10 Constitutional Framework for the Protection of Language Rights of Linguistic Minorities in Zimbabwe

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1 Introduction

Language rights relate to an individual's, entity's and or state authority's right to choose or prefer the language(s) to use for communication in private or public spheres. This chapter examines the extent to which the 2013 Zimbabwean Constitution protects the language rights of linguistic minorities. The chapter is divided into three sections. Section 2 deals with why language right are important linguistic minorities. Section 3 sets out the normative content of language rights of linguistic minorities in international law. Section 4 analyses the extent to which the Zimbabwean Constitution protects the language rights of linguistic minorities.

2 Why Are Language Rights Important to Linguistic Minorities?

Language rights are particularly important for linguistic minorities for a myriad of reasons. First, the intrinsic value of language affirms the need to protect language rights. Language is a mirror of one's cultural identity,[1] a vehicle of culture,[2] a medium of expression,[3] a means of transfer of knowledge[4] and a source of power, social mobility and opportunities.[5] The constitutional protection of language rights recognises, affirms and accommodates linguistic diversity.

Second, linguistic minorities have historically suffered discrimination based on language where one language was favoured and other minority languages were

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[1] V. Webb and Kembo-Sure (eds.), *African voices* (2000) p. 5 contend that in Africa "people are often identified culturally primarily (and even solely) on the basis of the language they speak".

[2] K. K. Prah, in his 2006 report commissioned by Foundation for Human Rights in South Africa, *Challenges to the Promotion of Indigenous Languages in South Africa* (2006) pp. 3–4, argues that language is a central feature used to transmit, interpret and configure culture.

[3] In *Malawi African Association and Others v. Mauritania* (2000), AHRLR 149 (ACHPR 2000), para. 136, the African Commission on Human and Peoples' Rights established that "[l]anguage is an integral part of the structure of culture; it in fact constitutes its pillar and means of expression par excellence. Its usage enriches the individual and enables him to take an active part in the community and its activities. To deprive a man of such participation amounts to depriving him of his identit".

[4] K. L. Dooley and L. B. Maruska ('Language Rights as Civil Rights: Linguistic Protection in the Post-Colonial Democratic Development of Canada and South Africa', 3 *Journal of Global Change and Governance* (2010) pp. 1–2) argue that: "Language is the means by which knowledge is transferred between individuals, between individuals and the state (and vice versa), and between individuals and subsequent generations through educational practices and various forms of culture left as nationalistic directives for each new generation to carry on the traditional 'mother tongue' of their particular national group."

[5] S. Makoni and B. Trudell, 'Complementary and Conflicting Discourses of Linguistic Diversity: Implications for Language Planning', 22:2 *Per Linguam* (2006) pp. 14–28, at p. 21.

restricted.[6] This led to linguistic assimilation,[7] linguistic loss and discrimination against linguistic minorities.[8] Language right help address this problem by making any linguistic discrimination visible and problematic, and abolishing such discrimination.[9]

Third, most linguistic minorities are numerically inferior, politically non-dominant, poor and socially vulnerable. They require the assistance of the law to protect their language rights in a functioning ethnolinguistic democracy. *S v. Makwanyane and Another* established that democracy demands that the law protects vulnerable minorities who are unable to protect themselves due to their numerical inferiority.[10]

Fourth, the legal protection of language rights contributes towards the preservation of the identity of linguistic minorities. In Africa, identity is linked to language. Webb and Kembo-Sure argue that in Africa, "people are often identified culturally primarily (and even solely) on the basis of the language they speak".[11] Examples include the Tonga, Ndebele and Shona in Zimbabwe. Constitutional recognition of language rights therefore aids the preservation of the identity of linguistic minorities. This is especially significant in view of the contention that the right to identity has been

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[6] It is interesting to note that A. Bamgbose, *Language and the Nation: The Language Question in Sub Saharan Africa* (1991) identifies two approaches to minority language rights. The first is the language-as-a-problem orientation and it favours a single language and attempts to restrict (and sometimes annihilate) the role of minority languages. The second is the language-as-a-resource orientation that sees all languages as useful cultural and identity resources that need to be accommodated to foster strong, representative and sustainable unity. This chapter supports the latter orientation.

[7] S. May ('Uncommon Languages: The Challenges and Possibilities of Minority Language Rights', 21:5 *Journal of Multilingual and Multicultural Development* (2000) pp. 366–369) describes the process of linguistic assimilation as involving a. introduction of majority language that replaces the functions of a minority language, b. linguistic minorities shifting to speak the majority language. This shift has three processes that include i) pressure to speak a majority language in the formal domain, ii) lesser use of minority language and ii) the replacement of a minority language with a majority over two or three generations.

[8] *See* J. Blommaert, 'Language Policy and National Identity', in T. Ricento (ed.), *An Introduction to Language Policy: Theory and Method* (2006) p. 10.

9T. Skutnabb-Kangas ('Linguistic Human Rights, Past and Present', in T. Skutnabb-Kangas and R. Phillipson (eds.), *Linguistic Human Rights: Overcoming Linguistic Discrimination* (1994) pp. 98–99) summarised linguistic human rights as follows: a. Every social group has the right to identify positively with one or more languages and to have such an identification accepted and respected by others. b. Every child has the right to learn fully the language(s) of his/her group. c. Every person has the right to use language(s) of his/her group in any official situation. d. Every person has the right to learn fully at least one of the official languages in the country where s/he is a resident, according to her/his own choice.

[10] *State v. T. Makwanyane and M. Mchunu,* 1995 3 SA 391 (CC), argues that "[t]he very reason for … vesting the power of judicial review of all legislation in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected."

[11] Webb and Kembo-Sure, *supra* note 2, p. 5.

regarded as part of the "peremptory norms of general international law"[12] used to protect minorities.[13]

Fifth, the legal protection of the language rights of linguistic minorities creates a platform for linguistic minorities to communicate effectively with government authorities and access public services like public health, public education, court proceedings, employment, social services, etc.

3 Language Rights of Linguistic Minorities in International Law

International law has a myriad of provisions that protect the language rights of linguistic minorities under the following broad categories:

3.1 *Equality and Non-discrimination*

International law provides that everyone is entitled to equal and effective protection against discrimination on grounds such as language. Paragraph 7 of the United Nations Human Rights Committee (UNHRC) General Comment [18] defines discrimination (on the basis of language) as "[a]ny distinction, exclusion, restriction or preference which is based on any ground such as … language … and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[14]

This essentially means that language preferences either between official languages,[15] or between and an official and a minority language[16] (in areas like administrative services,[17] access to the judiciary,[18] regulation of banking services by

[12] K. Henrard (Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination (2000) p. 12) argues that the Badinter Arbitration Commission, established in 1991 by the European union in the wake of the break up of Yugoslavia (Council of Ministers, EU, Joint Declaration on Yugoslavia, 27 August 1991. Opinion no. 2, 20 November 1991) explicitly recognised that the right to identity of minorities is part of the "peremptory norms of general international law".

[13] P. Thornberry ('The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update, in A. Phillips and A. Rosas (eds.), *Universal Minority Rights* (1995) p. 392) argues that the right to identity is sometimes regarded as constituting the whole of "minority rights."

[14] This definition is in line with Article 1 of the CERD that defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of pubic life". A substantially similar definition is also contained in the International Labor Organisation (ILO) Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation (1958) and Article 1 of the UNESCO Convention Against Discrimination in Education (1966).

[15] *Gunme v. Cameroon* (Communication No. 266/2003) [2009] ACHPR 99 (27 May 2009).

[16] *Diergaardt v. Namibia*.

[17] *Ibid.*

[18] *Bickel and Franz v. Italy* [1998] ECR I-7637.

authorities,[19] public education,[20] and even citizenship acquisition)[21] which unreasonably or arbitrarily disadvantage or exclude individuals would be a form of prohibited discrimination. States are guided by the principle of proportionality in designing their language legislation, policies and practices. Proportionality demands that states be guided by principles of disadvantage, exclusion and reasonableness in their language preferences. This human rights approach focuses on the differences of treatment between individuals, not languages. It is therefore the impacts – such as disadvantages or exclusion – on individuals rather than between languages that are considered in the reasonableness of any language preference in the policies, support or services provided by all levels of state authorities and actions.[22]

The equality principle is formulated in different ways in international human rights instruments such as prohibition of discrimination, equality before the law,[23] equal protection of the law, etc.[24] Prohibition of discrimination on the basis of language is enshrined in Articles 1 and 55 of the United Nations Charter, Article 2 of the Universal Declaration of Human Rights, Articles 2, 24 and 26 of the International Covenant on Civil and Political Rights, Article 2 of the International Covenant on Economic, Social and Cultural Rights, Articles 1 and 7 of the Convention on the Rights of Migrant Workers and Members of their Families and preamble of Convention on the Elimination of All Forms of Racial Discrimination. More specifically, Article 26 of the International Covenant on Civil and Political Rights prohibits the use of language as a basis for discrimination. Article 4(1) of the International Covenant on Civil and Political Rights further proscribes discrimination on the basis of language even in emergency situations. Article 24(1) of the International Covenant on Civil and Political Rights prohibits the state from discriminating against a child on the basis of language whenever the state takes measures to protect minors. Interestingly, Skutnabb Kangas and Dunbar argue that the principle of non-discrimination is so fundamental that it is considered to be *jus cogens*.[25]

Equality sometimes demands that states undertake affirmative action to correct a historic situation of discrimination on the basis of language.[26] Eide defines affirmative

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[19] *Gunme v. Cameroon*.
[20] *Belgian Linguistics Case No.* (1968) 1 EHRR 252.
[21] *Costa Rica Naturalistion Case,* Advisory Opinion OC-4/84, IACHR Series A no 4, IHRL 3442 (IACHR 1984), 19 January 1984.
[22]<http://www.ohchr.org/Documents.Issues.IEMinorities/LanguageRightsLinguisticMinoritiesHandbook.docx>, accessed on 31 January 2021.
[23] *See* Article 3(1) of the African Charter on Human and Peoples Rights and Article 24 of the American Convention on Human Rights.
[24] Equality before the law would refer to the formulation of legal texts while equal protection by the law is rather understood in terms of procedures of implementation and enforcement.
[25] T. Skutnabb Kangas and R. Dunbar, *Indigenous Children's Education as Linguistic Genocide and a Crime Against Humanity? A Global View* (2010) p. 22.
[26] Affirmative action can be traced back to Aristotle's formula that unequal or different things should be treated differently to the extent of the difference. Paragraph 10 of General Comment 18 states that: "The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a

action as "preference, by way of special measures, for certain groups or members of such groups (typically identified by race, ethnic identity or sex) for the purposes of securing adequate advancement of such groups or their individual members in order to ensure equal enjoyment of human rights and fundamental freedoms". [27] Affirmative action measures for linguistic minorities may include measures necessary for the development of minority languages, and where necessary, quotas designed to reach proportional group representation.[28] Affirmative action does not include separate legal status because it is only aimed at rectifying past discrimination.[29] Affirmative action aims at eliminating the enduring effects of past discrimination and reducing the vulnerability of linguistic minorities.[30] It is differential treatment aimed at substantive equality between members of linguistic minorities and the rest of the population.[31] Generally, affirmative action measures should only be allowed on a temporary basis and should be ended once the goal of substantive equality is reached.[32] Affirmative action is ultimately aimed at realising substantive or real equality between linguistic minorities and linguistic majorities.

3.2 *Identity*

Language is a marker of the identity of linguistic minorities as communities.[33]

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certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant."

[27] A. Eide, *Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solutions of Problems Involving Minorities*, UN Doc, E/CN.4/Sub.2/1993/34, 172.

[28] W. Mc Kean (*Equality and Discrimination under International Law* (1985) p. 100) summarises the debate around quotas as follows: "According to one view, reservations and quotas were a fundamental means of promoting equality in law and in fact for persons who have been victims of discrimination but others believed that it would be preferable to make special facilities available to backward groups in order to enable them to meet the general standards of merit."

[29] A. Eide ('Minorities and Indigenous Peoples: Equality and Pluralism', in L. A. Sicilianos (ed.), *Nouvelles Formes de Discrimination – New forms of discrimination* (1995) pp. 229–239) argues that affirmative action may include differential legal systems and concomitant status.

[30] W. Kymlicka, 'Individual and Community Right', in J. Baker, (ed.), *Group Rights* (1994) pp. 17–20.

[31] A. Eide ('Minority Situations: in Search of Peaceful and Constructive Solutions', 66 *Notre Dame Law Review* (1996) pp. 1311–1346, at pp. 1341–1342) argues that "the concept of special assistance or status should, therefore, refer only to measures made for minorities without the provision of corresponding measures for majorities. The only justification for doing so would be to restore equality where, in the past, there had been inequality, or where structural factors make equality difficult to preserve … Where the general conditions of some groups prevent or impair their enjoyment of human rights, the Committee points out that specific action should be taken even if it might amount to preferential treatment. … [A]s long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant."

[32] K. Henrard, 'The Right to Equality and Non-Discrimination and the Protection of Minorities in Africa', in S. Dersso (ed.), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (2010) p. 148.

[33] According to the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities UN Doc E/CN.4/52 Section V (Sub-commission, 1st session 1947), "[p]revention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish … Protection of minorities is the protection of non-dominant groups

International law protects a person's identity in the form of one's own name or surname in a minority language. The centrality of identity is emphasised in Article 1 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

Article 27 of the ICCPR is regarded as the *grundnorm* regarding minority rights.[34] It protects the right to linguistic identity. According to Thornberry "Article 27 is concerned with the right to identity of minorities even if this right is not named".[35] Article 27 of the ICCPR also enshrines the qualified right to non-state interference in the use of minority languages in private and in public. For lingustic minorities, this right would include qualified use of minority languages in names, education,36 public media, courts, communication with public officials and recognition of minority languages as official languages. Suffice to mention that the rights contained in Article 27 of the ICCPR are not absolute but can be limited. In *Lovelace v. Canada*[37] and *Kitok v. Sweden*,[38] the UN Human Rights Committee established that state parties can validly limit rights provided for in Article 27 if the limitation has a reasonable and objective justification[39] and is consistent with other provisions of the ICCPR particularly prohibition of discrimination. The regulation of the right to use a minority language in communication with public authorities is evaluated against the principle of substantive equality.[40] This evaluation uses the proportionality principle to balance between state interests in achieving national unity on one hand and the accommodation of linguistic diversity on the other hand.[41] Some relevant factors, none of which should be given absolute precedence, include: a) the number of language speakers, b) their territorial concentration, c) whether they are citizens, permanent residents or aliens, d) the extent of disadvantage, e) individual preference, f) the desirability of a common national language, g) available human and financial state resources and practicality,[42] h) the state's goal in favouring one

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which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population." *See also The Minority Schools in Albania*, Advisory Opinion 6 of the Permanent Court of International Justice Publication Series A-B No 64 17.

[34] Henrard, *supra* note 32, p. 156.

[35] Thornberry, *supra* note 13, p. 20.

[36] This right includes mother-tongue education, participation in curriculum development and the right to establish private educational institutions. These rights are explored in detail in this chapter.

[37] Communication 24/1977 *Lovelace v. Canada*, UNHR Committee (14 August 1979), UN Doc. CCPR/C/OP/1 at 10 (1984) (Lovelace case).

[38] Communication 197/1985 *Kitok v. Sweden*, UNHR Committee (27 July 1988), UN Doc. Supplement No 40 (A/43/40) at 221–230 (*Kitok case)*.

[39] Paragraph 9.8 of the UNHRC General Comment 23 states that "the Committee has been guided by the ratio decidendi in the Lovelace case … that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole".

[40] It can be argued that a flexible application of the non-discrimination principle could be beneficial to minorities in two ways. The first is that it can be used to identify discrimination of linguistic minorities based on language use patterns. The second is that affirmative action could then be taken to address historic structural discrimination and try to place linguistic minorities on a substantively equal footing with linguistic majorities.

[41] Henrard, *supra* note 32, p. 248.

[42] This requirement should be looked at in terms of political will and budgetary priorities.

language over the other, i) the history of discrimination of language speakers, and j) the extent to which the language has developed in written form.[43] The proportionality principle demands that there be a proportional relation between the goals of a certain language policy and the means used to achieve them.

The right to linguistic identity is also provided for in Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, Articles 2 and 7 of the Convention on the Rights of the Child, Article 10 of the European Human Rights Convention, Article 11 of the Framework Convention for the Protection of National Minorities, Article 10 of the European Charter for Regional or Minority Languages, Article 2 of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and Recommendation 13, Guidance Note of the UN Secretary General on Racial Discrimination and the Protection of Minorities (2013).

It is clear from the above that protecting, respecting and fulfilling language rights of linguistic minorities creates a conducive environment for the maintenance of the identity of linguistic minorities.

3.3 *Use of Language in the Private Sphere*

International law provides for linguistic freedom to use one's language in the private spheres of commercial activity, private access to information,[44] civil society and private organisation,[45] private education,[46] private media, private family,[47] religion, etc. This significantly protects the dignity[48] of linguistic minorities, preserves their languages and facilitates the development of their languages.

3.4 *Use of Language in the Public Sphere*

International law predominantly uses the proportionality principles to determine language use in the public sphere. For example, public education services (from kindergarten to university) must be provided to the appropriate degree in a minority language taking into account the number and concentration of speakers of the language, the level of demand, prior use of language as medium of instruction and

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[43] De Varennes, *Language, Minorities and Human Rights* (1996) pp. 87, 93, 95, 99, 121 and 127.

[44] *Ballantyne v. Canada*, UN Doc. CCPR/C/47/D/359/1989, UN Doc. CCPR/C/47/D/385/1989, Communication No. 359/1989, Communication No. 385/1989, (1993) 1-1 IHRR 145, IHRL 1687 (UNHRC 1993), 31 March 1993, United Nations [UN]; Human Rights Committee [CCPR].

[45] *Ouranio Toxo and Others v. Greece*, App No. 74989/01, ECHR 2005-X, (2007) 45 EHRR 8, IHRL 2806 (ECHR 2005), 20 October 2005, European Court of Human Rights [ECHR].

46 *See* Article 30 of the Convention on the Rights of the Child.

[47] *Raihman v. Latvia*, UN Doc. CCPR/C/100/D/1621/2007, IHRL 3747 (UNHRC 2010), 28 October 2010, United Nations [UN]; Human Rights Committee [CCPR].

[48] *See* Article 1 of the Universal Declaration of Human Rights and Minorities and the United Nations: The UN Working Group on Minorities, Pamphlet No. 2. Human dignity encapsulates those characteristics of a person that distinguishes them from other creatures and inanimate things. It advocates that persons must be treated in a manner befitting of human beings and not in a sub-human manner. Human dignity is one of South Africa's constitutional values and is protected in section 10 of the Constitution. It inhuman for a human being to be discriminated on the basis of language

therefore availability of resources.[49] The same considerations are used when determining the use of minority languages to access health, social, administrative and other public services.[50]

The proportionality principle is also used in determining language use in courts.[51] A person can be charged and tried in a language they understand. Clause 5.3 of the United Nations Human Rights Committee General Comment 23 makes it clear that "Article 14(3)(f) of the CCPR does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings". However, there are times when a language that one understands is different from the language that one speaks. In *Guesdon v. France*,[52] the UNHRC established that the notion of fair trial does not imply that the accused be afforded the possibility to express himself in the language which he normally speaks or speaks with a maximum of ease. If a court is certain that the accused is sufficiently proficient in the court's language, it is not required to find out if he would prefer to use another language. In *Harward v. Norway*[53] the UNHRC held that an essential element of the concept of a fair trial under Article 1 is to have adequate time and facilities to prepare a defence. However, this does not entail that an accused who does not understand the language used in court has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel. An accused person is entitled to the free assistance of an interpreter if he cannot understand or speak the language used in court. The state has the duty to pay for the interpreter in criminal proceedings. The state cannot refuse to provide it even for economic or any other justifications. Qualified minority language rights can therefore be impliedly protected through the general right of language in criminal proceedings.

4 Language Rights of Linguistic Minorities in the Zimbabwean Constitution

There are a number of provisions that provide for the protection of minority language rights in the Zimbabwean Constitution. This section will analyse these legal provisions and assess the extent to which they protect minority languages both in principle and in practice.

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[49] *See* Articles 2(2) and 13 of the International Covenant on Economic, Social and Cultural Rights, Article 26 of the International Covenant on Civil and Political Rights, and Articles 2, 28, 29 and 30 of the Convention on the Rights of the Child.

[50] *Diergaard*t *v. Namibia*. *See also* Articles 2(2), 9, 10, 12 and 15 of the International Covenant on Economic, Social and Cultural Rights; Articles 5(a) and 5(e)(4) of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 26 of the International Covenant on Civil and Political Rights; Articles 24, 25 and 30 of the Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries.

[51] *See* Articles 14 and 26 of the International Covenant on Civil and Political Rights, Article 40 of the Convention on the Rights of the Child, Article 9 of the European Charter for Regional or Minority Languages and Article 10(2) and (3) of the Framework Convention for the Protection of National Minorities.

[52] Communication 219/1986 *Guesdon v. France*, UNHR Committee (23 August 1990), UN Doc. CCPR/C/39/D/219/(1986).

[53] Communication 451/1991 *Harward v. Norway,* UNHR Committee (16 August 1994), UN Doc. CCPR/C/51/D/451/(1991).

4.1 *Founding Provisions*

Founding provisions embody the Constitutional values of a democratic Zimbabwe. Some of the values applicable to the minority language rights discourse are the principles of accommodation of diversity, fundamental human rights[54] and freedom, equality of all human beings, peace, justice, tolerance, fairness and the rule of law.[55] The Zimbabwean Constitutional Court has not yet made any pronouncements on the implications of constitutional values. However, the South African Constitutional Court jurisprudence has established that constitutional values are mutually interdependent and that collectively they form a unified, coherent whole.[56] It has also been established that the constitutional values are used to interpret constitutional provisions in order to preserve the Constitution's normative unity or value coherence.[57] In light of this jurisprudence, this chapter analyses and interprets all constitutional provisions that relate to minority language rights in light of the said constitutional values.

There are three key provisions that relate to minority language rights that are found in the founding provisions of the constitution. These are sections 3(2)(h), 3(2)(i) and 6 of the Constitution, which will now be discussed.

4.1.1 Multilingualism

One of the principles of good governance binding the state is recognition of multilingualism in fostering national unity, peace and stability. Section 3(2)(h) of the Constitution provides for "the fostering of national unity, peace and stability, with due regard to diversity of languages, customary practices and traditions". This section obliges the state to consider diversity of languages in fostering national unity. This is a departure from the nation state approach to nation building that Zimbabwe adopted during independence. The inclusive linguistic diversity constitutional approach accommodates different linguistic diversity in nation building. Minority languages are not sacrificed at the altar of national unity, peace and stability. This is a complete departure from colonial Africa's perception that multilingualism was a problem that threatened national unity, peace and stability. Section 3(2)(h) arguably introduces ethnolinguistic democracy in Zimbabwe

[54] Section 44 of the Constitution places an obligation on the state to respect, protect, promote and fulfill rights enshrined in the Constitution. It provides that: "The State and every person, including juristic persons, and every institution and agency at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter."

[55] *See* the Preamble and sections 3 and 6 of the Constitution.

[56] *See* MEC for Education, *KwaZulu-Natal v. Pillay*, 2008 1 SA 474 (CC), paras. 63–64 and *De Reuck v. Director of Public Prosecutions, Witwatersrand Local Division*, 2004 1 SA 406 (CC), para. 55.

[57] Executive Council of the *Western Cape Legislature v. President of the RSA*, 1995 4 SA 877 (CC), para. 204 and *S v. Mhlungu*, 1995 3 SA 867 (CC), paras. 45 and 105.

4.1.2 Rights of Linguistic Groups

Section 3(2)(i) of the Constitution recognises as one of Zimbabwe's foundations of good governance the "recognition of the rights of … linguistic … groups". Key to the rights of linguistic groups is the issue of language rights of linguistic minorities. For linguistic minorities, this would mean the constitutional recognition of their language rights. The protection of minority language rights under this provision is further strengthened by section 46 of the Constitution which makes it clear that in interpreting fundamental human rights, regard should be had to the value of equality and also international law must be taken into account. Section 46 empowers the courts to read into section 3(2)(i) the international language rights norms discussed above. One of these international language rights norms is the right of members of a linguistic minority group's right to use their language in private and in public as stipulated by Article 27 of the ICCPR. This can potentially protect the use of minority languages in the private domain and to a degree the public domain.

4.2 *Protection and Promotion of Official and Other Languages*

Section 6 of the Zimbabwean Constitution is the main language rights section in the Constitution in that it provides for the protection and promotion of official and non-official languages in Zimbabwe. Like the European Languages Charter, the focus is on the protection and promotion of minority languages and not linguistic minorities *per se.* The following areas are key:

4.2.1 Official Language Status

Section 6(1) of the Zimbabwean Constitution accords official language status to 16 languages, namely: Chewa, Chibarwe, English, Kalanga, Koisan, Nambya, Ndau, Ndebele, Shangani, Shona, sign language, Sotho, Tonga, Tswana, Venda and Xhosa. This reveals a complete shift from the previous language policy that saw only English as the official language. An official language is a language used in the business of government (executive, legislature and judiciary).[58] Each state has the discretion to choose an official language.[59] It would appear from the Zimbabwean context that the state discretion would have to be guided by the principle of multiculturalism and recognition of rights of linguistic groups discussed above.

Even though international law does not clarify whether official language status guarantees use of that language there is a strong implication that an official language should be proportionally used in government business. Official language status should therefore not be symbolic but should guarantee the proportional use of that language in accordance with international law discussed above.

Unlike the South African Constitution, section 6(1) of the Zimbabwean Constitution does not expressly mention anything about the use of the 16 languages in the

[58] UNESCO Report entitled: *The Use of Vernacular Languages in Education* (1953) 46; Malan, *infra* note 64, p. 387.
[59] *Diergaardt* case; *Ballantyne* case, *supra* note 44.

business of government. Neither is there any criteria set for determination of how official languages ought to be used in Zimbabwe. In practice, the current reality is that English language is the one used for government purposes. This limits the functional load of the other 15 official languages thereby making the other 15 official languages minority languages. The lack of use of the 15 official languages in government business also makes the granting of official language status to them merely symbolic. Until such a time the 15 languages are actually used in the public domain, the legal consequences of official language status of the 15 languages will not be fulfilled.

However, if section 6 of the Zimbabwean Constitution is to be interpreted using the values of multiculturalism, inclusive linguistic diversity, equality, human dignity and the section 46(1)(c) obligation to take into account international law and all the treaties and conventions to which Zimbabwe is a party, it would place an obligation on Zimbabwe to use officially recognised languages. This may mean that Zimbabwe would need to promulgate an Act of Parliament to specifically regulate the use of official languages in Zimbabwe. Such an Act would need to specify the criteria to be used to determine which language should be used where. The sliding scale approach may be useful to establish that an official language should be used in areas where the speakers are mainly concentrated.

A worrying observation is that there is no constitutional commitment to promulgate an Act of Parliament to regulate the use of official languages in government business and the accommodation of language rights concerns of majority and minority language speakers. The only constitutional commitment in section 6(2) is the possibility of the promulgation of an Act of Parliament to prescribe other languages as officially recognised and to prescribe languages of record. The Constitution does not give any guidelines on how such choices will be made and leaves the process entirely to the discretion of the state. This may indicate that the official constitutional recognition of the 16 languages was merely meant to be symbolic.

Yet, the protection of minority languages through national laws is very important to address the language problems that a country is facing.[60] According to Turi, "the fundamental goal of all legislation about language is to resolve the linguistic problems which stem from … language conflicts and inequalities by legally establishing and determining the status and use of the concerned languages".[61]

Language legislation should eliminate discrimination based on language, enable minority language speakers to conserve their linguistic characteristics, and allow it to remain in peaceful interaction with the majority. Language legislation must give members of the minority group the opportunity to deal on unequal basis with the majority in a way that conserves their linguistic distinction.

[60] The need for language specific detailed legislation is even more necessary in Zimbabwe where there is currently no case that has been decided on language rights in the new constitution.
[61] J. G. Turi, 'Typology of Language Legislation', in T. S. Kangas *et al.* (eds.), *Linguistic Human Rights: Overcoming Linguistic Discrimination* (1994) pp. 111–120.

The absence of such legislation deprives content to the exact scope of official language status and robs speakers of official minority languages of practical measures for the implementation of their rights. Zimbabwe needs to come up with a specific piece of legislation that gives content to the scope of official language status, regulates the use of these languages in government and provide specific mechanisms and measures to be taken in the event of violation of official minority language rights.

A textual reading of section 6 of the Zimbabwean Constitution reveals that the 16 official languages are official languages of the entire country. If it is to be accepted that affording official language status obliges states to use the designated official language to some degree, practicality and financial considerations may need to be taken into account to determine which languages are used where. It would be impossible to use all the 16 languages in government business in all the 10 provinces in Zimbabwe.

There are a number of practical challenges that could arise in implementing section 6(1) of the Constitution. First, some of the 16 languages (like Koisan, Nambya, sign language, Chibarwe, etc.) are not developed enough for them to be used for government purposes. Second, there is a huge financial cost associated with using all the 16 recognised languages as the languages of record. The cost lies in the development of the languages and translation of all official records into the 16 languages. The state would need to progressively develop some of the undeveloped official languages before they can be effectively used in government business.

There are a number of practical ways that Zimbabwe can approach the challenge of implementing section 6 of the Constitution. The first approach may entail Zimbabwe adopting the Ethiopian model. The Ethiopian model has one language (Amharic) as the official language of the whole country through the medium of which federal services are provided and regional governments are given the discretion to confer official language status to the one or more languages spoken in that region.[62]

Using the Ethiopian model, Zimbabwe could use English as its official language of record (as is currently obtaining) and have other languages used concurrently with English at a provincial level taking into account the number of the speakers of that language in each particular province and other practicality considerations. For example, Shona can be the official language for Harare, Manicaland province and all the Mashonaland provinces. Ndebele can be an official language for Bulawayo and all the Matabeleland provinces. This approach is very possible given the demographic and political structure established by the Zimbabwean Constitution. Section 264 of the Constitution allows for devolution of powers and responsibilities to provincial councils. Given that most linguistic minorities are concentrated in specific areas across Zimbabwe, it would be easy for provincial councils to use an official language that is mainly spoken in that province or town.[63]

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[62] Section 5 of the Ethiopian Constitution. *See also* Fessha, 'A Tale of Two Federations: Comparing Language Rights Regime in South Africa and Ethiopia, in *African Journal of Human Rights* (2009) p. 501.

[63] *See* S. J. Hachipola, A Survey of the Minority Languages of Zimbabwe (1998) p. 25.

The challenge with this approach though is that out of the 16 official languages, only English, Shona and Ndebele will be afforded official language status and would be used for government business in Zimbabwe's ten provinces. Such an approach would be in violation of section 6(1) of the Constitution in that it would reduce the other 13 official minority languages to symbolic official languages. Speakers of the other 13 languages could legitimately allege discrimination on the basis of language.

There is a need to vary the approach in order for it to accommodate the other13 official minority languages in a way that complies with section 6(1) of the Zimbabwean Constitution. These variations may include use of the other 13 languages in the cities and or towns when they are predominantly spoken. This territorial approach to minority language rights minimises the cost of implementing section 6(1) of the Constitution and reasonably protects minority languages and linguistic minorities in areas where they are concentrated.

The second approach may be for Zimbabwe to adopt the Belgian model where official language status is afforded to languages spoken in regions. For instance, Belgium is divided into three regions, namely: Flanders where Dutch is official language, Wallonia where French and German are official languages, and Brussels where Dutch and French are official languages.[64] The idea would then be to use multiple official languages in the areas where they are mainly spoken. This ensures that all the 16 official languages are used to some degree in areas where their speakers are concentrated. This can arguably be in substantial compliance with section 6(1) of the Constitution.

A third approach may be to combine national official language status with regional and municipal (or metropolitan) official language status.[65] In this approach, all the 16 languages will be official languages as prescribed by section 6(1) of the Constitution, but they will be mainly used where the majority of the speakers are concentrated. A specific language law can therefore provide for the declaration of the 16 languages as languages of record along with English in the areas where they are mainly spoken up until they are developed enough to carry a huge functional load at the national level. This can easily be possible given the devolution provision cited above and also Zimbabwe's language demography.[66] Based on this classification, official languages can be conferred with official language status as well as official language of record in the areas where they are mainly spoken. This would go a long way in protecting the language rights of linguistic minorities.

4.2.2 Language of Record

Section 6(2) of the Constitution provides that "[a]n Act of Parliament may prescribe other languages as officially recognised languages and may prescribe languages of

[64] K. Malan, 'The Discretionary Nature of the Official Language Clause of the Constitution', *26 South African Public Law* (2011) pp. 381–403.
[65] More along the lines of Canada. *See* Malan, *supra* note 64, pp. 400–403.
[66] S. J. Hachipola and I. Mumpande, *Silent Voices: Indigenous Languages in Zimbabwe* (Sable Press, Harare, 2006) pp. 7–9.

record". This subsection has two effects. The first positive effect is that it allows Parliament to declare official other languages that are not stated in section 6(1) of the Constitution. The major weakness though is that the section does not set out the criteria that Parliament has to use in order to determine official language status. This therefore gives Parliament a wide discretion in considering which language to declare official.

The Constitution should have provided some sort of criteria for determining the choice of a language as official. In the absence of such provision in the Constitution, the thesis suggests the promulgation of an Act of Parliament setting out the broad criteria for prescribing official language status. Some useful criteria could include the number of people that speak the language, the level of development of the language, the extent of use of the language, the functional load of the language in government business and the areas where the language is dominantly used.

The second effect is that it empowers Parliament to prescribe a language of record in Zimbabwe. A language of record is one used in the official records of a country. The weakness of this clause is that it does not give a timeline on when this Act of Parliament should be promulgated. Again, the provision does not stipulate the criteria that Parliament should use to determine language of record status. This gives Parliament a wide discretion in determining language of record status. It is also not clear how many languages should be prescribed languages of record.

There is also no clarity regarding whether languages of record will cover government business throughout Zimbabwe or in certain provinces or municipalities in Zimbabwe. Examples of the latter approach are that Ndebele can be a language of record in Bulawayo, Tonga can be a language of record in Binga, Shona can be a language of record in Harare, etc., either alone or in conjunction with English. Perhaps these are the issues that the proposed Act of Parliament should capture whenever it will be promulgated.

Section 6(2) does not also reveal whether or not the Constitution aspires to have all 16 official languages to be developed to be languages of record. If this is the aspiration, then provision should have been made for specific timelines expected to ensure that all 16 official languages become languages of record. To this end, the drafters of the Zimbabwean Constitution should have borrowed a leaf from section 4(5) of the Law Society of Zimbabwe (LSZ) Model Constitution that provides that: "An Act of Parliament must provide that— (a) within ten years from the commencement of this Constitution, every official language is a language of record, alongside English, where it is predominantly spoken and has been predominantly spoken for the past one hundred years; and (b) within twenty-five years from the commencement of this Constitution, all official languages must be recognised as languages of record alongside English."

Such a provision would give the state sufficient time to progressively develop all the 16 official languages to be languages of record. As the functional load of these languages increase in government business, such languages would move from official minority languages to official majority languages.

A final remark on this point is that there is currently no Act of Parliament prescribing any language to be Zimbabwe's language of record. However, in practice English is the *de facto* language of record. This elevates English above other official and non-official minority languages and discriminates against speakers of these languages.

4.2.3 Equitable Treatment of Languages

Section 6 (3) of the Constitution makes it clear that "[t]he State and all institutions and agencies of government at every level must— (a) ensure that all officially recognised languages are treated equitably; and (b) take into account the language preferences of people affected by governmental measures or communications".

This section confirms the language history of Zimbabwe where there has never been equal treatment of official and non-official languages. The Constitution establishes equitable treatment of official language. It does not go as far as the South African Constitution to provide for *'parity of esteem'* of official languages. It is important to note that equitable treatment is different from equal treatment of language. According to Currie, equitable treatment is treating all official languages in a just and fair manner in the circumstances.[67] Applied in the Zimbabwean context, these circumstances will include language preferences of people affected by governmental measures or communication.

This has two implications. The first implication is what Malan meant when he said "[e]quitability may mean precisely that English, being one language that is understood by all or at least most citizens and inhabitants, be used as the anchor language".[68]

The second implication is that the section acknowledges that not all the officially recognised languages can be used equally and practical steps should therefore be taken to avoid a scenario where one language dominates and others are diminished. Equitable treatment therefore affords the state and government institutions and agencies a broad discretion on the content of the considerations to be made when deciding how to treat official languages. The reality on the ground though is that English has taken a prominent role in the business of government with some official languages not being used at all. This makes the official language status afforded to the other 15 languages merely symbolic.

The glaring weakness of this provision is that it ignores the history of discrimination of minority language speakers, the diminished use and status of the minority languages and the need for positive, affirmative action measures to redress such history. This history of discrimination coupled with affirmative action, practicality and financial considerations could be useful tools to achieve equitable treatment of languages.

[67] I. Currie and J. De Waal, *The Bill of Rights Handbook*, 6th edition (Juta & Company Limited, Cape Town 2014).
[68] K. Malan, *supra* note 64, p. 392.

4.2.4 Promotion of Use and Development of All Languages

Section 6 (4) of the Constitution provides that "[t]he State must promote and advance the use of all languages used in Zimbabwe, including sign language, and must create conditions for the development of those languages".

It is interesting to note that this provision obliges the state to promote the use of all languages in Zimbabwe and not to actually use all languages in Zimbabwe. As argued before, there is a vast difference between promotion of use of language and actual use of language. According to De Varennes,[69] there are five distinctions between promotion of the use of an official language and the use of an official language. The first distinction is that in the promotion of the use of an official language, the state may or may not use the language concerned whereas use of an official language obliges authorities to actually use the language as prescribed. The second distinction is that in the promotion of the use of an official language, the actual use is decided by administrative or political branches of state apparatus. What is sufficient in terms of promotion is largely permissive, with the usual exception of public education, and determined politically. On the other hand, use of an official language is mandatory, and it is usually required by the constitution or legislation. The third distinction is that with promotion of the use of an official language, the remedies are usually political or administrative whilst use of an official language attracts legal, political and administrative remedies. Fourth, with the promotion of the use of an official language individuals cannot generally claim a breach before a court of law since they have no right to use an official language. On the other hand, use of an official language empowers individuals to claim a breach of a right to use an official language before a court of law.[70] Finally, with promotion of the use of an official language, the extent of obligations as to what is sufficient to promote the use of an official language is left to the discretion at the political level, as in language schemes approved by a minister or a parliamentary-approved commissioner. Conversely, with use of an official language, the extent of obligations as to what is involved in the use of an official language is largely determined by legislation and regulations. It is therefore clear that the promotion of use of language is weaker than the use of an official language in terms of the protection afforded to the language and its speakers.

Turning to section 6(4) of the Zimbabwean Constitution, it is noteworthy that the obligation to promote the use of all languages is mandatory as shown by the use of the word 'must', and the obligation lies with the state – executive, legislature and judiciary. This is different from the South African scenario where promotion of use of languages lies with the state and the PANSALB. Perhaps an adoption of a similar board with defined mechanisms to use to promote use of official and non-official languages could help implement this provision.

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[69] De Varennes *supra* note 43, p. 55.

[70] *See* for example *English Medium Students Parents v. State of Karnataka*, 1994 AIR 1702, 1994 SCC (1) 550, *State of Kerala v. Mother Provisional*, 1970 AIR SCC 2079, and more generally *L. M. Wakhare v. The State of Madhya Pradesh*, AIR 1959 MP 208.

The state obligation to promote the use of all languages in Zimbabwe is not confined to official languages only but to non-official languages also. There is however no clarity regarding the nature of measures that the state should take to promote the use of all languages. There is no clear provision of affirmative action in section 6(4). This chapter advocates for reasonable, practical and positive measures that take into consideration Zimbabwe's language history.

The last part of section 6(4) of the Zimbabwean Constitution obliges the state to create conditions for the development of all languages. The lack of clarity regarding the nature of conditions the state is obliged to create leaves room for divergent interpretations in respect to the nature of the state measures to be taken. It gives the state a wide margin of interpretation that could be exercised with check-and-balances if it is guided by a language specific Act of Parliament.

Perhaps before rounding off the section 6 discussion, it may be prudent to assess whether the section 6 minority language rights are subject to the general limitation clause in section 86 of the Zimbabwean Constitution. There are two possible approaches that could be taken in this regard. The first approach is a restrictive one that strictly interprets section 6 as a provision falling outside the Bill of Rights and therefore not subject to the limitation clause that limits rights in the Bill of Rights.[71] The second approach is a generous one that purposively interprets section 6 in the context of Zimbabwe's constitutional values and other rights[72] in the Bill of Rights that are inevitably used when implementing section 6. This approach will then see the application of the limitation clause in section 86 to section 6.[73] This would see the application of the proportionality principle used in international law as discussed above.

4.2.5. Section Summary

The preceding discussion reveals that even though section 6 textually promises to protect minority languages, there is no jurisprudence from Zimbabwe's Constitutional Court to clarify the content of minority language rights enshrined in section 6. Worse still, the practical implementation of section 6 has seen English emerging as the *lingua franca* and minority languages have been used very little in government business, afforded very limited protection and experiencing very little development in Zimbabwe. There is still a need for an Act of Parliament to be promulgated to regulate the use of the 16 officially recognised languages and for a statutory language body to be established to monitor the development, use and promotion of use of official and non-official minority languages in Zimbabwe.

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[71] This approach was followed in the SA case of *Van Rooyen v. S (General Council of the Bar of South Africa Intervening)*, 2002 5 SA 246 (CC) [35], where the Constitutional Court held that judicial independence was outside the Bill of rights and was therefore not subject to the general limitation in section 36(1).

[72] Examples include equality, non-discrimination, dignity and freedom of expression that require the application of the limitation clause.

[73] *See* J. L. Pretorius, 'The Use of Official Languages Act: Diversity Affirmed?', 16:1 *PER / PELJ* (2013) p. 281, at p. 295.

4.3 *Equality and Non-discrimination*

Section 56 (1) of the Constitution provides that "[a]ll persons are equal before the law and have the right to equal protection and benefit of the law". This provision coupled with section 56(3) of the Constitution, which proscribes discrimination on the basis of language, constitute the usual equality and non-discrimination provisions. This is in line with international law discussed above to the effect that language preferences either between official languages, or between and an official and a minority language (in areas like administrative services, access to the judiciary, regulation of banking services by authorities, public education, and even citizenship acquisition), which unreasonably or arbitrarily disadvantage or exclude individuals would be a form of prohibited discrimination. States are guided by the principle of proportionality in designing their language legislation, policies and practices. Proportionality demands that states be guided by principles of disadvantage, exclusion and reasonableness in their language preferences.

Equality and non-discrimination on the basis of language aim to place linguistic minorities in a substantially similar position with linguistic majorities or the rest of the population.

4.4 *Freedom of Expression*

Section 61 of the Constitution provides for freedom of expression. Even though this section does not specify the right to freedom of linguistic expression, the right to freedom of expression impliedly includes the right to linguistic expression.[74] Language is a means of expression par excellence. Once can best express themselves in a language they speak. There are some things that can only be expressed in parables and idioms of certain languages. In terms of linguistic minorities, expression is done through their minority languages. This argument found favour in the Canadian case of *Ford v. Quebec (Attorney General)*,[75] where the Court held that "[l]anguage is so intimately linked to the form and content of expression that there can be no real freedom linguistic expression if one is forbidden to use the language of one's choice". A minority language speaker can therefore express himself in his minority language. This protects the rights of minority languages in as far as linguistic expression is concerned.

Varennes was therefore correct when he argued that under international law, freedom of expression includes the right to linguistic expression.[76] This argument finds support in Ballantyne, Davidson & McIntyre *v.* Canada where the UNHRC established that freedom of expression entails use of one's language as envisaged in Article 27 of the ICCPR.[77] Freedom of expression therefore includes use of one's minority language and by implication protects minority language rights. This would

[74] F. de Varennes, 'The Existing Rights of Minorities in International law', in Kontra *et al.* (eds.), *Language: A Right and a Resource: Approaching Linguistic Human Rights* (1999) p. 121.
[75] [1988] 2 S.C.R. 712.
[76] De Varennes, *supra* note 43, p. 121.
[77] *Ballantyne* case, *supra* note 44, paras. 11.3 and 11.4.

include the use of all the 16 official languages in media.

The Declaration of Principles of Freedom of Expression in Africa, a non-binding instrument developed by the African Commission, calls upon states to take positive measures to promote diversity, including through "the promotion of the use of local languages in public affairs, including in the courts".[78] Notwithstanding its non-binding status, this clearly goes beyond what is provided in most international instruments in addressing the most controversial component of minority language claims. It expresses an acknowledgement that without the promotion of the use of minority languages in public affairs most people cannot adequately participate in public life as they are not generally well versed in the official European languages.

It is interesting to note that UN treaties are silent on whether or not freedom of expression guarantees access to media[79] by minority language speakers in view of the fact that media is one of the important means of linguistic and cultural reproduction.[80] Access to media for minority language speakers helps in the maintenance of that language and enhances the accommodation of linguistic diversity. The state however has an obligation to ensure that minority language groups have access to media by allocating them frequencies.81 Again Zimbabwe could use the 'sliding-scale approach' and assess from the size and geographical concentration of the minority population, the capacity of the state concerned, and the needs and interests of language speakers to determine which frequencies to give to linguistic minorities. If the state grants one or several language groups a frequency and or an amount of airtime on radio or television, the same state should also allocate an equivalent grant to the other remaining language groups unless there is reasonable and objective justification for differential treatment.[82]

International law does not recognise the state's obligation to support linguistic minority media institutions.[83] It has been argued that Article 27 of the ICCPR can (on the basis of equality, non-discrimination and the right to identity) be interpreted as guaranteeing the right for members of linguistic minorities to establish their own media.[84] The state should not interfere with this right except to merely regulate the registration and licensing of media.

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[78] *See* Principle III Resolution on the Adoption of the Declaration on Principles of Freedom of Expression in Africa, adopted by the ACHPR at its 32nd Ordinary session held in Banjul, the Gambia on 17-23rd October 2002.
[79] Media in this context includes written press, radio and television.
[80] *See* D. Gomien, 'Pluralism and Minority Access to Media', in A. Rosas *et al.* (eds.), *The Strength of Diversity: Human Rights and Pluralist Democracy* (Nijhoff, 1992) p. 49.
[81] De Varennes, *supra* note 43, p. 223.
[82] Henrard, *supra* note 32, pp. 268–269.
[83] *See* de Varennes, *supra* note 43, pp. 217–225.
[84] *See* Henrard, *supra* note 32, p. 268.

4.5 *The Right to Use of a Language and to Participate in the Cultural Life of Choice*

Section 63 affords every person a right to participate in the cultural life of their choice. Within the African context, the right to culture implies cultural identity. Language is an integral part of culture and the protection of the right to culture for linguistic minorities implies the use of one's minority language. For example, Ngugi wa Thiongo referred to language as the soul of culture.[85] Makgoba argues that "language is a culture and in language we carry our identity…"[86] Webb and Kembo-Sure further note that in Africa "people are often identified culturally primarily (and even solely) on the basis of the language they speak".[87] Examples include the Tonga, Ndebele and Shona in Zimbabwe. Prah contends that[88] "[i]f culture is the main determinant of our attitudes, tastes and mores, language is the central feature of culture. It is in language that culture is transmitted, interpreted and configured. Language is also a register of culture." Section 63 to a degree protects linguistic identity[89] and to use one's minority language. It follows therefore that the protection of the right to culture therefore secures linguistic identity and qualified use of a minority language too for linguistic minorities.

Section 63(a) affords everyone the right to use a language of his or her choice. This section relates to all languages – majority and minority languages. It is important to note that section 30 does not specify whether the right to use a language relates to the private or public domains or both. In the absence of a specific contribution to the contrary, the right to use a language includes use in both the private and public domains just as culture is expressed privately and publicly. Such an approach is consistent with section 46 of the Constitution that provides that international law should be taken into account when interpreting the Constitution. As argued before, the right to use a language at international law includes both private use and qualified public use.

It has been established before that one of the concerns of linguistic minorities is the use of minority languages in communication with public authorities, in public media

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[85] N. wa Thiongo, *Decolonizing the Mind, the Politics of Language in African Literature* (1986); S. Wright (*Language Policy and Language Planning: From Nationalism to Globalization* (2004) p. 2) also argues that: "Communities exist because they have the linguistic means to do so. In other words, language is the means by which we conduct our social lives and is foremost among the factors that allow us to construct human communities."

[86] Makgoba, p. 34.

[87] Webb and Kembo-Sure, *supra* note 1.

[88] Prah, *supra* note 2.

[89] Such an approach is consistent with Clause 1.0 of the Cultural Policy of Zimbabwe which provides that: "People, unlike other living life on earth, have an identity and the main characteristic of this identity is language, which is a God given fit to mankind. Zimbabweans speak a variety of indigenous languages and to add to these languages they also use English. All these languages are important as a means of communication. The languages are a strong instrument of identity be it culturally or otherwise. With language, one has a powerful tool to communicate joy, love, fear, praise and other values. With language we are able to describe cultural issues, effect praise, values and norms. With language you can thwart conflicts, engage in fruitful discourse and foster growth on the spiritual, physical and social state of a being."

and in education. At international law, states do not generally have an obligation to provide all public services in every language that members of the public might speak given the multiplicity of languages spoken in most multilingual African states.

Zimbabwe could use the 'sliding-scale approach'[90] to determine from the size of a linguistic population, their territorial concentration, the capacity of the state, and the nature of the service to determine which minority languages should be used in public service. States are expected to provide public services and communication in minority languages in places where their speakers are found in significant numbers, the public services in question are of a very important nature, and the resources required to provide the public services can be made available without unduly compromising the distribution of resources in other areas of public demand as well.[91]

As regards the use of language in media, it has been established earlier that the state does not generally have an obligation to support linguistic minority media institutions.[92] The state however has an obligation to ensure that linguistic minorities have access to media by allocating linguistic minorities frequencies.[93] Again Zimbabwe could use the 'sliding-scale approach' and assess from the size and geographical concentration of the minority population, the capacity of the state concerned, and the needs and interests of minorities to determine which frequencies to give to linguistic minorities.

The caveat in section 63 is that the exercise of the right to use a language should be done in a manner consistent with the Bill of Rights, taking into account the proportionality principle discussed above.

4.6 *Language Use in Criminal Proceedings*

Section 70(1)(j) affords every accused person the right to have trial proceedings interpreted into a language that they understand. This right has a number of meanings. First, just like in international law, language rights in criminal proceedings are afforded to everyone and are not peculiar to minority language speakers. However, minority language speakers can access their minority language rights through general language rights in criminal proceedings. Second, this right imposes on the state the duty to provide an interpreter at its expense in criminal proceedings where a person cannot understand the language of the court. The state cannot refuse to provide it even for economic or any other justifications. Third, the rationale for affording language rights in criminal proceeding is to facilitate the participation of an accused person in a trial in Zimbabwe's adversarial legal system. If language rights are not afforded to an accused person, then justice will be denied. Fourth, section 70(1)(j) of the Constitution in particular does not confer a right to be tried in a language of choice or language of the accused or the accused's first language or the language that they speak but merely to be tried in a language that the accused

[90] De Varennes, *supra* note 43, p. 177.
[91] *Ibid.*, pp. 177–178.
[92] *Ibid.*, pp. 217–225.
[93] *Ibid.*, pp. 223.

person understands. A language that one understands is different from the language that one speaks. If for instance a person that primarily speaks Sena and also understands English has proceedings conducted in English, the court would have complied with section 70(1)(j) of the Constitution.

International law on this aspect has already been discussed above and applies to this provision by virtue of section 46 of the Constitution. Section 70(1)(j) of the Constitution therefore imposes on the state the duty to provide an interpreter at its expense in criminal proceedings where a person cannot understand the language of the court. The state cannot refuse to provide it even for economic or any other justifications. The rationale for affording language rights in criminal proceeding is to facilitate the participation of an accused person in a trial in Zimbabwe's adversarial legal system. If language rights are not afforded to an accused person, then justice will be denied.

Section 5 of the Magistrates Court Act,94 section 49 of the High Court Act[95] and section 31 of the Supreme Court Act[96] make it peremptory for proceedings in the Magistrates, High and Supreme Courts to be in the English language. It makes it difficult for minority language speakers who do not understand English to follow and participate in legal proceedings. With poor interpretation of minority languages, minority language speakers fail to adequately access justice in Zimbabwean courts.

4.7 *Language Rights in Education*

Section 75(1) of the Constitution affords everyone a right to state funded basic and progressively state funded further education. In international law, three issues are key when dealing with the right to language use in education, namely minority specific issues revolving around mother tongue education, curricular content and establishment of private minority educational institutions.

4.7.1 Mother Tongue Education

Article 18 of the Cultural Charter for Africa affords states the discretion to choose one or more African languages to introduce at all levels of education. This choice could be guided by the 'sliding-scale approach' where the state could provide mother tongue education in areas where linguistic minorities are concentrated[97] taking into account the number of minority students seeking education in their language and the extent of the burden this puts on public resources.[98] The right to education in section 75 arguably includes the right to be educated in the mother tongue. The right to education in UN treaties was not initially intended to include the right to education in

[94] [Chapter 7:10].
[95] [Chapter 7:13].
[96] [Chapter 7:13].
[97] Henrard, *supra* note 32, pp. 260–261.
[98] De Varennes, *supra* note 43, p. 33.

the mother tongue.[99] However, there was later a realisation that the right to education cannot be fully enjoyed without involvement of the mother tongue.[100]

Education involves the transfer of information and this can be effectively done when the recipient understands the language used in transmitting education.[101] Mother tongue education is also important for the preservation of the language and traditions of the culture conveyed through it to future generations.[102] Also, mother-tongue education impacts the emotional, cognitive and socio-cultural development of students.[103] In any event, substantive equality and equality of opportunity demand that education be offered in the mother tongue to facilitate equal access to education by marginalised, disadvantaged and vulnerable linguistic minorities. Unequal access to education has repercussions on access to jobs and political power. That is the reason why education in the mother tongue is a concept widely acceptable under international law. For instance, the right of migrant workers' children[104] and indigenous people to be educated in their mother tongue are vividly recognised under the International Labour Organisation Conventions (ILO) No. 107[105] and 169.[106] Policies like additive bilingualism have been developed to ensure that learning a second language should not be to the detriment of the mother tongue.[107] This approach seems to be the one adopted by Zimbabwe's Education Act.[108] Firstly, section 62(1) of the Education Act provides that[109] "[s]ubject to this section, all the 3 main languages of Zimbabwe, namely Shona, Ndebele and English, shall be taught on an equal-time basis in all schools up to form two level."

For those language speakers who use Shona and Ndebele as their mother tongue, this provision means education up to form two level in the mother tongue. The downside of this provision is that there is no guarantee of mother tongue education for Shona and Ndebele speakers beyond form two. Only English is the dominant language taught up to tertiary level. Again, this provision elevates English, Shona and Ndebele above all other official and non-official minority languages. It forces other minority language speakers to learn in English, Shona or Ndebele. It in

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[99] *See* Article 26 of the Universal Declaration, the *Travaux Preparatoires* of the Universal Declaration and the *Belgian Linguistic Case* 1 EHRR 252 (1965)

[100] *See* G. Sieminsky, Working Paper on the Education Rights of Minorities: The Hague Recommendation UN Doc. E/CN.4/Sub.2/AC.5/1997/ WP.3, 5 May 1997, p. 2.

[101] T. Skutnabb-Kangas, 'Human Rights and Language Policy in Education', in S. May and and N. Hornberger (eds.), *Language Policy and Political Issues in Education*, Volume 1 of *Encyclopedia of Language and Education*, 2nd edition (Springer, 2008).

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[103] *Ibid.*, pp. 118–119.

[104] Articles 45(3) and (4) of the Convention on the Rights of Migrant Workers and Members of their Families.

[105] Article 23 of International Labour Organisation Conventions.

[106] Article 28(1) of International Labour Organisation Conventions.

[107] D. Young ('The Role and the Status of the First Language in Education in a Multilingual Society', in K. Heugh *et al.* (eds.), *Multilingual Education for South Africa* (Heinemann, 1995) pp. 63–68) argues that the mother tongue should continue to be used throughout various levels of education even when a second language is introduced.

[108] Zimbabwe education Act [Chapter 25:05].

[109] Clause 1.1 of the Cultural policy of Zimbabwe is even more stringent. It obliges government to: "Accord protection of mother tongue through usage during the first two years of formal schools."

essence discriminates against minority language speakers and contravenes section 6 of the Constitution. It potentially makes minority language speakers inferior to majority language speaker.

Minority language speakers do not seem to enjoy the equal protection of the law envisaged in section 56 (1) of the Constitution. Again, this clause is potentially discriminatory on the basis of language as envisaged by section 56 (3) of the Constitution. Finally, it can be argued that forcing a minority language speaker to learn in English, Shona or Ndebele may be regarded as inhuman, degrading and derogatory contrary to the provisions of section 53 of the Constitution. This is especially so in view of the fact that in Africa language is viewed as a form of identity and as a vehicle of culture. By learning in the three languages, minority language speakers lose their identity and culture. Accordingly, there ought to be a relook at section 62 of the Education Act to ensure that there is fairness and equity in the treatment of languages.

It is interesting to note that what has been happening in practice in respect to section 62(1) of the Education Act is that English language is given more learning time as compared to Shona and Ndebele. Again, literature in English is taught as a separate subject while Shona/Ndebele language and literature are regarded as one subject and allocated far lesser teaching/learning time than that allocated to English language alone notwithstanding the fact that there is sufficient Shona and Ndebele material to teach. This creates the impression that indigenous languages are not of any significance in terms of education.

It is interesting to note that section 62(2) of the Education Act provides that "[i]n areas where indigenous languages other than those mentioned in subsection (1) are spoken, the Minister may authorise the teaching of such languages in schools in addition to those specified in subsection (1)".

This subsection potentially opens room for mother tongue education in a minority language. However, the determination of which minority language should be used exclusively lies to the discretion of the minister of education[110] and is limited to areas where that language is spoken. The subsection does not specify the consideration that the minister has to take before authorising mother tongue education in an indigenous language. This gives the minister of education a wide discretion to choose which language should be taught.[111] A minister that is unfriendly to minority languages will not authorise the teaching of such languages. In the author's interview with the then Minister of Education, Sports and Culture, Senator David Coltart,[112] he

[110] The other sections that give the minister of Education a wide discretion are sections 62(3) and (4) of the Education Act. Section 62(3) of the Education Act states that: "The Minister may authorise the teaching of foreign languages in schools." In practice, French, Portuguese, Chinese, Arabic has been taught in schools. Similarly, Section 62(4) makes it clear that: "Prior to form 1, any one of the languages referred to in subsection (1) and (2) may be used as the medium of instruction, depending upon which language is more commonly spoken and better understood by the pupils."

[111] Section 62(5) limits the minister's discretion when it makes it peremptory for sign language to be taught as a medium of instruction for the deaf. It provides that: "Sign language shall be the priority medium of instruction for the deaf and hard of hearing."

[112] I interviewed him on telephone on 19 June 2012.

indicated that he supported the teaching of minority languages in school. His ministry had developed a number of policy directives authorising the teaching of some minority languages in schools. He however cautioned that the teaching of minority languages in schools was mainly dependent on the availability of teaching materials.

Section 62(2) of the Education Act should be amended to qualify the discretion on the minister and oblige the minister to authorise the teaching of minority languages in areas where they are predominantly spoken. Perhaps some of the factors that the minister should consider are the number of speakers of the language, the extent to which the language has been developed, the availability of textbooks and reading material, the availability of resource, the availability of teachers and examiners, etc. Hachipola makes interesting observations. First, he observes that Barwe, Chikunda, Doma, Sena and Tshwawo have never been taught in schools in Zimbabwe even during the colonial era. They have never been committed to writing in Zimbabwe, and there are no books on them. No orthography has yet been devised for this language. Second, Venda is taught in primary and secondary schools.[113] However, there is scarcity of teaching materials and shortage of Venda teachers. Third, Tswana has never been taught in Zimbabwe. Materials can be found in Botswana and South Africa should a decision be made to teach this language. Fourth, Tonga is currently being taught in primary and secondary schools.[114] Fifth, in the colonial era, Sotho was taught in schools as early as the 1920s, and by the 1960s Sotho was taught up to standard 6 in the Gwanda and Beitbridge Districts. It would appear though that no material was substantially developed and Sotho is no longer being taught in schools.[115] However, Sotho is taught in Lesotho and materials can be bought from Sotho for this language to begin to be taught in schools from primary school to tertiary level. Sixth, Shangani is taught in elementary education alongside English in the Chiredzi District. Seventh, Nambya is taught in primary schools in the Hwange District. The major challenge though is the shortage of materials and teachers. Eighth, The Fingo language has never been taught in schools in Zimbabwe. Materials for teaching can be obtained in South Africa should a decision be made that this language be taught in schools. Finally, Chewa was taught as a language during the colonial era. It is however not being currently taught in schools. No one can really explain how Chewa got out of Zimbabwe's education system. The materials for teaching Chewa even up to tertiary level are available in Malawi. This language can indeed be introduced in schools.

Isaac Mumpande[116] convincingly argued that all languages are equal and have equal richness. The only difference is that the richness of some languages has been explored more than others. For example, Shona and Tonga are equally rich languages. People have explored the richness of the Shona language but have not fully explored the richness of the Tonga language. The Tonga people have begun to develop teaching materials that will expose the richness of the Tonga language. Very

[113] Hachipola, *supra* note 63, pp. 32–33.
[114] *Ibid*., p. 41.
[115] *Ibid.,* pp. 18–19.
[116] Mumpande, *supra* note 66. He said this when I interviewed him on 19 June 2012 at Silveira House.

soon, Tonga will be taught in high school and tertiary institutions. Mumpande's argument is full of merit.

Zimbabwean language history shows that the people that wield political and economic power determine which language is elevated, with the rest of the languages marginalised. The fact that different languages were elevated at different times shows that any of those languages are capable of being developed and used in spheres of government, education, business, media and courts if there is political and economic will. In order to cure the discrimination perpetrated on most of the speakers of the 15 official languages, the state could introduce affirmative action measures in the form of remedial or restitutive measures[117] as provided for in section 56(6) of the Zimbabwean Constitution to ensure that the languages are used in education.

The remedial dimension of substantive equality (affirmative action) should be used to elevate the status of and advance the development and use of historically diminished languages.[118] Section 56(6)(a) of the Zimbabwean Constitution indicates that affirmative action should be used to redress circumstances of genuine need. These are yet to be defined by the Constitutional Court.

To this end, the Zimbabwean education system should lend political support and avail economic resources to develop teaching materials for sign language and other official languages that have not yet been developed to be taught in schools up to tertiary levels. Alternatively, teaching materials can be sourced from South Africa, Zambia, Mozambique, Botswana and Malawi where most of our minority languages are major languages that have developed teaching materials. This will see all the 16 languages being progressively taught even up to tertiary levels. In fact an Act of Parliament could provide for reasonable timelines on when the curriculum and teaching materials should be developed for all the 16 official languages should be progressively taught in public education.

4.7.2 Curriculum Content

Concerning the content of education, international law enjoins states to adopt a multicultural approach[119] where the education curricula should objectively reflect, among others the culture and language of historically disadvantaged language groups.[120]

Ideally, the text materials to be used should also be representative of the

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[117] *National Coalition for Gay and Lesbian Equality v. Minister of Justice*1999 1 SA 6 (CC) paras. 60–61; *Minister of Finance v. Van Heerden*2004 6 SA 121 (CC) para. 30.

[118] *Minister of Finance v. Van Heerden*2004 6 SA 121 (CC) para. 23. *See also* para. 31 which states that only by means of a positive commitment "progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege" can the constitutional promise of equality before the law and its equal protection and benefit be realised.

[119] *See* Article 4 of the 1992 UN Declaration on the Rights of Minorities and Article 12 of the Framework Convention.

[120] Henrard, *supra* note 32, pp. 262–265.

perspectives of members of different sections of society.[121] This aspect is not reflected in section 62 of the Education Act and could be included in an Act of Parliament to be promulgated.

4.7.3 Establishment of Independent Language Institutions

Mother tongue education could easily be effected where language groups are able to establish their own educational institutions at their cost subject to national standards of quality education. International human rights law does not oblige the state to establish educational institutions for all language groups (majority or minority) nor to financially support private linguistic minority educational institutions.[122] The state's obligation is to ensure that public education is accessible to all the 16 official language speakers. However, although the state does not generally have the obligation to fund such institutions, the obligation may arise where the minority lacks sufficient financial resources and public schools are not sufficiently pluralistic to give satisfaction to minority language education.[123]

Article 5(1)(c) of the UNESCO Convention against Discrimination in Education recognises the qualified right of minorities to establish schools where they use and teach in their own languages "depending on the educational policy of each state". The qualification allows state interference in private education. It has been argued that state interference should not go as far as eroding this right by making it impossible for linguistic minorities to establish their own educational institutions.[124] The proposed Languages Bill could provide that language speakers are free to establish their own educational institutions at their own expense.

4.8 *Implementation Mechanisms*

Before finalising this discussion, a look at the implementation mechanism for language rights of linguistic minorities warrants discussion. One of the major weaknesses of section 6 of the Zimbabwean Constitution is that there is no implementation mechanism put in place for the fulfilment of the language rights

[121] It is interesting to note that Articles 18 and 19 of the African Cultural Renaissance provides that: "African states recognize the need to develop African languages in order to ensure their cultural advancement, and acceleration of their economic and social development. To this end, they should endeavor to formulate and implement appropriate language policies… African states should prepare and implement reforms for the introduction of African languages into the education curriculum.121 To this end, each state should extend the use of African languages taking into consideration the requirements of social cohesion and technological progress, as well as regional and African integration." This provision is likely going to promote minority language rights in curriculum development if the Charter comes into force.

[122] *See* Henrard, *supra* note 32, p. 266. Henrard argues that if a state gives financial aid to one private school, an equivalent amount should be granted to another private school as well, unless the differential treatment is reasonable and objectively justifiable. At p. 267, Henrard further argues that "states would be obliged to finance private schools for minorities if state schools are not sufficiently pluralistic, because of their obligation under international law to respect the ideological and philosophical convictions of parents in educational matters".

[123] *See* Article 5(1)(c) of the UNESCO Convention on the Elimination of Discrimination in Education.

[124] Henrard, *supra* note 32, p. 266.

protected in that section. This makes it very difficult for the language rights norms provided for in the Constitution to be effectively implemented. This could be an area where a language specific Act of Parliament can come in and address this key aspect.

De Varennes argues that a number of countries successfully using more than one official language at the national level have clear legislation regulating language use and have also put in place the necessary structures and institutions to effectively ensure authorities carry out their duties – and that individuals can expect authorities to respond in their official language of choice.[125]

He further argues that there are three basic mechanisms that should be in place for the effective implementation of language rights. The first alludes to legal mechanisms where constitutional provisions on the use of two or more official languages by authorities are elaborated upon through legislation, regulations, directives and guidelines. Courts also play a significant role in clarifying these provisions through interpretation. Zimbabwe currently needs a language specific piece of legislation to attend to this gap. The protection of minority languages through national laws is very important to address the language problems that a country is facing.[126] According to Turi, "the fundamental goal of all legislation about language is to resolve the linguistic problems which stem from … language conflicts and inequalities by legally establishing and determining the status and use of the concerned languages".[127]

Language legislation should eliminate discrimination based on language, enable minority language speakers to conserve their linguistic characteristics, and allow it to remain in peaceful interaction with the majority. Language legislation must give members of the minority group the opportunity to deal on unequal basis with the majority in a way that conserves their linguistic distinction. The absence of such legislation deprives content to the exact scope of official language status and robs speakers of official languages of practical measures for the implementation of their rights.

The second refers to administrative mechanisms where government sets up a number of institutions to guide, co-ordinate and oversee the implementation of the use of official and non-official languages in government and administration. Zimbabwe needs administrative institutions to help oversee the implementation of use of official and non-official languages in government and the development of all languages. Such institutions can be along the lines of the PANSALB or a specific language commission or a generic Arts and Culture Commission suggested by section 142 of the National Constitutional Assembly (NCA) Draft Constitution.[128]

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[125] De Varennes, *supra* note 43, p. 47.

[126] The need for language specific detailed legislation is even more necessary in Zimbabwe where there is currently no case that has been decided on language rights in the new constitution.

[127] Turi, *supra* note 61.

[128] Section 142 of the NCA Draft Constitution provides that: "An Act of parliament must provide for the establishment, powers and functions of an Arts and Cultural Commission."

The third relates to political mechanisms where language policy is formulated and mechanisms are put in place to monitor such policy. The monitoring mechanisms can provide for conduits for consultation, communication and responses involving Parliament, parliamentary committees, a department within a ministry, a specific ministry devoted to this issue, the government and other more political entities. There can also be a mechanism for resolving official and non-official language disputes by an institution answerable to Parliament, such as in the case (usually) of an official languages commissioner, language board, ombudsman/public protector or a human rights commission.[129] Such political mechanisms are required in Zimbabwe if minority language rights provided for in the Constitution are to be promoted, protected and fulfilled.

5 Conclusions

A few conclusions can be drawn from the Zimbabwean constitutional framework for the protection of minority languages. First, Zimbabwe's constitutional framework substantially complies with international law relating to the language rights of linguistic minorities discussed above. Second, it accommodates linguistic diversity by introducing 16 official languages and providing for their equitable treatment. Third, section 6 does not clarify whether a territorial or unitary approach should be used in implementing provisions of section 6(1) of the Constitution. Fourth, the implementation of section 6 of the constitution has seen English dominating both the official and non-official minority languages in Zimbabwe. Fifth, there is no implementation mechanism provided to facilitate the promotion, protection and fulfilment of minority language rights in Zimbabwe. The normative and implementation deficiencies beckon for an introduction of a language specific Act of Parliament that will clarify the constitutional provisions relating to minority language rights and also put in place implementation mechanisms for the fulfilment of minority language rights.

[129] R. Dunbar, 'Minority Language Legislation and Rights Regimes: A Typology of Enforcement Mechanisms', Unpublished Paper presented at World Congress on Language Policies, Barcelona 16–20 April 2002, p. 3.