

Zimbabwe Rule of Law Journal

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FOREWORD

I am delighted to welcome the inaugural issue of the Zimbabwe Rule of Law Journal. The idea of establishing this Rule of Law Journal has largely been influenced by existing demand in the legal fraternity for a peer reviewed law journal with a national scope.

The aim of this Zimbabwe Rule of Law Journal is to make a significant contribution towards knowledge creation, raising general awareness on aspects of the law and instill informed scholarly debates. The journal is a joint endeavor between the International Commission of Jurists Africa Regional Programme and the Centre for Applied Legal Research (CALR). This journal is composed of articles and papers written by academics, legal practitioners and law students.

The rule of law is a foundational value and principle of our Constitution as set out in section 3. The Preamble of the Constitution recognises the need to entrench the rule of law because it underpins democratic governance. The rule of law is the means by which fundamental human rights are protected. It is therefore absolutely necessary that there be a way in which the legal profession is enabled to play its role in ensuring that the rule of law is maintained and promoted. This first issue contains articles on house demolitions in violation of s 74 of the Constitution, the right of access to the voters' roll, fair labour standards, the justice delivery mandate of the Judicial Service Commission, the right to life and applicable criminal defences, employment of persons with disabilities, accountability of persons in high offices and public statements prejudicial to the State.

It is my hope that this journal will play an important role in nation building. It will offer information on rule of law issues and disseminate the jurisprudence of our courts and international and regional courts on this very vital subject. It will hopefully introduce, through the contributions by lawyers and other practitioners of their professional expertise, to the comparative and international dimensions of the rule of law principle and the comprehensive developments in this area. In this way this journal will seek to protect and promote the rule of law through critical analysis of judgments of the courts.

The current Constitution of Zimbabwe was adopted in 2013. Many of its provisions require interpretation by the courts in order to build a body of jurisprudence for the future. It can be said that with the coming into force of the 2013 Constitution and establishment of the Constitutional Court, the process of balancing the Court's functional and institutional establishment has just began. There is a need to strike a proper balance between constitutional functions and the concrete power of the Court and between the objects and subjects of constitutional control. This journal can, with the contribution of many professionals, become a permanent, continual and systemic source of assessment of the work of our courts and provide invaluable insights into the working of our system of governance.

I wish to thank the many individuals who have made it possible for this Journal to be produced and congratulate those who have prepared the articles that make up this first issue. I wish to apologize in advance for any inadequacies that may be picked up in this issue. It is the first and all efforts will not be spared to improve subsequent issues in all respects.

Harare, February 2017

Justice MH Chingengo, Chief Editor

LANGUAGE RIGHTS IN SECTION 6 OF THE ZIMBABWEAN CONSTITUTION: LINGUISTIC DIVERSITY AFFIRMED AND ACCOMMODATED?

Innocent Maja¹

Abstract

This article examines the extent to which the language rights regime in s 6 of the Zimbabwean Constitution affirms and accommodates linguistic diversity in Zimbabwe. The study further suggests ways in which Zimbabwe could practically implement the language rights norms in s 6 of the Constitution.

Introduction

Section 6 of the Zimbabwean Constitution ("the Constitution")² is an embodiment of the constitutional regime for the protection of language rights in Zimbabwe. It provides for three crucial concepts that help protect language rights, namely: a) official language status; b) use of official languages; and c) promotion of use and development of all languages in Zimbabwe.

Perhaps the relevant question is why study the constitutional protection of language rights in Zimbabwe? Four reasons come to mind.

First, the intrinsic value of language affirms the need to protect language rights. Language is a mirror of one's cultural identity,³ a vehicle of culture,⁴ a medium of expression,⁵ a means of transfer of

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² Constitution of Zimbabwe (Amendment Act 20) of 2013

³ Webb and Kembo-Sure (eds) *African voices* (2000) 5 contend that in Africa, 'people are often identified culturally primarily (and even solely) on the basis of the language they speak.'

⁴ Kwesi Kwaa Prah, in his 2006 report commissioned by Foundation for Human Rights in South Africa 'Challenges to the promotion of indigenous languages in South Africa' 3-4, argues that language is a central feature used to transmit, interpret and configure culture.

⁵ 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

knowledge⁶ and a source of power, social mobility and opportunities.⁷ The constitutional protection of language rights recognises, affirms and accommodates linguistic diversity.

Second, the legal protection of language rights help address the problem of discrimination of linguistic minorities based on language that has been prevalent in the history of most African states including Zimbabwe. According to Skutnabb-Kangas, the promotion and protection of linguistic human rights is an attempt to apply the concept of human equality so as to cover the use of language and, hence, make any linguistic discrimination visible and problematic, and abolish such discrimination.⁸

Africa's pre-colonial and post-colonial history shows how political power relations⁹ introduced inequality in terms of language use to African languages that otherwise had the same linguistic value.¹⁰ Again, the post-colonial drive towards national unity, social integration and construction of a national identity in most African countries led to language policies that favoured the use of one official *lingua franca* for purposes of administrative efficiency to the exclusion of other languages.¹¹ According to Bamgbose, most African countries adopted the language as-a-problem orientation that favoured one language and

to take an active part in the community and its activities. To deprive a man of such participation amounts to depriving him of his identity.'

⁶ KL Dooley & LB Maruska 'Language rights as civil rights: Linguistic protection in the post-colonial democratic development of Canada and South Africa,' (2010) 3 *Journal of global change and governance* 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."

⁷ S Makoni & B Trudell 'Complementary and conflicting discourses of linguistic diversity: Implications for language planning' (2006) 22(2): 14-28 *Per Linguam* 21.

⁸ T Skutnabb-Kangas 'Linguistic human rights, past and present,' in T Skutnabb-Kangas & R Phillipson (eds) *Linguistic Human Rights: Overcoming Linguistic Discrimination* (1994) 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.

⁹ T Skutnabb-Kangas, 'Multilingualism and the Education of Minority Children' in T Skutnabb-Kangas & J Cummins (eds), *Minority Education: From Shame to Struggle* (1988) 12.

¹⁰ K Henrard Devising an adequate system of minority protection: Individual human rights, minority rights and the right to self-determination (2000) 244.

¹¹ See M Beloff, 'Minority Languages and the Law' (1987) *Current Legal Problems* 140.

restricted other minority languages.¹² Such language policies invariably led to linguistic assimilation,¹³ linguistic loss and discrimination against linguistic minorities.¹⁴

Third, most linguistic minorities are numerically inferior, politically non-dominant, poor and socially vulnerable. They require the assistance of the law to protect their rights in a functioning ethnolinguistic democracy. *S v Makwanyane and Another* established that democracy demands that the law protects vulnerable (linguistic) minorities who are unable to protect themselves due to their numerical inferiority.¹⁵ In a continent awash with states that claim to be democratic¹⁶ and have numerous linguistic minority groups,¹⁷ (for example, over 250 in Nigeria,¹⁸ over 200 each in Sudan¹⁹ Chad²⁰ and Cameroon,²¹ more than 100 in Tanzania,²² over 20 in Zimbabwe²³ and over 15 in South Africa),²⁴ all clamouring

¹² 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 thesis supports the latter orientation.

¹³ S May 'Uncommon languages: The challenges and possibilities of minority language rights' (2000) 21(5) *Journal of Multilingual and Multicultural Development* 366-369 describes the process of linguistic assimilation as that involving a. introduction of majority language 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 iii) the replacement of a minority language with a majority over two or three generations.

¹⁴ See J Blommaert 'Language policy and national identity' in T Ricento (ed) *An introduction to language policy: Theory and method* (2006) 10; N Dorian 'Western language ideologies and small-language prospects' in L Grenoble & L Whaley (eds) *Endangered languages: Language loss and community response* (1998) 3-21. The concept of discrimination is explored in the definition section of this Chapter.

¹⁵ *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 marginalized 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."

¹⁶ See S Dersso & F Palermo *Minority rights in M Tushnet et al (eds) Routledge Handbook of Constitutional Law* (2013) 162.

¹⁷ A Lodhi 'The language situation in Africa today' (1993) 2(1) *Nordic Journal of African Studies* 79-81 argues that Africa has at least 2 000 languages spoken in its 54 countries.

¹⁸ J Maxted & A Zegeye 'North and Central Africa' *World directory of minorities* (1997) 405-408.

¹⁹ See RK Hitchcock 'Human rights and indigenous peoples in Africa and Asia' in DP Forsythe & PC McMahon (eds) *Human rights and diversity* (2003) 209.

²⁰ Maxted & Zegeye (n 18 above).

²¹ Dammers & Sogge 'Central and Southern Africa' in *World directory of minorities* (1997) 479.

²² See RE Howard *Human rights in Common Wealth Africa* (1986) 97.

²³ Section 6 of the Constitution recognizes 16 languages.

²⁴ Section 6 of the Constitution recognizes 11 languages and also lists the San and Koi languages.

for protection, a study of the legal protection of minority languages and linguistic minorities presents African states with useful criteria they can use to balance different linguistic interests in their territories.

Fourth, the legal protection of language rights contributes towards the preservation of the identity of language speakers. 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.*"²⁵ 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 Henrard's contention that the right to identity²⁶ has been regarded as part of the "peremptory norms of general international law"²⁷ used to protect minorities.²⁸

The preceding discussion therefore indicates that there is merit in studying about the legal protection of language rights in Zimbabwe.

Because Zimbabwe has not yet developed language rights jurisprudence, the paper uses international and foreign comparative law jurisprudence in its analysis. The analysis also takes into account constitutional values in order to preserve the Constitution's normative unity or value coherence.²⁹ The constitutional values include the principles of accommodation of diversity, multilingualism, fundamental human rights³⁰

²⁵ V Webb & Kembo-Sure (eds) op cite note 3 at 5.

²⁶ The right to identity is impliedly provided for in article 27 of the ICCPR and explicitly enshrined in article 1 of the 1992 Declaration on Minorities and article 1 of the UNESCO Declaration on Race and Racial Prejudice.

²⁷ Henrard (n 10 above) who 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.'

²⁸ 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 & A Rosas (eds), *Universal Minority Rights* (1995) 392 argues that the right to identity is sometimes regarded as constituting the whole of "minority rights."

²⁹ See *Executive Council of the Western Cape Legislature v President of the RSA* 1995 4 SA 877 (CC) para 204 & *S v Mhlungu* 1995 3 SA 867 (CC) paras 45, 105. SA Constitutional Court jurisprudence in *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) paras 63-64 & *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC) para 55 has established that constitutional values are mutually interdependent and that collectively they form a unified, coherent whole.

³⁰ Section 44 of the constitution places an obligation on the state to respect, protect, promote and fulfil rights enshrined in the constitution. It provides that 'The State and every person, including juristic persons, and every institution and agency at

and freedom, equality of all human beings, peace, justice, tolerance, fairness and the rule of law.³¹

The paper is divided into six parts. The first part analyses the legal and practical implications of official language status. The second section explores the concept of the use of official languages. The third part highlights the legal implications of promotion of use of all languages. The fourth section identifies the implementation gap created by s 6. The fifth part investigates whether s 6 language rights can be limited. The final segment concludes the discourse.

1. Official language status

Section 6(1) of the Constitution officially recognises 16 languages namely, Chewa, Chibarwe, English, Kalanga, Koisan, Nambya, Ndau, Ndebele, Shangani, Shona, sign language, Sotho, Tonga, Tswana, Venda and Xhosa. Interestingly, s 6 neither defines an official language nor explains the legal implications of affording official language status to a language. There is no language rights jurisprudence from the Constitutional Court to help clarify these aspects. International law helps clarify the legal implications of declaring a language official.

a. What is an official language?

Even though international law does not define an official language, De Varennes convincingly defines an official language as "*a form of legal recognition of an elevated status for a language in a state or other jurisdiction.*"³² A UNESCO report defines an official language as "*a language used in the business of government – legislative, executive and judicial.*"³³

every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter.'

³¹ See the Preamble and sections 3 and 6 of the Constitution.

³² F de Varennes 'Draft report on international and comparative perspectives in the use of official languages: models and approaches for South Africa' (October 2012) 4. In the same vein, a decision of the Spanish Constitutional Court 82/1986 of 26 June, which decided on the unconstitutionality appeal against the Basic Law on the Normalisation of Basque Language Use, second legal fundament stated that '*... a language is official when it is recognised by public authorities as the normal means of communication within and between themselves and in their relations with private individuals, with full validity and legal effects.*'

³³ UNESCO Report entitled 'The use of vernacular languages in education,' (1953) 46.

b. What factors should be taken into account when a state decides to confer official language status on a language?

International law and foreign comparative law highlights that the declaration of official language status is a political process left to the discretion and prerogative of each state. For instance, in *Podkolzina v Latvia*,³⁴ the European Court of Human Rights held that³⁵

"... the Court is not required to adopt a position on the choice of a national parliament's working language. That decision, which is determined by historical and political considerations specific to each country, is in principle one which the State alone has the power to make."

International law and foreign comparative law does not quite clearly define the factors that need to be taken into consideration when a state is considering affording official status to a language. For instance, in *Diergaardt v Namibia*,³⁶ the United Nations Human Rights Committee (UNHRC) did not spell out the criteria used to afford official status to a language. Instead, the UNHRC took the view that whatever official languages a state freely chooses; it cannot use such a choice in a way which would violate international human rights law such as freedom of expression.

However, reference to foreign comparative law help reveal some of the criteria a state can use in considering to grant a language official status. For example, *Podkolzina v Latvia* establishes that the sovereign state can take into account historical and political considerations. The UN also took the view that the determination of an official language or languages is a historical, social and political process.³⁷

³⁴ *Podkolzina v Latvia* 2002 ECHR 34.

³⁵ See *Birk-Levy v France*, application no. 39426/06, published on 6 October 2010.

³⁶ Communication 760/1997, *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, UNHR Committee (6 September 2000) U.N. Doc. CCPR/C/69/D/760/1997 (2000). See also Communications 359/89 & 385/89, *John Ballantyne and Elizabeth Davidson, and Gordon McIntyre v Canada*, UNHR Committee (31 March 1993) UN Doc. U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993)

³⁷ *Study of the problem of discrimination against indigenous peoples*, UN Doc. E/CN.4/Sub.2/476/Add.6 states that "During the process of nation building, a language, usually that of the segment of the population which gains supremacy and imposes itself socially, politically and militarily on other segments in various regions and whose language dominates the other languages or dialects in the country, becomes, because of these extra-linguistic factors, the language of highest standing and, ultimately, the official language. Official recognition is of great importance to this and the other languages spoken in the country because, whether or not it is provided for in the Constitution or other basic law, such a selection means that this

Capotorti contends that these factors include the numerical importance of a linguistic community, their political and economic position within the state and the stage of development of a language.³⁸

Vieyetz summarises these social, historical and political considerations as a) the sociolinguistic situation of the country; b) the linguistic dynamics of the country and its context; c) the pre-existing legal situation and d) the political organisation of the state.³⁹

The above analysis shows that whenever a state is considering affording official language status, it should take into account a) the number of people that speak the language, b) the level of development of the language, c) the extent of use of the language, d) the language's history of discrimination, e) the functional load of the language in government business and f) the areas where the language is dominantly used.

c. The levels of official language status

International law does not clearly stipulate whether or not the granting of official language status to at least two languages in a state implies that the languages enjoy the same status. However, useful guidelines could be obtained from Vieyetz's study⁴⁰ that came up with four levels of official languages status that he calls officialities. The first level is what he calls '*full officiality and dominant language.*' In this case, official language status shows all the possible effects and the language involved is considered an element of the state's linguistic identity. The official language is fully used in government business. Examples of full officiality and dominant language include French in France or Monaco, Swedish in Sweden or Russian in the Russian Federation.

privileged linguistic instrument will be used in the various activities of the State... At the end of the colonial dependence... the people of many countries... faced the problem of having to decide which language would henceforth be the official language of their new State. During this process, what became the official language – either the single official or one of them – was often the language introduced by the colonizers; in a few cases, a national language was chosen."

³⁸ F Capotorti 'Study on the rights of persons belonging to ethnic, religious, and linguistic minorities' (1979) UN Docs. E/CN.4/Sub.2/384/Rev.1, Sales No E78XIV1 75-76.

³⁹ EJR Vieyetz 'Official languages and minority languages: Issues about their legal status through comparative law' (2004) *II Mercator International Symposium: Europe: A new framework for all languages?* 15.

⁴⁰ EJR Vieyetz (n 39 above) 24-25.

The second level of official language status is what Vieytez calls '*full officiality and non-dominant language*.' In this case, a language is afforded full official language status but it is not dominant because of social limitations. The language is still an identity element of the state although it evokes a colonial past (Malta) and it is an element of a more symbolic nature generally based on historical or geographical explanations. Examples include Irish Gaelic in Ireland, Swedish in Finland, English in Malta, Russian in Belarus or French in Luxembourg.

The third level of official language status is what Vieytez calls '*partial or limited officiality and dominant language*.' This level comes with two variations. The first variation is called '*exclusive officiality*' where the territorial principle is strictly adopted and different languages are given official language status in the areas where they are dominantly spoken. This is the case of French or German in Switzerland or Belgium and the Swedish of the Aaland Islands. The second variation is called '*shared officiality*' where official language status is shared by two or more languages within a territory, municipality, province or region. These are the cases of Feroese in the Feroe Islands, Greenlandish in Greenland, German in the South Tyrol, Russian in Transnistria or Crimea, Albanian in Kosovo or Catalan in Catalonia or the Balearic Islands.

The fourth and final level of official language status is what Vieytez calls '*partial or limited officiality and non-dominant language*.' Again, this has two variations. The first variation is called '*officiality in the institutional sphere of political autonomy*.' This refers to cases where a language, although giving way socially to the state language with which it shares officiality, benefits from some symbolic institutional presence in a sub state organised sphere. The second variation is called '*officiality in the local institutional sphere without its own political power*.' In this case, official language status is largely limited in the institutional, geographical or population spheres. Examples include Slovenian in Italy, Serbian languages in Germany, Hungarian in Slovenia or Sami in Norway.

Vieytez's observations and classification of official language status therefore reveal a need to clarify

the content of official language status granted to the 16 languages in s 6 of the Constitution and how language rights provided for in s 6 can be practically implemented across Zimbabwe.

There are a number of practical ways that Zimbabwe can approach the challenge of implementing s 6. 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.⁴¹

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 will be reasonable and practical given the demographic and political structure established by the Constitution. Section 264 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.

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 10 provinces. Such an approach would be in violation of s 6(1) in that it would reduce the other 13 official minority languages to symbolic official languages. Speakers of the other 13 languages could claim that they are being discriminated against on the basis of language.

⁴¹ Section 5 of the Ethiopian constitution. See also Fessha 'A tale of two federations: Comparing language rights regime in South Africa and Ethiopia' (2009) *African Journal of Human Rights* 501.

A different approach might be needed in order for Zimbabwe to accommodate the other 13 official minority languages in a way that complies with s 6(1). This different approach may include the use of the other 13 languages in the cities and or towns where they are predominantly spoken. This territorial approach to minority language rights minimises the cost of implementing s 6(1) and reasonably protects minority languages and linguistic minorities in areas where they are concentrated.

Another approach may be for Zimbabwe to adopt the Belgian model where official language status is afforded to different languages spoken in different regions.⁴² Using this model, 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. As argued above, other official languages would be excluded.

A third approach may be to combine national official language status with regional and municipal (or metropolitan) official language status.⁴³ In this approach, all 16 languages will be official languages as prescribed by s 6(1) but they will be mainly used where the majority of the speakers are concentrated. This approach is reasonable, practical and or rational given Zimbabwe's language demography.

According to Hachipola,⁴⁴ the following languages are spoken in specified areas in Zimbabwe: **Barwe** (Nyamaropa, Nyakombu districts in Nyanga and the Muzezuru and Mukosa areas of Mudzi); **Chewa/Nyanja** (mines and farms like Alaska, Trojan, Wankie, Shamva, Madziba, Mazoe, Acturus, Antelope, Mangura mines, Triangle, Hippo Valley sugar plantations, Mufakose, Mabvuku, Tafara, Matshobana, Makokoba, Njube, Tshabalala and Luveve); **Chikunda** (Lower Guruve (Kanyemba and Chikafa) and Muzarabani districts); **Doma** (Chiramba, Koranzi, Chiyambo, Mugoranapanja and Kuhwe areas of the Guruve District); **Fingo/Xhosa** (Mbembesi area near Bulawayo, Fort Rixon, Goromonzi (in

⁴² K Malan K Malan 'The discretionary nature of the official language clause of the Constitution' (2011) 26 *SA Public Law* 381-403.

⁴³ More along the lines of Canada. See K Malan K Malan note 42 381, 400-403.

⁴⁴ See SJ Hachipola 'A survey of the minority languages of Zimbabwe' 1998 25 and I Mumpande 'Silent voices: Indigenous languages in Zimbabwe' (2006) 7-9.

Chief Rusike's area), Msengezi, Marirangwe, and Gwatemba); **Hwesa** (Northern part of the Nyanga District); **Kalanga** (Bulilima and Mangwe Districts, Nyamandhlovu District, Kezi, Tsholotsho and Matobo Districts); **Nambya** (Hwange, Tsholotsho, Western Lupane and around Hwange National Park); **Shangani** (Chiredzi District, Beitbridge (Chikwalakwala), Mwenezi (in Chief Chitanga's area), Zaka (in Chiefs Tshovani and Mutshipisi areas), Mberengwa and Chipinge (in Gonarezhou); **Sotho** (Gwanda South (around Manama), Gwanda North (in Chief Nhlamba's area), Bililimamangwe (Plumtree), Beitbridge, Shashe, Machuchuta, Masera, Siyoka, Kezi and Masema (in the Masvingo District); **Tonga** (Binga District, west and north-west parts of Lupane District, Hwange, Chirundu (Kariba, Nyaminyami and Omay Districts), Gokwe North (Simchembu and Nenyunga), Mount Darwin and Mudzi (Gorongwa, Mukota and Dendera); **Tswana** (Bulilimamangwe District and Mpoengs (between Ramaguabane and Simukwe rivers that flow along the Botswana-Zimbabwe border); **Khoisan** (Tsholotsho (Maganwini, Sinkente, Pumula, and DomboMasili) and also Bulilimamangwe's area of Siwowo); **Venda** (Beitbridge); **Zimbabwe sign language** (schools like the Zimbabwe School Sign, Masvingo School Sign and Zimbabwe Community Sign) and **Sena** (Muzarabani, on plantations like Katiyo Tea Estate and other plantations, commercial farms and mines).

d. Language of Record

Section 6(2) empowers Parliament to prescribe a language of record in Zimbabwe. A language of record is one that is used in the official records of a country. The main drawback of this clause is that it does not stipulate the criteria that Parliament should use to determine language of record status and thus gives Parliament a wide discretion. 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.

There are various approaches that could be taken to determine the language of record. The first approach may be to formally declare English as the language of record throughout the country since English is currently the de facto language of record. The second approach may include having English

as the language of record throughout the whole country and then have other official languages as languages of record together with English in areas where those official languages are spoken. A third approach could be to have different official languages as languages of record in areas where the speakers are mainly concentrated. For example, 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.

Section 6(2) does not also reveal whether or not the drafters aspired to have all 16 official languages to be developed to be languages of record. If this is so, there could be need for the envisaged Act of Parliament to provide specific timelines expected to ensure that all 16 official languages become languages of record. A leaf can be borrowed from s 4(5) of the Law Society of Zimbabwe 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.

2. Use of Official Languages

Section 6(3) obliges the state and its institutions and agencies to use official languages. The Constitution does not mention the scope of use of official languages. Should some or all the official languages be used in education, media, cultural activities, public service and communication with government?

However, despite this omission, s 6(3) does highlight two main considerations that need to be taken into account when regulating the use of official languages. First, all official languages should be treated equitably. Secondly, the state should take into account the language preferences of people

in regulating use of official languages. The scope of use of official languages is not provided for in s 6(3). Neither has the Constitutional Court dealt with any matters relating to s 6(3) and international law and best practices from other states might therefore be useful in giving content to these sections.

International law does not expressly clarify whether official language status guarantees use of that language.⁴⁵ The use of official languages in administration, public education, public health, media, courts, business and other government activities depends on the provisions of the individual country's constitution, legislation, policies and jurisprudence. This ranges from the language being symbolic; to defined limited use of language, to undefined use of language; to unlimited use of an official language.

Implicitly, there are strong grounds that an official language should be used in government business.⁴⁶ This position accords with the definition of an official language cited above. *Mentzen alias Mencina v Latvia*⁴⁷ established that "... A language... cannot be divorced from the way it is actually used by its speakers. Consequently, by making a language its official language, the State undertakes in principle to guarantee its citizens the right to use that language... In other words, implicit in the notion of an official language is the existence of certain subjective rights for the speakers of that language."

In the same vein, De Varennes⁴⁸ convincingly argues that "... there is therefore, in the absence of legislation to the contrary, at least a very strong implication that a government has an obligation to use such a language, and a corresponding individual right for citizens to use that official language."

Official language status should therefore not be symbolic but should guarantee the use of that language. According to Wenner, an official language should be used in a court of law, when communicating with government, in public notices, in government reports, documents, hearings, transcripts and other

⁴⁵ For instance, in *Société des Acadiens du Nouveau-Brunswick v Association of Parents for Fairness in Education* (1986) 1 S.C.R. 549 (Canada) para 59 the Supreme Court of Canada held that the recognition of the status of official languages for French and English at the federal level under Article 16 of the Canadian Constitution did not guarantee as such a right to any type of service or use in either official language.

⁴⁶ F de Varennes 'Draft report on international and comparative perspectives' op cit note 32 at 10.

⁴⁷ Application no. 71074/01, admissibility decision of 7 December 2004

⁴⁸ F de Varennes op cit note 32 at 10.

official publications as well as in legislation and in the proceedings and records of the legislature.⁴⁹ In countries where more than one official language must be used, their use as a general rule is provided for through constitutional provisions, legislation, regulations, guidelines and case law.

One way of interpreting s 6 is to use the values of multiculturalism, inclusive linguistic diversity, equality, human dignity and to take into account international law as required by s 46(1)(c). Such a wide interpretation would place an obligation on Zimbabwe to use all the 16 officially recognised languages. Such an interpretation is in line with s 63(a) of the Constitution that affords everyone the right to use the language of their choice.

Of course, practicality and financial considerations 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. On this score there are a number of practical challenges that could arise in implementing s 6(1) of the Constitution, if this is the objective. First, some of the 16 languages (like Koisian, Nambya, Sign Language, Chibarwe, etc) are not developed enough for them to be used for government purposes. Further, there is a huge financial cost associated with using all the 16 recognised languages as the languages of record in all the 10 provinces. 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.

Suffice to mention that s 6(3) does not provide for equal treatment of official languages in terms of use but for equitable treatment. According to Currie, equitable treatment is treating all official languages in a just and fair manner in the circumstances.⁵⁰ Applied in the Zimbabwean context, these circumstances will include "*language preferences of people affected by governmental measures or communication.*"

49 MW Wenner 'The politics of equality among European linguistic minorities' in RP Claude (ed) *Comparative human rights* (1976) 184 193.

50 I Currie & J de Waal *The Bill of Rights Handbook* 6th Edition (2014).

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."⁵¹ 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, though, is that English has taken a prominent role in the business of government with some official languages not used at all. This makes the official language status afforded to the other 15 languages merely symbolic.

a. Language use in government activities and public service

Currie argues that government activities are divided into legislation and administration. Currie⁵² contends further that legislation should be published in the principal languages of the state and provincial legislation should be published in the official languages of the province. In administration however, Currie contends that there is greater flexibility where government should consider factors like demography, language preference of the population in the province, usage, etc.

Varenes interestingly suggests the use of a '*sliding-scale*' approach⁵³ to assess which official language should be used in particular government activity. This approach urges local authorities where language speakers are concentrated to increase level services in non-official minority languages as the number of language speakers increase beginning from the lower end of the sliding-scale and moving

⁵¹ K Malan 'The discretionary nature of the official language clause of the Constitution' (2011) 26 SA Public Law 381392.

⁵² I Currie & J de Waal *The Bill of Rights Handbook* (2005).

⁵³ F de Varenes, *Language, minorities and human rights* (1996) 177-178.

progressively to the higher end.⁵⁴ The services to be provided would include availing widely used official documents in minority languages, accepting oral or written applications in minority languages and use of minority languages as an internal and daily language of work within public authorities. Tailored to suit the concrete linguistic circumstances of each state, the sliding-scale approach can be an effective weapon to accommodate linguistic diversity. In any case, the sliding-scale approach clearly acknowledges that it is impractical to provide every government service in all the 16 official languages in all ten provinces in Zimbabwe.

As regards use of languages in the public service, international law does not oblige states to provide all public services in every language that members of the public might speak given the multiplicity of languages spoken in most multilingual states worldwide. States are expected to provide public services and communication in official 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.⁵⁵ Zimbabwe could use the '*sliding-scale approach*' 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. Such an approach is practical in Zimbabwe where language groups are usually territorially concentrated and most social and economic affairs are conducted at local levels in the regional or local vernacular.

b. Language use 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 key issues deal with the right to education, namely, mother tongue education, curricular content and establishment of private educational institutions.

⁵⁴ F de Varenes, *ibid* at 177.

⁵⁵ F de Varenes, *ibid* at 177-178.

i. Mother tongue education

The right to education in UN treaties was not initially intended to include the right to mother tongue education.⁵⁶ However, a later realisation concluded that the right to education cannot be fully enjoyed without involvement of the mother tongue.⁵⁷ Education involves the transfer of information which is most effective when the recipient understands the language used in transmitting education.⁵⁸ Mother tongue education is also important for the preservation of the language and traditions of the culture conveyed through it to future generations;⁵⁹ and impacts the emotional, cognitive and socio-cultural development of students.⁶⁰

In any event, substantive equality and equality of opportunity demands that education is offered in the mother tongue to facilitate equal access to education by marginalised, disadvantaged and vulnerable linguistic minorities to avoid later repercussions on access to jobs and political power. That is the reason why mother tongue education is a concept widely acceptable under international, regional and foreign comparative law. For instance, the right of migrant workers' children⁶¹ and indigenous people to be educated in their mother tongue are vividly recognised under the International Labour Organisation Conventions No. 107⁶² and 169.⁶³ Policies like additive bilingualism have been developed to ensure that learning a second language should not be to the detriment of the mother tongue.⁶⁴

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

⁵⁶ See article 26 of the Universal Declaration, the *travaux preparatoires* of the Universal Declaration and the *Belgian Linguistic Case* 1 EHRR 252 (1965)

⁵⁷ 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, 2.

⁵⁸ T Skutnabb-Kangas 'Language policy and political issues in education' in S May & N Hornberger (eds – 2nd ed) *Encyclopedia of Language and Education* (2008) 107-119.

⁵⁹ K Henrard op cit 10 at 257-258.

⁶⁰ T Skutnabb-Kangas, *Bilingualism or not: The education of minorities*, Clevedon: Multilingual Matters (1981) 118-119.

⁶¹ Arts 45(3) and (4) of the CMW.

⁶² Art 23.

⁶³ Art 28(1).

⁶⁴ 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*, (1995) Johannesburg: Heinemann 63 68 argues that the mother tongue should continue to be used throughout various levels of education even when a second language is introduced.

approach⁶⁵ taking into account the number of minority students seeking education in their language and the extent of the burden this puts on public resources.⁶⁶ The right to education in s 75 of the Constitution arguably includes the right to be educated in the mother tongue.

Another key provision in respect to language rights in education is s 62 of the Education Act.⁶⁷ It presents a number of interesting insights. For instance, S 62 (1) of the Education Act provides that⁶⁸

"... Subject to this section, all the three 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 Shona and Ndebele language speakers, this provision means mother tongue education up to form two level although 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.⁶⁹ Again, this provision elevates English, Shona and Ndebele above all other official languages and forces other language speakers to learn in English, Shona or Ndebele.

However, in practice English Language is given more learning time as compared to Shona and Ndebele.⁷⁰ 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 time notwithstanding that there is sufficient Shona and Ndebele material to teach. This creates the impression that indigenous languages are not as significant.

Section 62(1) of the Education Act arguably discriminates against other official language speakers on the basis of language as envisaged by the constitutional provisions of ss 56(3) and 6 and are not

⁶⁵ K Henrard op cit 10 at 260-261.

⁶⁶ F de Varennes Language, Minorities & Human Rights (1996) 33.

⁶⁷ Education Act, [Chapter 25:05]

⁶⁸ [Chapter 25:05] Clause 1.1 of the Cultural policy of Zimbabwe obliges government to '*... accord protection of mother tongue through usage during the first two years of formal schools.*'

⁶⁹ SJ Hachipola A survey of the minority languages of Zimbabwe 1998.

⁷⁰ Op cit note 69.

afforded the equal protection of the law as stipulated in s 56(1). To remedy this discrimination, the State could introduce affirmative action measures in the form of remedial or restitutive measures⁷¹ as provided for in s 56(6) to ensure that all the 15 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.⁷²

It can be argued that forcing other official language speakers to learn in English, Shona or Ndebele may be regarded as inhuman, degrading and derogatory contrary to the provisions of s 53 of the Constitution. This is especially so considering that, in Africa, language is viewed as a form of identity and as a vehicle of culture.⁷³ By learning in the three majority languages, minority language speakers lose their identity and culture. Accordingly, s 62 of the Education Act could be amended to ensure that there is equitable treatment of languages.

Section 62(2) of the Education Act provides that

"... In 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 minority languages in areas where that language is spoken at the discretion of the Minister of Education.⁷⁴ It does not specify the

⁷¹ *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.

⁷² *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 23. See also para 31 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.

⁷³ Webb & Kembo-Sure op cit note 3 argue that in Africa "*people are often identified culturally primarily (and even solely) on the basis of the language they speak.*"

⁷⁴ 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, s 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.*"

criteria that the minister uses to authorize mother tongue education in indigenous languages which allows a wide discretion in choice of which language should be taught.⁷⁵

According to Hachipola, nine trends have emerged in practice. First, Barwe, Chikunda, Doma, Sena and Tshwawo have neither been committed to writing nor taught in Zimbabwean schools even during the colonial era. Second, Venda is taught in primary and secondary schools.⁷⁶ However, there is scarcity of teaching materials and shortage of Venda teachers. Third, Tswana has never been taught in Zimbabwe. Fourth, Tonga is currently being taught in Primary and Secondary schools particularly in Binga.⁷⁷

Fifth, 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.⁷⁸ However, Sotho is taught in Lesotho and materials can be bought from Lesotho 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. Finally, Chewa was taught as a language during the colonial era although it is not being currently taught in schools. The materials for teaching Chewa even up to tertiary level are available in Malawi.

S 62(2) of the Education Act should be amended to achieve two purposes. The first would be to provide for the equitable teaching of all the 16 official languages with two limitations. First, the 16

⁷⁵ 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.*"

⁷⁶ SJ Hachipola (n 44 above) 32-33.

⁷⁷ SJ Hachipola op cit note 44 at 41.

⁷⁸ SJ Hachipola op cit note 44 18-19.

official languages need to be developed (in terms of curriculum, course books and teachers) in order for them to be used at different levels of education. Since most of the 16 official language speakers are factually in an economic and political non-dominant position, government financial assistance plays a crucial role in making mother tongue education a reality. 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. Practically, the sliding scale approach could play a crucial role in determining which official languages should be developed and taught in which areas.⁷⁹ The state would be expected to provide education in a certain official language if the linguistic group is of a certain size and are concentrated in a certain area.⁸⁰

Second, mother tongue education can be denied if the limitation is reasonable and justifiable.⁸¹ The proportionality requirement discussed above would apply.

The second purpose of amending section 62(2) of the Education Act is to qualify the minister's discretion when authorizing the teaching in indigenous languages. The minister should consider 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.

ii. Curriculum content

International law enjoins states to adopt a multicultural approach⁸² where the education curricula should objectively reflect, among others, the culture and language of historically disadvantaged language groups.⁸³ Ideally, the text materials to be used should also be representative of the perspectives of members of different sections of society.⁸⁴ This aspect is not reflected in the Education Act.

⁷⁹ K Henrard op cit note 10 260-261.

⁸⁰ F de Varennes op cit note 66 at 189.

⁸¹ *Belgian Linguistic Case* 1 EHRR 252 (1965) 284-254 held that the denial of mother-tongue education may not be for arbitrary reasons but must have an objective and reasonable justification.

⁸² See Article 4 of the 1992 UN Declaration on the Rights of Minorities and Article 12 of the Framework Convention.

⁸³ K Henrard op cit note 10 262-265.

⁸⁴ It is interesting to note that arts 18 and 19 of the African Cultural Renaissance provide that "*African states recognize*

iii. 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 educational institutions.⁸⁵ The State's obligation is to ensure that public education is accessible to all language speakers. However, the state obligation to fund such institution may arise where a language group lacks sufficient financial resources and public schools are not sufficiently pluralistic to give satisfaction to mother-tongue education. Article 5(1)(c) UNESCO Convention⁸⁶ provides that private education should depend "on the educational policy of each state."⁸⁷

c. Language use in media

Section 61 of the Constitution provides for freedom of expression and freedom of the media. In international law, freedom of expression includes the right to linguistic expression.⁸⁸ Language is a means of expression par excellence and people best express themselves in a language they speak. This argument found favour in the Canadian case of *Ford v Quebec (Attorney General)*⁸⁹ where the court held that:

Language is so intimately linked to the form and content of expression that there can be no real

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. 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.

⁸⁵ See K Henrad op cit note 10. At 266, Henrad 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 267, Henrad 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."

⁸⁶ See art 5(1)(c) of the UNESCO Convention on the Elimination of Discrimination in Education.

⁸⁷ K Henrad op cit note 10 at 266.

⁸⁸ 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) 121.

⁸⁹ [1988] 2 S.C.R. 712.

freedom linguistic expression if one is forbidden to use the language of one's choice.

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 International Covenant on Civil and Political Rights (ICCPR).⁹⁰

Interestingly, international law is silent on whether or not freedom of expression guarantees access to media⁹¹ by language speakers in view of the fact that media is one of the important means of linguistic and cultural maintenance and propagation.⁹²

However, international law obliges states to ensure that language groups have access to media by allocating them frequencies.⁹³ Zimbabwe could use the 'sliding-scale approach' 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.⁹⁴

International law does not place an obligation on the states to support private media institutions.⁹⁵ 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.⁹⁶ The state should not interfere with this right except to merely regulate the registration and licencing of media.

⁹⁰ Communications 359/89 & 385/89, *John Ballantyne and Elizabeth Davidson, and Gordon McIntyre v Canada*, UNHR Committee (31 March 1993) UN Doc. U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993) paras 11.3 and 11.4.

⁹¹ Media in this context includes written press, radio and television.

⁹² See D Gomien, "Pluralism and minority access to media" in A Rosas et al (eds) *The strength of diversity: Human rights and pluralist democracy*, Dordrecht: Nijhoff (1992) 49.

⁹³ F de Varennes op cit note 66 at 223.

⁹⁴ K Henrard op cit note 10 268-269.

⁹⁵ See F de Varennes op cit note 66 at 217-225.

⁹⁶ See K Henrard op cit note 10 at 268.

d. Language use in criminal proceedings

Section 70(1)(j) of the Constitution affords every accused person the right to have trial proceedings interpreted into a language that they understand and is substantially similar to article 14(3) of the ICCPR.⁹⁷

S 70(1)(j) of the Constitution does not however 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 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 English, the court would have complied with s 70(1)(j) of the Constitution.

International law supports this reasoning and interpretation. Clause 5.3 of the UNHRC General Comment 23 makes it clear that '*[a]rticle 14(3)(f) of the ICCPR does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings.*' In *Guesdon v France*,⁹⁸ 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*⁹⁹ 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.

⁹⁷ It provides that "*In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him... f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court...*"

⁹⁸ Communication 219/1986 *Guesdon v France* UNHR Committee (23 August 1990), UN Doc CCPR/C/39/D/219/(1986).

⁹⁹ Communication 451/1991 *Harward v Norway* UNHR Committee (16 August 1994), UN Doc CCPR/C/51/D/451/(1991).

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. In Zimbabwe's adversarial legal system, the rationale for affording language rights in criminal proceeding is to facilitate the participation of an accused person in the trial. If language rights are not afforded to an accused person, then justice is denied.

Section 5 of the Magistrates Court Act,¹⁰⁰ s 49 of the High Court Act¹⁰¹ and S 31 of the Supreme Court Act¹⁰² make it peremptory for proceedings in the Magistrates, High and Supreme Courts to be in the English language which creates difficulties for other language speakers to participate in legal proceedings. With poor interpretation of official languages, other language speakers may fail to adequately access justice in Zimbabwean courts.

e. Language use in cultural activities

Section 63 of the Constitution affords every person a right to participate in the cultural life of their choice and implies cultural identity. Language is the soul of culture¹⁰³ and a vehicle of cultural expression.¹⁰⁴ In Africa '*people are often identified culturally primarily (and even solely) on the basis of the language they speak.*'¹⁰⁵ Examples include the Tonga, Ndebele and Shona.¹⁰⁶

¹⁰⁰ [Chapter 7:10].

¹⁰¹ [Chapter 7:13].

¹⁰² [Chapter 7:13].

¹⁰³ 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) 2 argues that '[c]ommunities 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.' KL Dooley and LB Maruska '*Language rights as civil rights: Linguistic protection in the post- colonial democratic development of Canada and South Africa,*' (2010) 3 *Journal of global change and governance*, 1 at 2 argue that "[l]anguage, in essence, serves as the building bloc of cultural recognition, and it provides communities with the necessary tools to define themselves as particular entities, noticeably set apart from other communities."

¹⁰⁴ S Makoni & B Trudell '*Complementary and conflicting discourses of linguistic diversity: Implications for language planning*' (2006) 22(2): 14-28 *Per Linguam* 21.

¹⁰⁵ V Webb & Kembo-Sure *op cit* note 3 at 5

¹⁰⁶ I Mumpande '*Silent voices*' *op cit* note 44. He further argues that '*a community without a language is like a person without a soul.*'

Section 63 of the Constitution protects the use of languages in cultural activities and, essentially, protects linguistic identity.¹⁰⁷ Again, 'the sliding scale approach' could be used to determine which language is used for which cultural expression.

3. Promotion of Use and Development of All Languages In Zimbabwe

Section 6(4) of the Constitution provides for the promotion of use of all languages (official and non-official) spoken in Zimbabwe and, in the process, obliges the state to create conditions for the development of all these languages. The promotion of language use is yet to be defined and given meaning by the Constitutional Court. Section 6(4) essentially obliges the state to promote the use of all languages but not to actually use all the languages.

There is a vast difference between promotion of use of language and actual use of language. According to De Varennes,¹⁰⁸ there are five distinctions between promotion of the use of an official language and the actual 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.

Second, with 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.

Third, for the promotion of the use of an official language, the remedies are usually political or

¹⁰⁷ 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.*'

¹⁰⁸ F de Varennes 'Draft report on international and comparative perspectives' op cit note 32 at 55.

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. Use of an official language empowers individuals to claim a breach of a right to use an official language before a court of law.¹⁰⁹

Finally, with promotion of the use of an official language, the extent of obligations 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 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 s 6(4) of the 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. Two deficiencies are glaring in s 6(4). First, there is no clarity regarding the nature of measures that the state should take to promote the use of all languages. These measures could include affirmative action. Second, s 6(4) does not specify the nature of conditions that the state should create for the development of all languages.

4. Lacuna in s 6 of the Constitution

One of the major weaknesses of s 6 of the Constitution is that there is no implementation mechanism in place for the fulfilment of the language rights protected in that section. This makes it very difficult for the language rights norms provided for in the Constitution to be effectively implemented.

¹⁰⁹ 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.

De Varennes¹¹⁰ argues that there are three basic mechanisms that should be put in place for the effective implementation of language rights.

The first refers to legal mechanisms¹¹¹ where constitutional provisions on the use of two or more official languages by authorities are elaborated upon through legislation, regulations, directives and guidelines.¹¹² Courts also play a significant role in clarifying these provisions through interpretation. Language legislation should eliminate discrimination based on language, enable minority language speakers to conserve their linguistic characteristics, and allow peaceful interaction with the majority. Language legislation must give members of the minority group the opportunity to deal with the majority in a way that conserves their linguistic distinction.

The current absence of such legislation in Zimbabwe deprives content to the exact scope of official language status and deprives speakers of official languages of practical measures for the implementation of their rights.

The second refers to administrative mechanisms where government sets up institutions to guide, co-ordinate and oversee the implementation of the use of official and non-official languages. 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 built along the lines of the PAN South African Language Board or a specific language commission or a generic Arts and Culture Commission suggested by s 142 of the National Constitutional Assembly Draft Constitution.¹¹³

¹¹⁰ F de Varennes 'Draft report on international and comparative perspectives' op cit note 32 at 47.

¹¹¹ G Turi 'Typology of language legislation' in TS Kangas et al (1994) *Linguistic human rights: overcoming linguistic discrimination* 111-120 argues that "... 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."

¹¹² 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.

¹¹³ 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 through provision of 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 political entities. There can also be mechanisms for resolving official and non-official language disputes by an institution answerable to Parliament, such as an official languages commissioner, language board, ombudsman/public protector or the human rights commission.¹¹⁴ Such political mechanisms are required if language rights provided for in the Constitution are to be promoted, protected and fulfilled.

5. Limitation of Language Rights in s 6

One crucial issue for discussion is whether s 6 is subject to the general limitation clause in s 86 and there are two possible approaches to this. The first approach is restrictive and strictly interprets s 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.¹¹⁵

The second approach is a generous one that purposively interprets s 6 in the context of the constitutional values and other rights¹¹⁶ in the Bill of Rights that are inevitably used when implementing s 6. This approach sees the application of the limitation clause in s 86 to s 6.¹¹⁷

The limitation of rights in s 86 is essentially two-fold. First, a law of general application should limit fundamental human rights. The law of general application refers to the rule of law¹¹⁸ that includes

¹¹⁴ Unpublished: 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 3.

¹¹⁵ 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).

¹¹⁶ Examples include equality, non-discrimination, dignity and freedom of expression that require the application of the limitation clause.

¹¹⁷ See JL Pretorius 'The Use of Official Languages Act: Diversity affirmed?' 2013 (16)1PER /PELJ 281 282295.

¹¹⁸ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).

legislation,¹¹⁹ common law¹²⁰ and customary law¹²¹ that is impersonal,¹²² applies equally to all and is not arbitrary in its application.

Second, the law of general application should be fair, reasonable, necessary and justifiable¹²³ in an open and democratic society that is based on openness, justice, human dignity,¹²⁴ equality and freedom. This requirement introduces the proportionality principle which is considered as central to a constitutional democracy.¹²⁵

Section 86(2) of the Constitution lists six factors that are used to determine proportionality. The first is the nature of the right or freedom. Here, courts should balance the importance of the language right against the justification of its infringement. Use of a language in government business is arguably very important to the preservation of linguistic identity and access to public service than any justification of its limitation. Courts are likely going to apply a high threshold before accepting any limitation to this right.

The second factor is the purpose of the limitation. Section 86(2)(b) indicates that the limitation should be '*...necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest.*' The Constitutional Court is yet to be seized with matters that will see it formulating jurisprudence in this regard.

The third factor is the nature and extent of the limitation. Zimbabwean Courts have not yet decided

¹¹⁹ It includes Acts of Parliament and delegated legislation. See *Larbi-Odam v MEC for Education (North West Province)* 1998 1 SA 745 (CC) 27.

¹²⁰ Policy, practice and contractual provisions do not qualify as law of general application. See *Hoffmann v South African Airways* 2001 1 SA (CC) 41 and *Barkhuizen v Napier* 2007 5 SA 323 (CC) 26.

¹²¹ *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 44 & 136.

¹²² *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC).

¹²³ GE Devenish *The South African Constitution* (2005) 181 says the limitation should be reasonable and proportional.

¹²⁴ Section 86(3)(b) of the Constitution makes it clear that human dignity is one of the rights that cannot be limited.

¹²⁵ DM Beatty *Ultimate Rule of Law* (2005) 163 argues that "[t]he fact is that proportionality is an integral, indispensable part of every constitution that subordinates the system of government it creates to the rule of law. It is constitutive of their structure, an integral part of every constitution by virtue of their status as the supreme law within the nation state."

on this aspect. However, South African Courts have established that this factor looks at the effects of the limitation on the right concerned and not on the right holder.¹²⁶ In the context of this paper, what is the effect of the limitation on the right to use an official language? The law that limits the right should not do more damage to the right than is reasonable for achieving its purpose.¹²⁷

The fourth factor is the relationship between the limitation and its purpose. Section 86(2)(b) qualifies this factor to assess whether the limitation "... *imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose.*"

The fifth factor concerns the availability of less restrictive means to achieve the stated purpose. South African Courts have established that the limitation is not be proportional if there are less restrictive (but equally effective) means that can be employed to achieve the same purpose of the limitation.¹²⁸

The sixth factor is the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others.

Clearly, s 86 incorporates the principle of proportionality. Pretorius¹²⁹ argues that the application of proportionality to s 6 demands in general that the principle of inclusive linguistic diversity expressed in the official language clause must be related to other competing values, principles or considerations in a way which is non-reductionist¹³⁰ and non-hierarchical.¹³¹

¹²⁶ *S v Meaker* 1998 8 BCLR 1038 (W).

¹²⁷ *S v Manamela* 2000 3 SA 1 (CC) 34.

¹²⁸ *S v Makwanyane* 1995 3 SA 391 [123] and [128].

¹²⁹ JL Pretorius 'The Use of Official Languages Act: Diversity affirmed?' 2013(16)1 *PER / PELJ* 281 282 299.

¹³⁰ Non-reductionism requires that competing constitutional goods should be related to one another in a way which preserves their plurality without reducing one into another and without lumping all of them together into some common space (like utility) that denies their plurality.

¹³¹ Non-hierarchical relatedness means that constitutional goods must not be pitched against each other in terms of an arbitrary abstract rank order.

6. Conclusion

Even though s 6 of the Constitution potentially affirms linguistic diversity, there is need for language legislation to clarify the scope of official language status, the extent of use of official languages; the obligation to promote the use and development of all languages and provide for the implementation mechanisms if the language rights are to be protected, promoted and fulfilled.

