethnic status) or the dearth of complaints received from deaf or sign language users. This may also be because of the evident lack of co-operation between institutions and overlapping mandates.

The following question is whether SASL should be recognised as the twelfth official language. DeafSA has since 2007 advocated for this inclusion.¹⁹⁰ It has been argued that articles 9 and 21 of the CRPD obligate states to give equal access to communication and information to deaf and hard-of-hearing persons through the recognition of sign language and the availability of appropriate technology, which effectively means

185 Sec 185 of the Constitution.

186 J Mubangizi 'The role of national human rights institutions in the promotion and protection of human rights in Uganda and South Africa: A comparative evaluation' (2006) 27 *Obiter* 463.

187 I Fredericks 'SA sign language added to curriculum' *IOL News* 1 December 2014 http://www.iol.co.za/news/south-africa/western-cape/sa-sign-language-added-to-curriculum-1.1788756#.VYfeUbcw_IU (accessed 23 September 2015).

188 Cara Loening, director of Sign Language Education and Development (SLED), quoted in K Scott 'The state of South African sign language' *Groundup* 26 September 2014 http://groundup.org.za/article/state-south-african-sign-language_2287 (accessed 23 September 2015).

189 PanSALB *Annual Report 2011/2* <http://www.pansalb.org/PanSALB%20Annual%20report%202012.pdf> (accessed 2 February 2016) (indicating a qualified audit, and dissolution of the Board).

190 South African Parliament: Joint Constitutional Review Committee Recognition of South African sign language as official language: Briefing by Deaf Federation of South Africa 16 February 2007 accessed on Parliamentary Monitoring Group <https://pmg.org.za/committee-meeting/7724/> (accessed 23 September 2015).

recognition as an official language.¹⁹¹ However, there has been no further development from parliament in this regard.

Unfortunately, the incident during the memorial for the late President Mandela, when a person with a psycho-social illness made up signs while interpreting, brought to the fore challenges with regard to the accreditation and standardisation of SASL.¹⁹² In time, these fears will be laid to rest as SASL is taught, throughout schools and tertiary institutions, as the language of the deaf and hearing-impaired and its usage is promoted by society at large. The continued monitoring of the linguistic and cultural rights of sign language users will hopefully address the shortcomings in the education system, but this will necessitate dedicated funding and political will. The level of protection of sign language in education may depend on the framing of the right in question as a disability or linguistic minority right, which is discussed next.

4 Legislative and policy choices: Sign language as a disability right or linguistic minority right

By and large, jurisdictions rely on sign language as a linguistic minority right (a human right) or as a disability right as the basis for the extent to which sign language is recognised in legislation and policy.¹⁹³ Snoddon has commented that countries that adopt disability rights legislation (such as the United States of America and Canada) view sign language as an accommodation provided for deaf persons to access public services on an equitable basis. However, such legislation serves the needs of 'autonomous Deaf adults' who already know and use these sign languages, but does not address the needs of 'pre-tertiary Deaf students right to learn or receive an education in signed language'.¹⁹⁴ In other words, couching the right to receive education in sign language as a civil-political right accruing to persons due to their disabilities, as opposed to a linguistic minority issue (a socio-cultural right), determines what entitlements are attainable. For example, in the USA, the classification of students as disabled has prevented them from benefiting from the Bilingual Education Act of 1968, legislation supporting the rights of language minority students.¹⁹⁵

191 SAPA 'Should sign language be an official language in SA?' *Health24* 29 January 2015 <http://www.health24.com/Medical/Hearing-management/Hearing-in-children/Should-sign-language-be-an-official-language-in-SA-20140926> (accessed 23 September 2015).

192 B Molosankwe 'Sign language "fake" blames illness' *IOL News* 12 December 2013 <http://www.iol.co.za/news/south-africa/gauteng/sign-language-fake-blames-illness-1621044> (accessed 23 September 2015).

193 See eg A Mülhke 'The right to language and linguistic development: Deafness from a human rights perspective' (1999) 40 *Virginia Journal of International Law* 705.

194 Snoddon (n 125 above) 256.

195 The USA's IDEA Act, originating in the Education for All Handicapped Children Act of 1975, provides for the accommodation of students with disabilities in schools.

Ball argues that the classification of the users of sign language as disabled offers better protection for the linguistic rights of sign language users than as a linguistic minority.¹⁹⁶ The author argues that this is possible through the employment of the framework of the CRPD to obtain recognition, since the CRPD identifies deafness as a 'distinct culture and identity, expressed throughout the world in numerous sign languages'.¹⁹⁷

The next question is whether the CRPD represents the best framework for ensuring the rights of the deaf to practise their culture and use their language. Batterbury argues that despite its 'disability provenance', the CRPD may be more effective for language justice and promulgation of sign language policies from a minority language perspective than the limited efficacy of minority language imperatives.¹⁹⁸ The author explains that the initiative for greater linguistic access during the negotiations around the CRPD was from a disability perspective,¹⁹⁹ not from a linguistic perspective as required by other international instruments.

Reading together the obligations under the CRPD that states are to facilitate the learning of sign language and the promotion of the linguistic identity of the deaf community; and to ensure that the education of children, in particular those who are deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual in environments maximising academic and social development,²⁰⁰ gives credence to both the linguistic and cultural rights and disability right status of sign language. The former focuses on the linguistic aspect, while the latter focuses on the disability (or impairment) aspect of deaf learners facing barriers to equal education where inappropriate languages are used in schools or school environments which are not conducive to their maximum development.

Murray reviewed research on the outcomes of existing legislation (and legislative efforts) and laments that subsequent outcomes have not fully realised the linguistic goals of the deaf community, noting that 'current legislation has not brought about legally codified sign language rights for deaf children'.²⁰¹ Whilst 31 countries, mainly in Europe, have afforded explicit legal status to sign language, poorer countries, including Benin, Bolivia, Cape Verde, Haiti, Suriname, Laos, Myanmar, Eritrea, Seychelles and Swaziland, have not recognised sign language, have no sign language dictionary, and appear not to accord equal rights to deaf citizens compared

196 AR Ball 'Equal accessibility for sign language under the Convention on the Rights of Persons with Disabilities' (2010) 43 *Case Western Reserve Journal of International Law* 759-798.

197 Ball (n 196 above) 798.

198 Batterbury (n 76 above) 267-268.

199 Batterbury (n 76 above) 263.

200 Arts 24(3)(b) and (c) of the CRPD.

201 J Murray 'Linguistic rights discourse in deaf community activism' (2015) 15 *Sign Language Studies* 379.

to their hearing counterparts.²⁰² Various law and policy reform measures have recognised the rights of sign language users, namely, either by the recognition of the linguistic status of sign language and its users, or the right to use sign language in particular contexts, educational, legal or medical.

A number of constitutions have explicitly recognised the status of a particular country's dominant sign language(s).²⁰³ The inclusion by South Africa of SASL under the mandate of the Language Board in the Constitution, grouping it with other minority languages, squarely identifies sign language users as a minority group. However, this protection has not translated into dedicated measures to advance the development of this language and to protect the linguistic and cultural interests of this segment of society.

A four-pronged education planning in deaf education rather than the ineffective use of disability legislation for language planning and upholding language rights in education has been recommended.²⁰⁴ First, attitude planning breaks down ethnocentric assumptions about the superiority of spoken languages over signed languages of the deaf, and rather refocuses the aims of education as a right and educational resource.²⁰⁵ Second, status planning requires legal and policy recognition of signed languages in education. Third, corpus planning requires developing signed language dictionaries, curricula, technology, and so forth. Fourth, acquisition planning focuses on the support for teachers of sign language, including formal organisations and training programmes for language instructors, particularly to study bilingual bicultural pedagogy.²⁰⁶

How has the South African education system fared in this regard? The attitude planning has not yielded results and will need further efforts from the relevant institutions responsible for monitoring the rights of sign language users. The Department of Education has obviously had to revise its attitude towards the status of sign language in schools, but regarded the provision of sign language to learners as a progressive step, starting with special schools and 'eventually' offering the subject in mainstream schools.

202 M de Keulder 'The legal recognition of sign languages' (2015) 15) *Sign Language Studies* 498.

203 Eg, sec 17 of the Constitution of Finland guarantees the rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability; art 74(2)(g) of the Constitution of Portugal recognises the duty of the state to protect and develop Portuguese sign language, as a cultural expression and instrument of access to education and equality of opportunity. Council of Europe 'The status of sign languages in Europe' (2005) 67 http://www.coe.int/t/e/social_cohesion/soc-sp/5720-0-ID2283-Langue%20signe_GB%20assemble.pdf (accessed 23 September 2015).

204 Snoddon (n 125 above) 268.

205 S Nover 'Politics and language: American sign language and English in deaf education' in C Lucas (ed) *Sociolinguistics in deaf communities* (1995) 109.

206 Cf Murray (n 201 above) 404-405.

This is not consistent with the vision of inclusive education offered in the CRPD. Status planning has its roots in the SASA and Policy Act, but needs to be prioritised at policy level. Corpus planning has commenced, with SASL as a language subject in special schools, but needs further expansion into mainstream schools for truly inclusive education to be realised. The assistance to and training of sign language teachers has a long way to go in realising the right to education and linguistic and cultural rights of the deaf community. A lack of training and support for teachers and insufficient post-provisioning has plagued the entire education system, not only special schools for the deaf.²⁰⁷ Education planning should complement and further entrench the protection already provided in the Constitution and legislation and obligations under international law to deaf learners as being entitled to equal rights in education, with reasonable accommodation or support measures where necessary, and as a linguistic minority.

5 Litigation and law reform for the recognition and use of sign language and sign language interpreters in other jurisdictions

Some lessons may be learnt from litigation in other jurisdictions. The availability of sign language interpreters to ensure equal participation in life, including in accessing education, has been the subject of litigation.²⁰⁸ Predominantly, however, litigation in health care settings has mushroomed and ensured that the deaf receive sign language interpretation and auxiliary services in accessing health care, including information about health care.²⁰⁹ This section outlines cases and law reform in select countries, namely, Australia, Canada, Columbia, Kenya,

207 Equal Education 'Taking equal education into the classroom: The challenges to teaching and learning, and possible campaigns to address the crisis of quality and equality in the pedagogic encounter' (2015) 102. *Linkside & Others v Minister of Basic Education & Others* Case 3844/2013 [2015] ZAECGHC 36 (26 January 2015).

208 *Julio David Perez v Mayors Office of Monteria* Decision of T-051/11 File T-2650185 (date of decision: 4 February 2011) Constitutional Court of Colombia <http://www.corteconstitucional.gov.co/relatoria/2011/t-051-11.htm> (accessed 23 September 2015). The Chilean Constitutional Court granted Constitutional Protection Claim *Molina contra Canales de Televisión* Appeals Court of Santiago, 2001, Rol No5527-2 -1/ Clínica de Acciones de Interés Público y Derechos Humanos – Programe Jurídico sobre Discapacidad – Facultad de Derecho, Universidad Diego Portales. The Appeals Court of Santiago ensured that access to information for the deaf in news programmes was placed on the public agenda. As a consequence of the litigation, an agreement was entered into between the deaf community of Chile, the National Television Council, the National Television Association and other political actors that sign language interpretation would be provided in at least one television news programme every day. Cf MS Cisternas Reyes 'Standard rules on equality of opportunities for persons with disabilities: Legal view of provisions on support services, auxiliary resources and training/View from Latin America' in MH Rioux et al (eds) *Critical perspectives on human rights and disability law* (2011) 419 446.

209 Eg, private hospitals and medical facilities in the USA.

New Zealand, the United States of America (USA) and the United Kingdom (UK).

5.1 Australia

Komesaroff has written extensively about discrimination claims brought by parents of child users of Auslan to vindicate their right to use sign language in schools.²¹⁰ She reviewed 11 discrimination cases before the Human Rights and Equal Opportunities Commission that were conciliated in Australia, and explains that such settlements mean that there is no admission of liability, the setting of legal precedent is avoided, and the requirement of confidentiality is more often than not imposed.²¹¹ The net effect is to provide solutions for particular individual claimants, but systemic discrimination is not addressed.

In *Clarke v Catholic Education Office & Another*,²¹² the Federal Court upheld the decision of the court *a quo*, finding that the school had discriminated against a prospective profoundly deaf student on the ground of his disability, by failing to provide Auslan interpreting assistance to support the student in the classroom, and awarded substantial compensation. The expert witness in that case, Komesaroff, stressed the inappropriateness of placing a child user of Auslan

in an educational environment that provides no access to that language. Furthermore, it is highly unreasonable to expect a deaf student to use note taking as his primary method of communication, and it is a monumental failure of the school system not to provide adequate access for a student who is culturally and linguistically deaf.²¹³

The provision of sign language to the Clarke child, and to Tiahna Hurst in the next case under discussion, occurred in mainstream schools, and was more akin to the reasonable accommodation measures understood before the CRPD finally entrenched support measures to ensure inclusive education on the international law front. Both cases are, therefore, not concerned with recognising sign language as a language subject, but rather with the provision of interpreters in sign language to facilitate children's learning. In this way, it is perceived as a disability right, and not a linguistic right *per se*.

210 LR Komesaroff 'Denying claims of discrimination in the Federal Court of Australia: Arguments against the use of native sign language in education' (2007) 7 *Sign Language Studies* 360.

211 LR Komesaroff 'Allegations of unlawful discrimination in education: Parents taking their fight for Auslan to the courts' (2004) 9 *Journal of Deaf Studies and Deaf Education* 210.

212 [2003] FCA 1085.

213 Komesaroff (n 211 above) 215.

In *Hurst v State of Queensland*,²¹⁴ two families of deaf children challenged the use by teachers of signed English and the absence of Auslan in the classroom. The case, heard in the Federal Court of Australia in 2005, was determined in favour of one family (Devlin) and against the other family (Hurst). However, in July 2006 the judgment against Hurst was overturned in the Appeals Court. The discrimination claim of Tiahna Hurst was based on the fact 'that she ought to have been taught in Auslan because that was not merely the best, but the only appropriate, method of communication with profoundly deaf children'. However, the court *a quo*, *per* Justice Landers, decided against Tiahna as she was fluent in Auslan, her first language. Evinced the oralist tradition, the court held:

There is no evidence, or no evidence which I am prepared to accept, to support a finding that Tiahna cannot be educated in English, including Signed English ... On Tiahna's own evidence, she has not established that she has fallen behind her hearing peers. It might be that she has not fallen behind her hearing peers because of the attention which she receives from her mother and the instruction which she no doubt receives from her mother in Auslan.²¹⁵

Tiahna's case, however, was that her ability to cope in the classroom did not translate into reaching her full educational potential, and she remained disadvantaged without it:

It only meant that her detriment was masked. Lack of Auslan assistance was an educational disadvantage to Tiahna because it denied her the opportunity to realise her full potential. In the case of a less able student, it might cause the student to fail rather than pass. In Tiahna's case, it caused her to perform at an average level rather than excel. In both cases, there is serious disadvantage. Neither student performs to the best of his or her ability.²¹⁶

On appeal, reliance on the ICCPR and CRC, *inter alia*, may have carried the day, particularly insofar as the independence of children was stressed. These submissions provided a broad interpretation of the Disability Discrimination Act²¹⁷ and the responsibility of Australian states to provide deaf students with equitable and optimal educational opportunities.²¹⁸ As discussed below, this may be contrasted with the USA decision in *Rowley*. However, the Federal Court watered down the precedent-setting nature of the decision:

It should be stressed that Tiahna's case is not a test case. The judgment of this court does not establish that educational authorities must make provision for Auslan teaching or interpreting for any deaf child who desires it. It does not

214 [2005] FCA 405.

215 *Hurst* (n 214 above) para 38.

216 *Hurst* (n 214 above) para 56.

217 Sec 6(c) of the Discrimination Act 1992.

218 *Hurst* (n 214 above) paras 78-81. Cf J Cumming *Valuing students with impairment: International comparisons of practice in educational accountability* (2012) 68.

establish that Auslan is better than signed English as a method of teaching deaf children. It does not determine that an educational authority necessarily acts unreasonably if it declines to provide Auslan assistance.²¹⁹

Recently, there have been advocacy efforts to bring about legislation recognising the legal right of deaf persons to use Auslan as a primary or preferred language.²²⁰ The Committee on the Rights of Persons with Disabilities dismissed a complaint lodged by a deaf person wishing to challenge his probable exclusion from jury duty due to the legal position that potential jurors requiring Auslan interpreting are exempted from jury duty for a lack of victim status being proven.²²¹ Should the admissibility hurdle be overcome in a case such as this, the arguments about exclusion from jury duty due to the need for support and Auslan interpretation, with concomitant violations of the right to exercise legal capacity and political rights may at a civil-political level raise the bar for the recognition of participation rights of sign language users on a global scale.

In summary, measures for reasonable accommodation in schools are based on an individual learner's requirements that can be fulfilled immediately. However, inclusive education is a process that will take longer to overcome the archaic attitudes evident in the *Hurst* case. In that case, the judgment, although a victory for Tiahna, does not recognise her rights to be taught in her language, Auslan, on an equal basis with her hearing peers, since she belongs to a linguistic and cultural minority. The *obiter* sentiments expressed by the judge is not in line with the requirement in the CRPD that the maximum development of the child is to be achieved. Hopefully, deaf learners will in future be able to frame their complaints against schools not providing sign language assistance in class, or as a language subject, as not meeting the inclusive education demands of the CRPD, and not only as 'reasonable accommodation' measures.

5.2 Canada

The Canadian decision in *Eldridge v British Columbia (Attorney-General)* was a landmark judgment in connection with the provision of sign language interpreters.²²² In this case, the failure of hospitals to provide sign language interpretation where necessary for effective communication of patients was held to constitute a violation of the rights of deaf persons under the Canadian Charter of Rights and Freedoms.²²³ A declaration of this failure

219 *Hurst v State of Queensland* [2006] FCAFC 100 131.

220 Deaf Australia *Equality, capacity and disability in commonwealth laws* (2014) Issue Paper 44 (IP44) http://www.alrc.gov.au/sites/default/files/subs/37._org_deaf_australia_jan_2014.doc (accessed 23 September 2015).

221 *AM v Australia* Committee on the Rights of Persons with Disabilities Decision CRPD/C/13/D/12/2013 Decision adopted by the Committee at its 13th session (25 March–17 April 2015).

222 [1997] 3 SCR 624.

223 Sec 15(1) of the Canadian Charter.

as unconstitutional was ordered, with a direction that the government administer the relevant legislation in a manner consistent with the Charter.

The initial enthusiasm following the outcome of the case was watered down by the disappointingly slow and reactive pace at which the order was implemented by provincial governments.²²⁴ A Canadian disability activist commented that follow-up on the case had not been prioritised by DPOs, and a cumbersome letter-writing campaign was utilised to enforce the order. Instead, a test case in a province to challenge the lack of an implementation plan in line with the *Eldridge* decision may have resulted in quicker, though more costly, action.²²⁵ However, this decision remained a unanimous victory.

5.3 Columbia

In *Julio David Perez v Mayors Office of Montería*,²²⁶ the Constitutional Court of Columbia held that the right to education of a hearing-impaired college student had been violated by the denial of a sign interpreter being available in college due to a rule that only where there are more than ten hearing-impaired students in class would an interpreter be provided. Mr Perez was hearing-impaired and had completed the first semester at the Primary School Teachers College in Montería, but was unable to continue further than the first year of study because paragraph 3, article 9 of Decree 366/2009 established that the presence of a minimum of 10 students with hearing disabilities was necessary to require sign language interpreters in educational institutions.

Citing article 23 of the CRC, General Comment 5 of the ESCR Committee, the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, the Protocol of San Salvador, as well as articles of the Colombian Constitution and national case law, the Constitutional Court concluded that Perez's right to education had been violated, and granted protection to the fundamental right to inclusive education. Furthermore, the Court found that the provision making the appointment of sign language interpreters conditional on a minimum enrolment of hearing-impaired students was unconstitutional. This requirement, it was held, deepened the marginalisation and exclusion of students with hearing disabilities. The Court further ordered the Montería mayor's office to make the necessary corrections to the budgets, planning, curricula and organisation of its

224 L Vanhala 'Disability equality and opportunity in the Supreme Court of Canada' in L Vanhala (ed) *Making rights a reality? Disability rights activists and legal mobilisation* (2011) 127.

225 Snoddon (n 125 above) 264.

226 *Perez v Mayors Office* (n 208 above). Since the decision is in Spanish, the English summary of the case, provided by the court on its website, has been relied on <https://www.escri-net.org/docs/i/1600443> (accessed 23 September 2015).

educational institutions so as to effectively provide access to the right to education to those with hearing disabilities.

Since this decision, Colombia ratified the CRPD on 10 May 2011. Following a request by the Constitutional Court, the decision was communicated to economic, social and cultural rights organisations and centres and to civil society organisations focusing on disability rights involved in the case. This case led to a review of public policy regarding inclusive education in Colombia, mostly attributable to the finding that the applicable regulations included requirements that, when implemented, had a disproportionate impact on persons with disabilities. Therefore, the Court ordered public authorities to adopt general measures aimed at correcting policies and designing effective mechanisms to ensure inclusive education for students with disabilities. This judgment is commensurate with an understanding of inclusive education, albeit at higher education level, not merely integrating students with hearing impairments into mainstream institutions, but requiring support measures that allow effective communication for learning. The focus on necessary budgetary allocation is in line with the refrain by the UN Human Rights Council that an efficient budget is necessary to fund measures for inclusive education.²²⁷

5.4 Kenya

Kenya has been reported to be on the brink of introducing sign language in schools in line with the goal of inclusive education.²²⁸ However, Mweri has lamented the lack of recognition of Kenyan sign language (KSL) in schools, including the segregation of deaf learners in deaf 'units' within mainstream schools. The Basic Education Act 14 of 2013 promotes special needs education, establishing special institutions, including those for hearing-impaired learners.²²⁹ In particular, Mweri notes that the quality of teachers in institutions for the deaf 'is below par' as they 'lack the linguistic know how to use KSL to impart knowledge to the deaf'.²³⁰

227 UN Human Rights Council Thematic study on the right of persons with disabilities to education *Report of the Office of the United Nations High Commissioner for Human Rights A/HRC/25/29* 18 December 2013 para 49.

228 Jacob Kaimenyi, Cabinet Secretary for Education, cited in F Achanda 'State to introduce sign language in schools' *The Star (Nairobi)* 23 February 2015 <http://allafrica.com/stories/201502231830.html> (accessed 23 September 2015).

229 The Cabinet Secretary is required to ensure that every special school is provided with appropriate trained teachers and infrastructure for learners with disabilities.

230 JG Mweri 'Diversity in education: Kenyan sign language as a medium of instruction in schools for the deaf in Kenya' (2014) 4 *Multilingual Education* 4.

The Kenyan National Commission of Human Rights has reported the challenges faced by deaf learners, including the lack of proficient teachers, the lack of resources in schools and the lack of sign language interpretation when accessing public services and accessing information.²³¹ This is despite the recognition by the Kenyan Constitution of the role of the state in promoting and developing the use of indigenous languages, including KSL.²³² The Constitution emphasises the specific rights accruing to persons with disabilities.²³³ KSL is also recognised as one of the languages of parliament.²³⁴ The Kenyan Persons with Disabilities Act 14 of 2003 is currently being reviewed to bring it in line with the 2010 Constitution and the CRPD, as this Act predated both documents.²³⁵ The 2003 Act is aimed at providing for the rights and rehabilitation of persons with disabilities, to achieve equalisation of opportunities for persons with disabilities, and to establish the National Council for Persons with Disabilities, as well as the National Development Fund for Persons with Disabilities to provide monetary assistance to organisations and persons with disabilities.²³⁶ In a nutshell, legislative and policy provisions for equal education for deaf learners is still lacking in Kenya. There have been calls for the reform of the Basic Education Act of 2013 to bring it in line with the state's obligations under article 24 of the CRPD.²³⁷

5.5 New Zealand

The New Zealand Sign Language Act of 2006 declared New Zealand sign

- 231 Kenyan National Commission on Human Rights 'From norm to practice: A status report on the implementation of the rights of persons with disabilities in Kenya' (2014) <http://www.knchr.org/Portals/0/Reports/Disability%20Report.pdf> (accessed on 23 September 2015). The report finds that, whilst the policy environment of education is theoretically supportive of education for learners with disabilities, it faces bottlenecks in implementation. Eg, the inclusion policy is yet to be implemented and the implementation framework of the National Policy on Special Needs Education Policy of 2009 has not been developed.
- 232 Sec 7(3)(b) of the Kenyan Constitution of 2010. The listing of disability as a ground of discrimination in the Kenyan Constitution of 2010 (sec 27(4)) is welcomed, considering the outcome of the decision in *Duncan Otieno Waga v Attorney-General* [2013] EKLR, where the Kenyan High Court held that it could not find for the applicant since disability was not listed in the non-discrimination clause of the previous Constitution of 1969, as amended in 1997.
- 233 Sec 54 of the Kenyan Constitution *inter alia* guarantees the rights '(b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person; (c) to reasonable access to all places, public transport and information; (d) to use sign language, braille or other appropriate means of communication; and (e) to access materials and devices to overcome constraints arising from the persons disability'.
- 234 Sec 120(1) of the Kenyan Constitution.
- 235 Kenyan Persons with Disabilities Amendment Bill 2014.
- 236 For an overview of the 2006 Act, see K Kindiki 'Legal protection of persons with disabilities' in Kenya in Rioux et al (n 208 above) 309-340. Cf E Kamundia 'Country report: Kenya' (2014) *African Disability Rights Yearbook* 185-205 190.
- 237 Kamundia (n 236 above) 205.

language (NZSL) a third official language, alongside English and Te Reo Māori.²³⁸ The Act was reviewed in 2011 and, following a recommendation by the Human Rights Commission, a working group persuaded the government to establish an advisory board, the New Zealand Sign Language Board, and a fund to promote and maintain NZSL progress priorities for the language, and to support NZSL initiatives for the full participation in society of the deaf community.

The fund would include \$1.5 billion annually over four years. Resource allocation in line with policy and law reform measures was clearly deemed important. Although the Human Rights Commission acknowledged the fact that funding was available to support deaf people and NZSL users to access education through the provision of NZSL interpreters and other resources,²³⁹ this funding was still insufficient. It did not allocate NZSL resources and support to enable the acquisition of NZSL including funding for NZSL interpreters in schools and the capacity of staff to deliver NZSL in early childhood education centres and schools. The lack of an implementation strategy and resourcing has hampered the efficacy of the Act.²⁴⁰ Especially in the education and legal systems, limitations on accessing NZSL have persisted. Even where budgets are allocated for the development of sign language, its implementation will require continued monitoring to ensure that it is meaningful.

5.6 United States of America

The 1982 decision in *Board of Education of Hendrick Hudson Central School District v Rowley*²⁴¹ is an example of the domination of the medical model of deafness in law. Amy Rowley, profoundly deaf since birth, was a first-grade student in New York. Her parents sought the services of a sign language interpreter for Amy in the general education classroom. Although Amy was an excellent lip-reader, it was estimated that she was missing more than half of what was being said in the classroom. Her parents were deaf and believed that she should be receiving instruction in her own language, American sign language (ASL), rather than placing sole reliance on her ability to lip-read. When the school denied this request, her parents filed a complaint under the Individuals with Disabilities Education

238 New Zealand Office of Disability Issues Review of the New Zealand Sign Language Act 3 <http://www.odi.govt.nz/what-we-do/nzsl/2010-review-nzsl-act.html> (accessed 23 September 2015).

239 Eg, the NZ Human Rights Commission noted that the Ministry of Education provides funding through the Ongoing Resourcing Scheme for additional specialists, teacher aides, and/or equipment that a child might need in the classroom to access the curriculum. Office of the Minister for Disability Issues Promotion and maintenance of New Zealand sign language (2014) Cabinet Social Policy Committee <http://www.odi.govt.nz/documents/nzsl/nzsl-board/pdf-word-cabinet-paper-nzsl-board-may-2014.pdf> (accessed 23 September 2015).

240 RL McKee 'Action pending: Four years on from the New Zealand Sign Language Act 2006' (2011) 42 *Victoria University Wellington Law Review* 277-298 296.

241 458 US 176 (1982).

Act (IDEA Act). The matter eventually came before the Supreme Court, and the Court ruled that Amy was not entitled to a sign language interpreter as her excellent grades made an interpreter unnecessary.

The majority decision of the Court was that the failure by a school to provide free appropriate public education, as defined by the Education for All Handicapped Children Act²⁴² (the precursor of the IDEA Act), had to be because the school did not comply with the procedural standards in the Act, rather than as a result of an ineffective or even a poorly-designed individualised education programme. As such, the Court held that a student received free appropriate public education when the state provides 'personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction'.²⁴³ Therefore, 'if the child is being educated in the regular classroom', the individual education programme 'should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade'.²⁴⁴ The Court did not implement the standard of maximising a student's educational outcome, but rather to provide an education 'reasonably calculated' to provide 'some educational benefit' as a baseline of educational services and instruction to allow a student with disabilities to advance from one grade to the next.²⁴⁵ This has meant that the Court focused on attempts by the school at good enough access rather than on the student's actual good outcomes.²⁴⁶

The dissent, instead, indicated that the Act was intended to provide 'equal educational opportunity' for learners with disabilities and, accordingly:

The basic floor of opportunity is instead, as the courts below recognized, intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible. Amy Rowley, without a sign language interpreter, comprehends less than half of what is said in the classroom, less than half of what normal children comprehend. This is hardly an equal opportunity to learn, even if Amy makes passing grades.²⁴⁷

242 Pub L No 94-142, 89 Stat 773 (1975).

243 *Rowley* (n 241 above) 203.

244 *Rowley* (n 241 above) 204.

245 *Rowley* (n 241 above) 198-199. The District Court, on the other hand, had interpreted the Act to provide that each child with a disability should be given an opportunity to achieve their maximum educational potential commensurate with their non-disabled peers.

246 AK Kaufman & E Blewett 'When good enough is no longer good enough: How the high stakes nature of the No Child Left Behind Act supplanted the Rowley definition of a free appropriate public education' (2012) 41 *Journal of Law and Education* 5 6.

247 Justice Blackmun in *Rowley* (n 241 above) 213.

The *Rowley* decision epitomises another lost opportunity to address the lack of awareness and misguided assumptions about disability.²⁴⁸ Snoddon explains that the *Rowley* standard does not recognise students to excel academically with an education in sign language where they have already acquired a language.²⁴⁹ Rather, the approach underscores the idea that deaf learners must first fail before they can obtain access to their sign language, that is, ASL.²⁵⁰ The decision, if taken today, would not meet the maximum development standard in article 24 of the CRPD.

5.7 United Kingdom

British sign language (BSL) was officially recognised in 2003.²⁵¹ The policies currently in place in the UK are based on the assumption that deaf persons require 'assimilation to reduce the adverse effects of their disabilities', which Batterbury argues is contrary to the collective self-identity of the deaf community as a minority linguistic community.²⁵² The deaf community is advocating for full legal recognition of BSL,²⁵³ and a Scottish BSL Bill²⁵⁴ is also on the cards.²⁵⁵ Integration is not enough, as the CRPD demands inclusive education.

Policy and law reform efforts to recognise sign languages of particular deaf communities in specific countries, and inclusive education where deaf students attend 'mainstream' schools, have catapulted the acceptance of sign language and deaf culture into regular education.²⁵⁶ On the litigation front, however, an awareness of the value of sign language education is evident in the Australian and Columbian decisions only. Greater law and

248 TJ Seligmann 'Sliding doors: The Rowley decision, interpretation of special education law and what might have been' (2012) 41 *Journal of Law and Education* 71; JF Mead & MA Paige 'Board of Education of Hendrick Hudson v Rowley: An examination of its precedential impact' (2008) 37 *Journal of Law and Education* 329.

249 Snoddon (n 125 above) 266.

250 L Siegel *The educational and communication needs of deaf and hard of hearing children: A statement of principle regarding fundamental systemic educational changes* (2000); Greenbrae, CA: National Deaf Education Project 25 cited in Snodden (n 125 above) 265.

251 V Krausneker 'On the legal status of sign languages: A commented compilation of resources' (2009) 10 *Current Issues in Language Planning* 351.

252 SCE Batterbury 'Democratising policy theories: Enhancing prospects for language justice for sign language peoples' (2014) 42 *Policy and Politics* 547 559.

253 British Deaf Association Response by the BDA to the Office for Disability Issues: Draft UK initial report on the UNCRPD (2011); BDA *Transforming deaf people's lives: BSL strategy* (2012), both cited in Batterbury (n 251 above) 548.

254 British Sign Language (Scotland) Bill, lodged in the Scottish Parliament on 29 October 2014.

255 M de Meulder 'A barking dog that never bites? The British Sign Language (Scotland) Bill' (2015) 15 *Sign Language Studies* 446.

256 See, eg, the argument by R Rosen 'An unintended consequence of IDEA: American sign language, the deaf community, and deaf culture into mainstream education' (2006) 26 *Disability Studies Quarterly* <http://dsq-sds.org/article/view/685/862> (accessed 23 September 2015). Rosen argues that the integration of deaf students into American society is one of the laudable goals of the USAs Individuals with Disabilities Act. Its objective has been to foster speech and hearing skills and the placement of deaf and hard of hearing students in mainstream schools with hearing students. According to

policy reform efforts in Kenya and the UK will hopefully steer those jurisdictions towards compliance with article 24 of the CRPD, and their obligations, generally, under international and regional law to accord linguistic and cultural minority status and the promotion of inclusive education. However, the examples of New Zealand and Kenya illustrate that law reform efforts require funding priorities aimed at developing sign language to be maintained.

6 Conclusion

A resounding victory for deaf learners has been achieved following the settlement in *Springate* and the consequent curriculum development, in that these learners can start to learn sign language in schools and that they will hopefully not be relegated to unequal educational and employment opportunities compared to their hearing peers. The protection, though fragmented, in the Equality Act, the South African Schools Act, the Constitution and various policies for SASL should be read within the growing acceptance globally that sign language is both a right accruing due to disability accommodations, and due to the linguistic and cultural minority status of deaf users of sign language. The inattention of the constitutionally-mandated body, the Language Board, to these rights of deaf learners, and the blame-shifting by the Department of Education, evident in the way in which the advocacy and litigation have played out, have not been entirely remedied. These organs of state will continue to play a crucial part in the protection and promotion of SASL for deaf children and adults alike, and it is hoped that they will take their cues from the human rights framework in the Constitution, and on the international level, including through the explicit recognition of sign languages in the CRPD. Similarly, the SAHRC and CRL Commission will continue to play a monitoring role and should put the issue of sign language in schools on their agendas.

The majority of the litigation discussed predated the CRPD, and reliance on its framework for entrenching the recognition of sign languages in signatory countries has not yet been tested. In *Springate*, the settlement avoided a legal precedent. Submissions on the obligations on the state under the CRPD, therefore, may have been raised in argument. Despite the lack of consensus as to the best means of achieving the recognition of

Rosen, however, an analysis of historical and educational documents shows that IDEA *unintentionally* created the process for the inclusion of the language, community, and culture of signing deaf and hard of hearing students into the American education system. Whereas the legislation integrates signing deaf and hard of hearing students into the American education system; American Sign Language (ASL) and the American deaf community and culture are also mainstreamed into the system. However, Cripps & Suppalla (n 1 above) 89 indicate that integration of deaf learners in mainstream schools with non-disabled, non-signing peers has resulted in a lack of attention to the signed language, reflecting spoken language biases. These include the declining socialisation opportunities as well as ASL acquisition.

sign language in the various jurisdictions, particularly in the educational setting, a decision which interprets the state's obligations under the CRPD may inform the debate between advocates for sign language as a disability right and those preferring to frame it as a linguistic minority right. It appears that law reform efforts are proliferating around the globe to recognise sign languages, either (rarely) as official languages, or, more often, by promoting its usage within particular settings (such as the medical and legal spheres). For deaf children, whether placed in schools for the deaf or mainstream schools, meaningful access to their vernacular should maximise their educational opportunities. States should, therefore, be cognisant of their policies and legislative choices to avoid the pitfalls of approaches such as that of the USA in *Rowley*. Whether disability-specific legislation and, in particular, unequivocal legislative enactments for sign language will be necessary in the South African context should be carefully planned, bearing in mind the lessons learnt from other jurisdictions.

The next challenge for the deaf community in South Africa is the education of deaf learners in 'mainstream' schools, through the implementation of inclusive education. This will require teachers to be well versed and trained in SASL in order to teach both hearing-impaired students and hearing students in one classroom.²⁵⁷ Human Rights Watch has also recommended that the state 'adequately train all teachers deployed to schools where deaf or hard-of-hearing students are accommodated in South African Sign Language to address the gap in access to quality teaching in South African Sign Language'.²⁵⁸ This recommendation is based on reports of children facing exclusion from education due to the lack of materials in sign language in mainstream and special schools; that limited specialised centres are available for teaching sign language; and because of the dearth of teachers adequately trained in teaching sign language. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) has also stressed the need for educational planning to include the training of 'sufficient numbers of fully-competent and qualified teachers' able to teach in the mother tongue.²⁵⁹ Most recent available statistics reveal a ratio of one interpreter to 99 000 users of sign language in South Africa.²⁶⁰ Statistics for the incidence of teachers of sign language for every learner are not available. Fortunately, the curriculum planning process for SASL flowing from the *Springside* intervention appears to have anticipated this need. However, the

257 Glaser & Van Pletzen (n 120 above) 25.

258 Human Rights Watch *Complicit in education: South Africa's failure to guarantee an inclusive education for children with disabilities* (2015) 47 85.

259 UNESCO *Education in a multilingual world* (2003) 31 <http://unesdoc.unesco.org/images/0012/001297/129728e.pdf> (accessed 23 September 2015).

260 DeafSA 'Policy on the provision and regulation of South African sign language interpreters, Johannesburg' (2011) cited in T Zulu *The socio-economic status, sign language interpreter utilisation and the cost of providing South African sign language interpreter services in the Cape Metropole District health services* MPH thesis in Health Economics, University of Cape Town, 2014 10.

allocation of funding will have to match the staggering demand for qualified teachers and interpreters.

The disparities between budget allocation for special schools as opposed to inclusive education have persisted, despite the policy statements in White Paper 6, and the international law position requiring the adequate allocation of resources.²⁶¹ Ram and Muthukrishna have cautioned that inclusion does not merely involve moving deaf learners from special schools to mainstream schools, which means that, once 'mainstreamed', the students are 'included' and integrated.²⁶² Rather, inclusive education is a continuous process, requiring constant 'pedagogical and organisational transformation within the mainstream to ensure that the system is responsive to learner diversity'. Without challenging the curriculum and organisational arrangements and the failure to overcome barriers to learning and participation as experienced by deaf learners in mainstream schools, it will remain 'exclusionary'. Instead, the authors call for

the ethos of a school ... to affirm the culture and language of Deaf learners. Within the philosophy of inclusive education, the implication is that even schools for the Deaf should stress interventions that uncover and minimise barriers to learning.²⁶³

It has been suggested that the current policy and academic discourses on diversity and inclusion should be strengthened so that both concepts can facilitate the entrenchment of the language and other human rights of the deaf community. What is needed for understanding diversity is a group rights-based foundation, whereas inclusion should be understood as a form of societal inclusion of sign language persons, promoting bilingual sign education in a group setting and ensuring both individual and collective rights.²⁶⁴

The bias towards spoken languages continues: Whether in early childhood development, primary, secondary or tertiary education, it is clear that hearing teachers and lecturers dominate. Komesaroff calls for a systemic change, because

[t]he denial of linguistic and cultural difference, in preference for a disability construction, ignores the situation in which many deaf people find

261 Human Rights Watch (n 257 above) 76. Cf Department of Basic Education Progress report on inclusive education and special schools Portfolio Committee on Basic Education 23 June 2015; D Budlender 'Budgeting for realising the right to basic education for children with disabilities in South Africa' Annexure C in T Fish-Hodgson & S Khumalo *Left in the dark: Failure to provide access to quality education to blind and partially sighted learners in South Africa* (2015) <http://section27.org.za/wp-content/uploads/2015/11/S27-left-in-the-dark-2015-accessible.pdf> (accessed 14 February 2016).

262 A Ram & N Muthukrishna 'Voices of deaf adults' (2001) 19 *Perspectives in Education* 39.

263 Ram & Muthukrishna (n 262 above) 49.

264 Kusters et al (n 46 above) 25.

themselves. Language exists within a social and cultural context and is therefore political and bound up with issues of power. Schools and universities are powerful institutions whose practices can maintain the positions of particular cultural and linguistic groups.²⁶⁵

The positive changes in education of the deaf, therefore, can only be expanded upon if the deaf community continues to ensure that its 'voice' be heard through processes that strategise and implement education policies, as was the case for the decade before and during the litigation in *Springate*, and through concerted planned advocacy, litigation, lobbying and law reform, as evinced in other jurisdictions.²⁶⁶ As the quote at the beginning of the articles hows, offering sign language as a language subject in mainstream or full-service schools is considered to be constrained by the 'reasonable practicable' standard in South Africa. This is not in line with the notion of full inclusive education. Sign language in South Africa should not merely remain within the 'realms of special education', but should be placed 'within the mainstream'.²⁶⁷ The recent White Paper on the Rights of Persons with Disabilities, gazetted in 2016, recognises the linguistic identity of the deaf community and the importance of SASL within that framework.²⁶⁸ Hopefully, the implementation of the policy directives will bear fruit and bring us closer to meeting inclusive education imperatives under international and domestic law.

265 L Komesaroff 'Diversity and justice: Being different in universities and schools' (2000) paper presented at the AARE Sydney 2000 conference, 4-7 December 2000 1-11 10 <http://www.aare.edu.au/data/publications/2000/kom00269.pdf> (accessed 23 September 2015).

266 Storbeck (n 13 above) 133 143.

267 Dyson, cited in Cripps & Supalla (n 1 above).

268 Department of Social Development (n 99 above).