

**A HUMAN RIGHTS FRAMEWORK TOWARDS THE PROTECTION OF
MINORITY LANGUAGES AND LINGUISTIC MINORITIES IN AFRICA:
CASE STUDIES OF SOUTH AFRICA AND ZIMBABWE**

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DECLARATIONS

I, the undersigned **INNOCENT MAJA**, do hereby solemnly state that this work is presented in its original state and has not been submitted to any other institution of learning for consideration in fulfilment of an academic requirement. While I acknowledge that some of the views used herein were taken from writings of other scholars, the sources have been fully acknowledged.

Signature of student: _____

Signature of supervisor: _____

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DEDICATION

To my wife Florence and daughters Eliora and Netania

And to all marginalised and discriminated speakers of minority languages in Africa

The God of justice will surely vindicate your struggle for substantive equality in the fullness of time.

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ABSTRACT

This thesis examines and defends the use of a human rights framework for the protection of minority languages and linguistic minorities in Africa as an effective means to eliminate discrimination against linguistic minorities, protect minority languages, preserve linguistic minority identity and foster substantive equality between linguistic majorities and linguistic minorities.

The argument that runs throughout the thesis is that in order to effectively integrate linguistic minorities, while allowing them to preserve their linguistic identity, the human rights framework should have two pillars with two clusters of rights. The first pillar consists of individual human rights of special relevance to linguistic minorities that ensure that linguistic minorities are placed on a substantially equal footing with other nationals of the state. Key rights are the rights to equality and non-discrimination on the basis of language. Other individual rights include freedom of expression, the right to culture, the right to participation, the right to a name, the right to family, the right to fair trial and the right to education. The second pillar consists of minority-specific standards (rights and measures) designed to protect and promote the separate identity of minority language groups. These include prevention of assimilation, the right to identity and the right to use a minority language in the public and private spheres. This study argues that even though the international, regional and national human rights standards are general and often qualified and have some gaps and deficiencies, they provide a human rights framework for the protection of minority languages and linguistic minorities in Africa.

The study recommends two approaches to assist in clarifying the normative content of minority language rights in Africa. On the one hand, there is the progressive interpretation approach, which does not introduce new standards for the protection of minority languages and linguistic minorities in Africa but allows the African Commission on Human and Peoples' Rights and African Court on Human and Peoples Rights to use articles 60 and 61 of the ACHPR to draw inspiration from the UN, European, Inter-American and national human rights systems to imply or infer minority language rights from the rights to equality and non-discrimination on the basis of language, right to identity, freedom of expression, right to culture, right to work, right to education, right to the protection of the family, the right of every child to a name and the right to a fair trial in the African Charter on Human and Peoples' Rights. On the other hand, there is the standard setting approach which entails the drafting of a specific treaty setting new standards

for the protection of minority languages and linguistic minorities. To this end, the thesis suggests and provides a draft framing for a Protocol to the African Charter on Human and Peoples' Rights on Minority Language Rights in Africa.

ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
AU	African Union
CAT	Convention Against Torture, Inhuman or Degrading Treatment or Punishment
CMW	Convention on the Rights of Migrant Workers and Members of their Families
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
ECHR	European Court on Human Rights
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
CCPR	International Covenant on Civil and Political Rights
CESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LSZ	Law Society of Zimbabwe

MDC	Movement for Democratic Change
NCA	National Constitutional Assembly
OAS	Organization of American States
OAU	Organisation of Africa Unity
OSCE	Organisation for Security and Co-operation in Europe
PANSALB	Pan South African Language Board
SA	South Africa
SERAC	Social and Economic Rights Action Centre
UANC	United African National Council
Universal Declaration	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Committee
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WGIP	Working Group on Indigenous Populations
ZANU PF	Zimbabwe African National Union Patriotic Front
ZAPU	Zimbabwe African Peoples Union
ZIM	Zimbabwe

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Chapter 1

Introduction

Does not the sun shine equally for the whole world? Do we not all equally breathe the air? Do you not feel shame at authorizing only three languages and condemning other people to blindness and deafness? Tell me, do you think that God is helpless and cannot bestow equality, or that he is envious and will not give it?¹

Introduction

This study's central aim is to examine and defend the use of a human rights framework for the protection of minority languages and linguistic minorities in Africa as an effective means to eliminate discrimination of linguistic minorities, protect minority languages, preserve linguistic minority identity and foster substantive equality between linguistic majorities and linguistic minorities.

Interestingly, some scholars have argued that international human rights law has very few provisions dealing with language rights generally and minority language rights specifically. For instance, Kymlicka and Patten² argue that the existing human rights instruments say little about language rights and uses this to dismiss the desirability of protecting language rights through human rights law.

This thesis refutes this argument by contending that international human rights law contains language rights norms in the form of individual rights (like equality and non-discrimination based on language) and specific minority rights (like right to use a language and right to preservation of linguistic identity) that can indeed be used to protect linguistic minorities and minority languages. This thesis argues that even though the international and regional standards are general and often qualified and have some gaps and deficiencies, they provide a human rights framework for the protection of minority languages and linguistic minorities in Africa.

¹ Constantine the Philosopher (Cyril), 9th Century A.D, quoted in JA Fishman *Readings in the sociology of language* (1969) 589.

² W Kymlicka & A Patten *Language rights and political theory* (2003) 33.

1.1 Background

The thesis assists in addressing at least four legal problems associated with minority languages and linguistic minorities in Africa. First, the concepts of 'minority' and 'minority language' are still problematic and debatable in Africa.³ For instance, the terms 'minority' and 'minority language' are not defined and are still debatable. The classification of minority using the numerical factor is difficult considering that most African states are multi-ethnic⁴ and multi-linguistic without a clear majority.⁵ In any event, most African states are reluctant to recognise minority groups such as linguistic minorities within their territories for fear that recognition may lead to secession.⁶ When minorities are recognised, they are mainly recognised as 'indigenous'⁷ or 'home-grown' minorities.⁸ For example, in *Sudan Human Rights Organisation and another v Sudan*, the African Commission interpreted 'peoples' to include linguistic minorities.⁹ In *Gunme and others v Cameroon*, the African Commission accepted the Southern Cameroonians as a people on the basis of linguistic tradition among others.¹⁰ This study contributes to clarifying the concepts of 'minority' and specifically 'minority languages' in Africa.

Second, the human rights protection of minority languages and linguistic minorities help address the problem of discrimination of linguistic minorities based on language that has been prevalent in the history of most African states. According to Skutnabb-Kangas, the promotion and

³ T Murithi "Developments under the African Charter on Human and Peoples' Rights relevant to minorities" in K Henrard & R Dunbar (eds) *Synergies in minority protection: European and international law perspectives* (2008) 385.

⁴ Report of the African Commission's Working Group of Experts on Indigenous Populations/ Communities (2005) 101-102.

⁵ S Slimane MRG Briefing: Recognising minorities in Africa (2003) 1.

⁶ Report on the first seminar on Multiculturalism in Africa: Peaceful and constructive group accommodation in situations involving minorities and indigenous peoples held in Arusha, Tanzania, 13-15 May 2000, UN Doc E/CN.4/Sub.2/AC.5/2000/WP.3, para 28.

⁷ Interestingly, the African Commission defined people in a way that included minorities in *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001).

⁸ 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) 239.

⁹ Communication 279/03, 296/05 (joined), *Sudan Human Rights Organisation and another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (28th Activity Report).

¹⁰ Communication 266/03, *Gunme and others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) (26th Activity Report).

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.¹¹

The pre-colonial and post-colonial history of Africa chronicled in Chapter 3 identifies how political power relations¹² introduced inequality in terms of language use to African languages that otherwise had the same linguistic value.¹³ 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.¹⁴ According to Bamgbose, most African countries adopted the language as-a-problem orientation that favoured one language and restricted other minority languages.¹⁵ Such language policies invariably led to linguistic assimilation,¹⁶ linguistic loss and discrimination against linguistic minorities.¹⁷

¹¹ 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.

¹² 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.

¹³ K Henrard *Devising an adequate system of minority protection: Individual human rights, minority rights and the right to self-determination* (2000) 244.

¹⁴ See M Beloff, 'Minority Languages and the Law' (1987) *Current Legal Problems* 140.

¹⁵ 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.

¹⁶ 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 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.

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 (human rights law included) protects vulnerable (linguistic) minorities who are unable to protect themselves due to their numerical inferiority.¹⁸ In a continent awash with states that claim to be democratic¹⁹ and have numerous linguistic minority groups,²⁰ (for example, over 250 in Nigeria,²¹ over 200 each in Sudan²² Chad²³ and Cameroon,²⁴ more than 100 in Tanzania²⁵, over 20 in Zimbabwe²⁶ and over 15 in South Africa),²⁷ all clamouring for protection, a study of the human rights framework for the protection of minority languages and linguistic minorities presents African states with useful criteria they can use to balance different linguistic interests in their territories. This partly justifies the choice of South Africa and Zimbabwe as some of the countries that have adopted new constitutions or constitutional reforms that are deliberately designed to provide for comprehensive institutional mechanisms for the protection of minority languages and linguistic minorities.

¹⁷ 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.

¹⁸ *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.'

¹⁹ See S Dersso & F Palermo Minority rights in M Tushnet *et al* (eds) *Routledge Handbook of Constitutional Law* (2013) 162.

²⁰ 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.

²¹ J Maxted & A Zegeye 'North and Central Africa' *World directory of minorities* (1997) 405-408.

²² See RK Hitchcock 'Human rights and indigenous peoples in Africa and Asia' in DP Forsythe & PC McMahon (eds) *Human rights and diversity* (2003) 209.

²³ Maxted & Zegeye (n 21 above).

²⁴ Dammers & Sogge 'Central and Southern Africa' in *World directory of minorities* (1997) 479.

²⁵ See RE Howard *Human rights in Common Wealth Africa* (1986) 97.

²⁶ Section 6 of the Constitution recognizes 16 languages.

²⁷ Section 6 of the Constitution recognizes 11 languages and also list the San and Koi languages.

Fourth, a human rights framework for the protection of minority languages and linguistic minorities contributes towards the preservation of minority languages and 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.'*²⁸ Examples include the Tonga, Ndebele and Shona in Zimbabwe and the Xhosa and Zulu in South Africa.

In Africa, individuals are conceived as being part of and in harmony with their community rather than independent or in conflict with it.²⁹ It is within a communal context and through culture that persons become persons.³⁰ The philosophical expressions *'I am because we are, and because we are therefore I am'*³¹ and *'umuntu ngumuntu ngabantu'*³² aptly reflects 'communality and the inter-dependence of the members of a community'³³ and that every individual is an extension of others.³⁴ Cultural identity therefore defines the right to identity in Africa. Protection of minority languages and linguistic minorities aids the preservation of the identity of linguistic minorities. This is especially significant in view of Henrard's contention that the right to identity³⁵ has been regarded as part of the 'peremptory norms of general international law'³⁶ used to protect minorities.³⁷

²⁸ V Webb & Kembo-Sure (eds) *African voices* (2000) 5.

²⁹ BO Okere 'The Protection of Human Rights in Africa and the African Charter on Human Rights and Peoples' Rights: A Comparative Analysis with the European and American Systems' (1984) 6 *Human Rights Quarterly* 141, 148 (indicating that the 'African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity'). Also see R Kiwanuka 'The Meaning of "People" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80, 82.

³⁰ See JAM Cobbah 'African Values and the Human Rights Debate: An African Perspective' (1987) 9 *Human Rights Quarterly* 309-331, 320-325; MW Mutua 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* 339, 346-359

³¹ JS Mbiti *African Religions and Philosophy* (1970) 141.

³² Literally translated as 'a person is a person through other people.'

³³ *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 163.

³⁴ *MEC for Education, KwaZulu-Natal & Others v. Pillay* 2008 (1) SA 474 (CC) para. 53.

³⁵ The right to identity is impliedly provided for in article 27 of the CCPR and explicitly enshrined in article 1 of the 1992 Declaration on Minorities and article 1 of the UNESCO Declaration on Race and Racial Prejudice.

³⁶ Henrard (n 12 above) 12 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,

The preceding discussion therefore indicates that there is merit in studying about the human rights framework for the protection of minority languages and linguistic minorities in Africa.

1.2. Statement of the problem

Most minority language speakers in Africa are discriminated against on the basis on their language. The drive towards national unity, social integration and construction of a national identity in most African countries has led to linguistic assimilation, linguistic loss and discrimination against linguistic minorities. The discrimination stems from the mistaken notions that multilingualism inhibits national integration and that national integration necessarily involves the emergence of a nation state with only one national language.³⁸

In any event, the linguistic value of languages and their relative political strength and importance are at variance.³⁹ Whereas all languages are linguistically equivalent, the speakers of the different languages are not equal in terms of political power relations.⁴⁰ The language history of Africa in Chapter 3 reveals that political dominance has played a critical role in determining which languages become dominant and which ones become vulnerable. This has seen languages spoken by non-dominant minorities becoming marginalized, sometimes extinct and linguistic minorities being discriminated⁴¹ against on the basis of language.

Accordingly, linguistic diversity, linguistic minorities and minority languages have been viewed as problems. Minority language speakers are sometimes constructed as linguistic oddities, deficient, suffering from lack of knowledge of the dominant language and backward rather than

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.'

³⁷ 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."

³⁸ A Bamgbose *Language and the nation: The language question in Sub Saharan Africa* (1991).

³⁹ Henrard (n 13 above) 244.

⁴⁰ T Skutnabb-Kangas 'Multilingualism and the Education of Minority Children' Skutnabb-Kangas & Cummins (n 11 above) 12.

⁴¹ The concept of discrimination and equality are addressed in the definition section of this Chapter.

owners of a positive resource, another language, or multilingual skills.⁴² Speakers of minority languages are associated with social problems such as poverty, low educational qualifications and little or no social mobility. The language-as-a-problem orientation therefore favours a single language and attempts to restrict (and sometimes annihilate) the role of minority languages.

In countries where minority languages have been afforded official language status such as Zimbabwe and South Africa, the official language status has been mainly symbolic in two respects. Theoretically, there has been delay in passing legislation regulating the use of the official languages by government, for example South Africa. Zimbabwe does not currently have such legislation. Practically, most official languages have hardly been used much by the apparatus of the state in administration, public education, public health, social services, the judiciary and government business. As a result, minority language speakers have lost and or diluted their culture, failed to express themselves (especially in public), faced disproportionate challenges in trying to access information, education, media, business, government and justice and failed to participate in development and politics.

The discrimination against minority language speakers on the basis of their language in Africa is compounded by the fact that there is no express legal framework for the protection of minority languages at either the sub-regional or continental levels. There is no specific treaty dealing with language rights in Africa.⁴³ Neither is there a policy governing the use of minority languages in Africa. Given this lacuna, a study of human rights framework for the protection of minority languages and linguistic minorities becomes justified.

1.3. Research questions

Taking into consideration the problem being interrogated, the leading research questions are as follows:

⁴² A Bamgbose (n 38 above).

⁴³ This African situation is different from Europe where there are two specific treaties dealing with language rights namely the Framework Convention for the Protection of National Minorities (a human rights treaty protecting persons) and the European Charter for Regional or Minority Languages (which protects linguistic diversity and therefore creates obligations in favour of languages).

- a) Does the African human rights system sufficiently protect minority language rights and linguistic minorities in view of international human rights norms?
- b) To what extent do African constitutional democracies (represented by SA and ZIM) use their constitutional designs to protect minority languages and linguistic minorities?
- c) What can be done at the national and continental levels to ensure an adequate protection of linguistic minorities and minority languages?

1.4 Thesis statement

Even though the international and regional standards are general and often qualified, they provide a human rights framework for the protection of minority languages and linguistic minorities in Africa.

1.5. Definition of terms and clarification of concepts

This section lays a theoretical foundation of the human right framework for the protection of minority languages and linguistic minorities. The section has two parts. The first part deals with the concept of the human rights framework where substantive equality and right to identity are discussed as bedrocks to the protection of linguistic minorities and minority languages. Substantive equality and minority-specific standards aimed to protect linguistic minorities are identified as the two pillars for a human rights framework for the protection of linguistic minorities and minority language rights. The second part explores the concept of minority in a bid to identify the criteria that should be used to identify a minority language and couch a working definition of a minority language.

1.5.1. Human rights framework

A human rights framework refers to a conceptual structure⁴⁴ derived from human rights norms that can be used to effectively protect minority languages and linguistic minorities.

⁴⁴ <http://whatis.techtarget.com/definition/framework> defines a framework as a real or conceptual structure intended to serve as a support or guide for the building of something that expands the structure into something useful. <http://www.thefreedictionary.com/framework> defines a framework as a fundamental structure for supporting or

The human rights framework for the protection of linguistic minorities and minority languages should aim to effectively integrate linguistic minorities while allowing them to preserve their linguistic identity.⁴⁵ This process requires two things namely (a) ensuring that linguistic minorities are placed on a substantially equal footing with other nationals of the state and (b) preserving linguistic identity.⁴⁶ The Minority Schools in Albania Advisory Opinion 6 of the Permanent Court of International Justice⁴⁷ brilliantly sums this up as follows:

The idea underlying the treaties for the protection of minorities was to secure for them the possibility of living peaceably alongside of the population, while preserving their own characteristics. In order to attain this objective, two things were regarded as particularly necessary. The first was to ensure that members of racial, religious and linguistic minorities should be placed in every respect on a footing of perfect equality with the other nationals of the state. The second was to ensure for the majority elements suitable for the preservation of their own characteristics and traditions... These two requirements are indeed closely interlocked, for there would not be true equality between a majority and a minority if the latter were ... compelled to renounce that which constitutes the very essence of its being a minority.

The court went on to hold that the substantive equality and preservation of identity (linguistic) are inseparable pillars of minority protection. They are important benchmarks when evaluating the extent to which a proposed system of minority protection adequately or sufficiently protects minority languages and linguistic minorities. Put differently, any system of protection of linguistic minorities should aim to achieve substantive equality and preserve linguistic identity. For this reason, the principle of substantive equality and the right to identity are key concepts

enclosing something else, especially a skeletal support used as the basis for something being constructed. <http://www.merriam-webster.com/dictionary/framework> defines a framework as a basic conceptional structure (as of ideas).

⁴⁵ Henrard (n 13 above) 8 observes that 'A *'full-blown system of minority protection consists of a conglomerate of rules and mechanism enabling an effective integration of the relevant population groups, while allowing them to retain their separate characteristics.'*

⁴⁶ 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), 'Prevention 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 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.'

⁴⁷ Publication Series A-B No 64 17.

that are used throughout the thesis to evaluate whether and the extent to which the African human rights system or framework sufficiently protects linguistic minorities and minority languages.

In order to effectively integrate linguistic minorities while allowing them to preserve their linguistic identity, the human rights framework should have two clusters of rights.⁴⁸ The first cluster consists of equality provisions (including prohibition of discrimination) and individual human rights of special relevance to linguistic minorities that ensure that linguistic minorities are placed on a substantially equal footing with other nationals of the state. Such rights include freedom of expression, right to fair trial and right to education.⁴⁹ The second cluster of minority language rights consists of minority-specific standards (rights and measures) designed to protect and promote the separate identity of minority language groups. These include the right to identity, the right to use a minority language in the public and private spheres, etc. Below the thesis explores the two clusters to further clarify the human rights framework for the protection of minority languages and linguistic minorities.

A. The concept of substantive equality

As highlighted above, equality⁵⁰ is key in ensuring that linguistic minorities are placed on a substantially equal footing with other nationals of the state. Henrard interestingly argues that the concept of equality is thin on one hand and very rich on the other hand.⁵¹ The thinness of the

⁴⁸ Henrard (n 13 above) 8 argues that an adequate system for the protection of minorities ‘... is based on two pillars or basic principles, namely the prohibition of discrimination on one hand and measures designed to protect and promote the separate identity of the minority groups on the other hand.’ H O’Nions *Minority rights protection in international law* (2007) 179 argues that minority rights and non-discrimination can be viewed as two sides of the same coin. However, this position is not universally accepted. There are some scholars who have argued that only the first pillar adequately protect minorities (CC O’Brien ‘What rights should minorities have?’ in B Whitaker (ed) *Minorities: A question of human rights?* (1984) 21; J Raikka (ed) *Do we need minority rights? Conceptual issues* (1996); NS Rodley ‘Conceptual problems in the protection of minorities: International legal developments’ (1995) 17 *Human Rights Quarterly* 64.

⁴⁹ This section focuses on equality. The scope of application of other individual rights of special relevance to linguistic minorities is dealt with extensively in Chapter 2.

⁵⁰ Z Motala & C Ramaphosa *Constitutional law: Analysis and cases* (2002) 253 argue that ‘[t]he right to equality is part of customary international law, if not *jus cogens*.’ See also GE Devenish *The South African Constitution* (2005) 47.

⁵¹ K Henrard, ‘The impact of international non-discrimination norms in combination with general human rights

equality principle presupposes some kind of comparison.⁵² International supervisory bodies have not yet tried to develop relevant criteria in relation to the comparator and the 'comparability' factor through (quasi) jurisprudence.⁵³ In the end, thinness does not recognize pure equality in the sense that two objects are always different in some way or the other.⁵⁴

The richness of the equality principle is the one predominantly used by international supervisory bodies. Equality is viewed as having many different (albeit interrelated) dimensions such as discrimination, affirmative action, equality before the law, equal protection of the law etc.⁵⁵ The richness of the equality principle also lies in the fact that there are several distinctive conceptions of equality.⁵⁶ An important one that this thesis focuses on is the distinction between formal and substantive equality.

Formal equality⁵⁷ presupposes sameness of treatment in that similar people that are similarly situated in relevant ways should be treated similarly and people that are not similar should be treated dissimilarly.⁵⁸ Formal equality regards all persons as equal bearers of rights and does not take into account the actual social and economic disparities between individuals and groups. In the context of this thesis, formal equality would require that all language speakers (majority and minority) be equal bearers of language rights despite their social and economic disparities. The limitation of the concept of formal equality is that although all language speakers are

for the protection of national minorities: The European Convention on Human Rights' Report prepared for the Committee of Experts on issues relating to the protection of national minorities, 25 October 2006.

⁵² S Fredman, 'Introduction' in S Fredman (ed) *Discrimination and Human Rights: the case of racism* (2001) 18.

⁵³ See K Henrard 'Equality and Non-discrimination', in M. Weller (ed) *Jurisprudence Digest: Minority Protection* (2006) 57.

⁵⁴ E Holmes 'Anti-Discrimination Rights Without Equality' (2005) 68 *The Modern Law Review* 179.

⁵⁵ See para 1 of the UNHRC General Comment no 18.

⁵⁶ Examples include equality of chances versus equality of results and *de jure* versus *de facto* equality. *Treatment of Polish nationals in Danzig* 1932 Series AB/44, 39-40 (2 W.C.R 814-5) 19-20 says 'Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of differential treatment in order to obtain a result which establishes an equilibrium between different situations... The prohibition against discrimination, in order to be effective, must ensure the absence of discrimination in fact as well as in law.'

⁵⁷ Aristotle argues that equality entails that likes should be treated alike, and unlikes unlike in proportion to their unlikeness. See Aristotle 'Nicomachean Ethics' in Jonathan Barnes (ed) 2 *The Complete Works of Aristotle: The Revised Oxford Translation* (1984) 1729.

⁵⁸ I Currie & J de Waal *The Bill of Rights Handbook* (2014) 210.

granted the same rights, the actual political, economic and social disparities produce a different impact on linguistic minorities.⁵⁹

Substantive equality on the other hand, requires an examination of the actual political, economic and social disparities between language speakers to determine whether the linguistic minorities should be treated similarly or differently.⁶⁰ It acknowledges differences in starting positions which may necessitate differential treatment in order to place linguistic minorities on a substantially similar footing with linguistic majorities.⁶¹ Substantive equality is therefore essential for linguistic minorities in their quest (for special measures in order) to protect and promote their linguistic identity.

Another crucial distinction is the distinction between equality of results and equality of opportunities. Equality of opportunities aims to equalize the playing field and equalize the starting point by providing special measures for disadvantaged linguistic minorities so that they begin to compete with linguistic majorities for access to state resources from the same position.⁶² According to Henrard,⁶³

⁵⁹ J Turi 'The importance of the conference theme: language and equality' in K Prinsloo et al (eds) *Language, law and equality, proceedings of the third international conference of the International Academy of Language Law (IALL) held in South Africa (1992)* 18 aptly observes that '... not all languages are equal from a historical point of view. There are dominant and dominated languages, leading to situations of linguistic minorities and thus creating negative situation in linguistic and non-linguistic fields. Language equality, we said, does not mean language uniformity. Nor does language equality among thousands of languages and dialects in the world mean absolute equality among them. It means that all languages, precisely because they are vitally different, must live and let others live equally in different ways... so we must proclaim solemnly the principle of equality and the principle of the dignity of all human languages. We must avoid any kind of unacceptable linguistic hegemony.'

⁶⁰ The *South West Africa Case (Second Phase)*,⁶⁰ the International Court of Justice established that 'The principle of equality before the law does not mean...absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means...relative equality, namely the principle to treat equally what are equal and unequally what are unequal...To treat unequal matters differently according to their inequality is not only permitted but required... [The principle of equality before the law] does not exclude the different treatment of persons from the consideration of factual differences such as... language... To treat different matters equally in a mechanical way would be unjust as to treat equal matters differently.'

⁶¹ S Fredman Providing Equality: Substantive Equality and the Positive Duty to Provide (2005) 21 *South African Journal on Human Rights* 163.

⁶² S Fredman 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a new definition of Equal Rights', in I Boerefijn et al (eds) *Temporary Special Measures* (2003), 110-111, 113-115.

Equality of results or outcome, goes beyond the equalization of the starting point, which it considers insufficient and hence ineffective to obtain real, substantive equality, and focuses on the outcome and actual equality of results.

Currie and de Waal⁶⁴ argue that substantive equality⁶⁵ requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment (in the form of affirmative action) to achieve this goal.⁶⁶ Put differently, substantive equality requires the law to ensure equality of outcome based on actual social and economic disparities between language speakers and is prepared to tolerate disparity of treatment (in the form of affirmative action) to achieve this goal. Substantive equality therefore contributes to the inclusion of disadvantaged linguistic minorities since unequal factual patterns are treated unequally to attain an equal result. It can therefore be argued that one of the differences between the two forms of equality is that formal equality concerns the nature of the treatment, while substantive equality deals with the result of a certain treatment.

The equality principle is formulated in different ways in international human rights instruments such as prohibition of discrimination,⁶⁷ equality before the law, equal protection of the law.⁶⁸ The following analysis focuses on prohibition of discrimination especially the various ways in which

⁶³ K Henrard, 'The impact of international non-discrimination norms in combination with general human rights for the protection of national minorities: The European Convention on Human Rights' Report prepared for the Committee of Experts on issues relating to the protection of national minorities, 25 October 2006 6.

⁶⁴ Currie & de Waal (n 58 above) 213.

⁶⁵ K Henrard (2007) *Equal rights versus special rights: Minority protection and the prohibition of discrimination* 13 refers to substantive equality as real or full equality.

⁶⁶ W Mc Kean *Equality and discrimination under international law* (1983) 65 highlights that Roosevelt, the then Chairperson of the UN Commission on Human Rights argued that '*equality does not mean identical treatment for men and women in all matters...*' Paragraph 8 of the UNHRC General Comment 18 highlights that '*[t]he enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance...*'

⁶⁷ 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, articles 2, 24 and 26 of the CCPR, 2 of the CESCR, 1 and 7 of the CMW and preamble of CERD. More specifically, article 26 of the CCPR prohibits the use of language as a basis for discrimination, article 3(1) of the ACHPR and article 24 of the American Convention on Human Rights. Article 4(1) further proscribes discrimination on the basis of language even in emergency situations. Article 24(1) prohibits the state from discriminating a child on the basis of language whenever the state takes measures to protect minors.

⁶⁸ 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.

non-discrimination (particularly eradication of discrimination, indirect discrimination and affirmative action) can contribute to substantive equality.

i. Prohibition of discrimination

Paragraphs 7 of the United Nations Human Rights Committee (UNHRC) General Comment 18 defines discrimination (on the basis of language) as:⁶⁹

[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.

Interestingly, Skutnabb Kangas and Dunbar argue that the principle of non-discrimination is so fundamental that it is considered to be *jus cogens*.⁷⁰

Equality and non-discrimination are interrelated⁷¹ despite the different formulations in international treaties and national constitutions.⁷² On one hand, equality guarantees that the law will protect and benefit people equally by ensuring that they fully and equally enjoy their rights

⁶⁹ 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 public life.’ A substantially similar definition is also contained in the International Labor Organization (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).

⁷⁰ T Skutnabb Kangas & R Dunbar, *Indigenous Children’s education as linguistic genocide and a crime against humanity? A global view* (2010) 22.

⁷¹ This possibly explains the formulation of article 26 of the CCPR that says ‘*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*’

⁷² BO Bryde & MA Stein ‘General provisions dealing with equality’ in M Tushnet *et al* (eds) *Routledge handbook of constitutional law* (2013) 288-289 identify the following three models namely a) constitutions containing only general equality provisions, b) constitutions with only non-discrimination provisions and c) constitutions with general equality provisions and either general discrimination prohibitions or discrimination prohibitions on the basis of particular characteristics.

and freedoms. On the other hand, non-discrimination prohibits unfair differential treatment on the basis of a number of grounds including language and enjoins the state to take special measures to protect or advance persons that were historically disadvantaged by unfair discrimination. To this end, Bayefsky refers to equality and non-discrimination as positive and negative statements of the same principle.⁷³

Discrimination is usually based on an enumerated ground such as language, race and gender. The grounds for discrimination can be open or closed. It is interesting to note though that the practice of supervisory bodies like the CERD Committee has sometimes established an overlap between language and race, or that differentiations on the basis of language could at least amount to indirect racial discrimination.⁷⁴

International human rights law makes a distinction between direct and indirect discrimination.⁷⁵ Direct discrimination occurs when persons who should be treated equally are explicitly treated unequally. Indirect discrimination occurs when a neutral regulation that applies equally to all persons has a discriminatory effect and there exists no objective justification for this result.⁷⁶ Put differently, indirect discrimination may refer to a practice, rule, requirement or condition which is neutral on its face, but which nevertheless has a disproportionate impact on a particular linguistic group, without there being a reasonable and objective justification for this impact.⁷⁷

⁷³ A.F Bayefsky 'The principle of Equality or Non-discrimination in International Law' (1990) 11 *Human Rights Quarterly* 5.

⁷⁴ These include Concluding Observations on Armenia, CERD Committee, UN Doc CERD/ C/304, Add 51, para 13; Concluding Observations on The Netherlands, CERD Committee, UN Doc CERD/C/304/Add 46, para 13; Concluding Observations on Macedonia, CERD Committee, UN Doc CERD/C/304/Add 38, para 15.

⁷⁵ ST Dahl *Women's Law: An Introduction to Feminist Jurisprudence (Scandinavian library)* (1988) 48, 49 contends that discrimination can also be *de jure* and *de facto*. *De jure* discrimination is discrimination in the law, meaning that the law states that persons should be treated differently, for instance, on the basis of their language. *De facto* discrimination on the other hand refers to a discriminatory result.

⁷⁶ In the *advisory Opinion on the Question Concerning Lease Concessions to German Nationals who have become Polish Subjects* (1922-1925) Permanent Court of International Justice, Series b, No. 6, 23-24 indirect discrimination was explained in the following words 'The facts that no ... discrimination appears in the text of the law of 14 July 1920, and that in a few instances the law applies to non-German Polish nationals who took as purchasers from original holders of German race, make no substantial difference... There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law... [A]lthough the law does not expressly declare that the persons who are to be ousted from the lands are persons of the German race, the inference that they are so is to be drawn even from the terms of the law.'

⁷⁷ See C Tobler *Indirect discrimination: A case study into the development of the legal concept of indirect*

Even though the UN Human Rights Committee initially did not recognize indirect discrimination in *Ballantyne & Others v Canada*,⁷⁸ the Committee accepted indirect discrimination in *Diergaardt v Namibia*,⁷⁹ *Althammer v Austria*⁸⁰ and *Derksen v The Netherlands*.⁸¹

Indirect discrimination is relevant to the protection of minority languages and linguistic minorities because it reveals that apparently neutral criteria *de facto* favour the dominant language speakers. In any event, indirect discrimination's focus on the actual effect of certain policies, laws and rules tends to contribute to the realization of substantive equality, which is of crucial importance for linguistic minorities.

It is important to highlight that in international law, not every difference in treatment amounts to prohibited discrimination. Difference in treatment is permissible if there is a reasonable and objective justification. Supervisory bodies have established a three-step test to assess whether a differentiation in treatment has a reasonable and objective justification.⁸² The first step establishes whether or not there is a *prima facie* case of discrimination.⁸³ The second step assesses whether there is reasonable and objective justification for the discrimination.⁸⁴ The third step involves a legitimate aim and a proportionality requirement.⁸⁵

As regards the proportionality test, attention is drawn to the fact that there are a number of

discrimination under EC law (2005) 57.

⁷⁸ Communication Nos 359/1989 & 385/1989, *Ballantyne, Davidson and Mc Intyre v Canada*, UNHR Committee (31 March 1993), UN Doc CCPR/C/47/D/359/1989 and 385/1989/Rev 1 (1993) para 11.5.

⁷⁹ 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) para 10.10.

⁸⁰ Communication 998/2001, *Althammer v Austria*, UNHR Committee, para 10.2.

⁸¹ Communication 976/2001, *Derksen v The Netherlands*, UNHR Committee, para 9.3.

⁸² Henrard, *The right to equality and non-discrimination and the protection of minorities in Africa* in Dersso (n 7 above) 219.

⁸³ For example, Also the CERD Committee acknowledges that only once a *prima facie* case of discrimination has been established by the claimant, the duty rests on the respondent state to offer the required justifications (General Comment 3 on Discrimination against Non-citizens, CERD Committee, para 24).

⁸⁴ See G Barrett 'Re-examining the concept and principle of equality in EC Law' (2003) 22 *Yearbook of European Law* 130-136.

⁸⁵ Paragraph 13 of the UNHRC General Comment 18 highlights that '[n]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'

considerations⁸⁶ that need to be taken into account to ensure that the means used by a state⁸⁷ to limit a right are proportional to the aim sought. In a nutshell, proportionality includes aspects of suitability, subsidiarity and proportionality in the narrow sense.⁸⁸ Suitability requires that the differential treatment should in principle lead to the legitimate aim which is sought after. Proportionality in the narrow sense requires a reasonable relationship between the infringement and the legitimate aim. It essentially follows that a greater infringement should further a heavier legitimate aim. The subsidiary test reviews whether there are other alternative less restrictive means to reach the legitimate aim.⁸⁹ Essentially, differentiation of treatment based on language is acceptable if it has a reasonable and objective justification.⁹⁰

Affirmative action

It is interesting to note that differential treatment may include affirmative or positive action.⁹¹ Eide defines affirmative action as⁹²

⁸⁶ F de Varennes, *Language, minorities and human rights* (1996) 127 identifies that some relevant considerations to be used to determine reasonableness of differentiation based on language to 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 language in a state, g) available resources and practicality, h) the state's goal in favouring one 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.

⁸⁷ States are afforded some margin of discretion in this regard. The concept of margin of appreciation is discussed in Chapter 2 under the European human rights system because its origins are traced in the European system and it is predominantly applied in that system.

⁸⁸ Henrard, The right to equality and non-discrimination and the protection of minorities in Africa in Dersso (n 7 above) 220.

⁸⁹ JH Gerards Intensity of judicial review in equal treatment cases (2004) 51(2) *Netherlands International Law Review* 52.

⁹⁰ For instance, in the *South West Africa Case (Second Phase)* [1966] International Court of Justice 284 differential treatment in mother tongue education was accepted because it was reasonable. The *Belgian Linguistic case* (1968) 1 EHRR 252 held that the non-discrimination principle can only be violated if the distinction had no 'reasonable and objective justification.' The United States case of *Lau v Nicholas* 414 U.S. 563 (1974) (United States) 6, 16-17 established the following '[D]ifferentiation as to... language... is discriminatory when it is unreasonable, arbitrary, unfair, capricious or invidious; and conversely, differentiation that occurs for a legitimate purpose and is rationally related to the purpose and necessary to its achievement is non-discriminatory... Everyone accepts the rule that for a right to be implemented there must be a relationship of proportionality between the benefits and the costs.'

⁹¹ 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

... 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.

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.⁹³ Affirmative action does not include separate legal status because it is only aimed at rectifying past discrimination.⁹⁴

Affirmative action aims at eliminating the enduring effects of past discrimination and reducing the vulnerability of linguistic minorities.⁹⁵ It is differential treatment aimed at substantive equality between members of linguistic minorities and the rest of the population.⁹⁶ Generally, affirmative

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 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.'

⁹² 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.

⁹³ W Mc Kean, *Equality and discrimination under international law* (1985) 100 summarizes 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.'

⁹⁴ A Eide, 'Minorities and indigenous peoples: Equality and Pluralism' in L.A Sicilianos (ed) *Nouvelles Formes de Discrimination – New forms of discrimination* (1995) 229 239-239 argues that affirmative action may include differential legal systems and concomitant status.

⁹⁵ W Kymlicka, 'Individual and community right' in J Baker (ed) *Group rights* (1994) 17 20.

⁹⁶ A Eide 'Minority situations: in search of peaceful and constructive solutions' (1996) 66 *Notre Dame Law Review* 1311-1346 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

action measures should only be allowed on a temporary basis and should be ended once the goal of substantive equality is reached.⁹⁷ Affirmative action is ultimately aimed at realizing substantive or real equality between linguistic minorities and linguistic majorities.

B. The concept of minority-specific standards aimed at preserving linguistic identity

It has been established above that one of the pillars for the protection of linguistic minorities and minority languages is minority-specific standards⁹⁸ designed to protect and promote the separate identity of minority language groups.⁹⁹ These standards come in the form of specific minority rights and positive measures by the state.

A number of concerns have been raised by state parties and academics opposed to 'special' minority rights. However, two distinctly come out. The first is that minority rights are group specific and this could lead to the escalation of secessionist movements¹⁰⁰ and eventually to the territorial fragmentation of the state¹⁰¹ which in turn hampers nation-building.¹⁰²

treatment. "[A]s long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.'

⁹⁷ Henrard (n 13 above) 148.

⁹⁸ Article 27 of the CCPR captures minority-specific standards. It states that 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.' Minority specific standards are also captured in the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities discussed in Chapter 2.

⁹⁹ 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), '...Protection of minorities is the protection of non-dominant groups 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.'

¹⁰⁰ See H Hannun, *Autonomy, sovereignty and self-determination: The adjudication of conflicting interests* (1996) 71.

¹⁰¹ 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) 13-76.

¹⁰² N Canefe, 'Sovereignty without nationalis? A critical assessment of minority rights beyond the sovereign nation-state model' in M Sellers (ed) *The new world order. Sovereignty, human rights and self-determination of peoples* (1981) 91 108.

This argument can be countered by the argument that real unity is not forcefully imposed.¹⁰³ Real unity accommodates linguistic and ethno-cultural diversity,¹⁰⁴ fosters integration without assimilation and protects the identities of (linguistic) minority.¹⁰⁵

The second concern is that minority rights should be rejected because they are created outside the human rights framework. It should be emphasised that minority rights are not situated outside the human rights framework, but are considered to be part and parcel of it.¹⁰⁶ For instance, article 1 of Framework Convention for the Protection of National Minorities highlights that minority rights form '*an integral part of the international protection of human rights.*'

Suffice to highlight that minority rights are 'special' measures and rights afforded to minorities (linguistic) to cure past discrimination and inequality by placing members of (linguistic) minorities in a substantively equal position as the rest of the population. They also aid linguistic minorities to preserve their identity.

Suffice to mention that minority rights are not absolute but are limited by the requirements of substantive equality discussed above. In short, the limitation would entail application of the proportionality principle. As indicated above, the proportionality principle refers to the relationship between a goal and means to the goal. According to Henrard,¹⁰⁷

¹⁰³ See RL Bash, 'Minorities: The struggle for a universal approach' in G Alfredson & F Mac Alister-Smith (eds) *The living law of nations: Essays on refugees, minorities, indigenous peoples and the human rights of other vulnerable groups – in memory of Atle Hrahl-Madsen* (1996) 143-155.

¹⁰⁴ See A Eide, 'Ethno-nationalism and minority protection: The need for institutional reforms' in X (ed) *The reform of international institutions for the protection of human rights*. International Colloquium on Human Rights (La laguna, Tenerife, 1-4 November 1992) (1993) 101-134.

¹⁰⁵ See PM Kitromilides, 'Political community in plural societies' in C Fried (ed) *Minorities: Community and identity* (1983) 341, 348.

¹⁰⁶ See UNHRC General Comment 18. F de Varennes 'Language rights as an integral part of human rights' (2001) 3 *International Journal on Multicultural Societies* 17 says 'The rights of minorities are often thought of as constituting a distinct category of rights, different from traditional human rights. Such a view fails to recognise that the use of descriptive expressions such as "minority rights" or "language rights" may be useful, but also imprecise. Most of what are widely recognised as minority rights are in fact the direct application of basic human rights standards such as freedom of expression and non-discrimination. This means that language rights are not collective rights, nor do they constitute "third generation" or vague, unenforceable rights: by and large, the language rights of minorities are an integral part of well established, basic human rights widely recognised in international law, just as are the rights of women and children.'

¹⁰⁷ Henrard (n 13 above) 225.

The restriction of minority rights and their general goal of realization of substantive equality calls for a sliding scale approach and thus for the measures that are adapted to each concrete situation.

Minority specific measures come in the form of 'special' minority rights and 'special' minority measures as discussed below.

1. 'Special' rights

Article 27 of the CCPR is regarded as the *Grundnorm* regarding minority rights.¹⁰⁸ Chapter 2 analyses extensively the normative content of article 27 of the CCPR. However, three preliminary things are worth noting about the application of article 27 of the CCPR to the language rights discourse.

First, although the right to identity is not explicitly mentioned it can be implied¹⁰⁹ in article 27 of the CCPR. Thornberry supports this view when he argues that '*article 27 is concerned with the right to identity of minorities even if this right is not named.*'¹¹⁰ It has already been argued above that the essence of linguistic minority protection is to preserve the linguistic identity of minorities and ensure that linguistic minorities are placed on a substantively equal footing with linguistic majorities.

Second, article 27 of the CCPR enshrines the qualified right to non-state interference in the use minority languages in private and in public. For linguistic minorities, this right would include qualified use of minority languages in names, education,¹¹¹ public media, courts, communication with public officials and recognition of minority languages as official languages.

¹⁰⁸ Henrard (n 13 above) 156.

¹⁰⁹ The concept of implied rights is discussed in Chapter 2.

¹¹⁰ 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) 20.

¹¹¹ 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 Chapter 2.

Third, the rights contained in article 27 of the CCPR are not absolute but can be limited. In *Lovelace v Canada*¹¹² and *Kitok v Sweden*,¹¹³ 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 justification¹¹⁴ and is consistent with other provisions of the CCPR 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.¹¹⁵ This evaluation uses the proportionality principle to balance between state interests in achieving national unity on one hand and the accomodation of linguistic diversity on the other hand.¹¹⁶ 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,¹¹⁷ h) the state's goal in favouring one 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.¹¹⁸ 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.

It is clear from this section that 'special' minority rights are essential in the effective protection of linguistic minorities and minority languages.

¹¹² Communication 24/1977 *Lovelace v Canada* UNHR Committee (14 August 1979) UN Doc CCPR/C/OP/1 at 10 (1984) (*Lovelace case*).

¹¹³ Communication 197/1985 *Kitok v Sweden* UNHR Committee (27 July 1988) UN Doc. Supplement No 40 (A/43/40) 221-230 (*Kitok case*).

¹¹⁴ 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.*'

¹¹⁵ 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.

¹¹⁶ Henrard (n 13 above) 248.

¹¹⁷ This requirement should be looked at in terms of political will and budgetary priorities.

¹¹⁸ de Varennes (n 86 above) 87, 93, 95, 99, 121 & 127.

2. Special measures

Special measures are meant to preserve and promote identity by helping reduce the vulnerability of linguistic communities by placing linguistic minorities on a substantially equal footing with linguistic majorities.¹¹⁹ Special measures recognise the past and present inequalities and discrimination perpetrated on minority language speakers and are designed to redress that and ensure that all language speakers are equal both in law and fact.¹²⁰

Special measures come in the form of state obligations,¹²¹ positive action and other measures like the one enshrined in article 27 of the CCPR. Unlike affirmative action, special measures are not necessarily temporary.¹²² This is especially critical to linguistic minorities in view of the need for enduring differential treatment in order to protect and promote the separate identity of linguistic minorities.

Supervisory practice has recommended the need for states to take positive measures. For instance, the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights recommended the additional training or education of minorities to enhance chances of employment.¹²³ The CERD Committee recommended that governments provide structural institutional measures that ensure that minorities preserve their identities.¹²⁴

It is important to note that clause 6.1 of the UNHRC General Comment 23 allows for the limitation of special measures using the prohibition of discrimination principle. This would entail the application of the proportionality principle. The positive measures should serve a legitimate

¹¹⁹ See Kymlicka, 'Individual and community rights' in Baker (n 95 above) 20.

¹²⁰ See clause 6.2 of UNHRC General Comment 23.

¹²¹ See clause 9 of UNHRC General Comment 23.

¹²² See article 1(4) and 2(2) of the CERD. See also M Freeman 'Temporary special measures: How long is temporary and what is special?' in I Boerefijn et al (eds) *Temporary special measures* (2003) 100.

¹²³ See W Vandenhoe *Non-discrimination and equality in the view of the UN human rights treaty bodies* (2005) 219 & 234.

¹²⁴ General Recommendation 21: The Right to Self-Determination, CERD Committee, para 5 says '...Governments should consider, within their respective constitutional frameworks, vesting persons belonging to ethnic or linguistic groups ... where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.'

aim (namely achieving substantive equality) and the measure used should be proportional to that aim.¹²⁵

C. Section summary

The preceding discussion in this section shows that the human rights framework for the protection of linguistic minorities and minority languages is anchored on substantive equality and preservation of linguistic identity. It comprises of equality and non-discrimination provisions as well as other individual human rights of special relevance to linguistic minorities on one hand and specific-minority rights and measures on the other hand. This explains why the key theoretical issue of this work is the analysis of the interrelation between individual human rights and minority language rights in the effective protection of minority languages and linguistic minorities. Relevant international and regional human rights provisions are analysed and evaluated in terms of the right to identity of minority language speakers and the principle of substantive equality. This thesis argues that even though the international and regional standards are general and often qualified and have some gaps and deficiencies, they provide a human rights framework for the protection of minority languages and linguistic minorities in Africa.

It can be argued that considering the fact that the right to identity and substantive equality are the two central themes of minority protection, the equality principle could be a potentially important avenue to enhance minority protection because it is not minority specific.¹²⁶ This is especially important in the African context where states tend to question whether the concept minority is relevant at all, and whether it would capture the reality of disadvantaged groups. The scope of protection of minority language rights and linguistic minorities through the equality principle depends on the willingness of international and regional supervisory bodies to interpret prohibition of discrimination in a way that furthers substantive equality and the right to linguistic identity of minorities.

¹²⁵ See Henrard, The right to equality and non-discrimination and the protection of minorities in Africa in Dersso (n 7 above) 231.

¹²⁶ Clause 4 of UNHRC General Comment 23 establishes that '[t]he entitlement, under article 2(1), to enjoy the rights under the Covenant without discrimination applies to all individuals within the territory or under the jurisdiction of the State whether or not those persons belong to a minority.'

However, this argument is not meant to deny the importance of having minority-specific rights. On the contrary, it does point to the possibility of heightened levels of *de facto* minority protection even without minority-specific rights.¹²⁷ Nevertheless, there would still be an added value of (explicit) minority-specific rights since they arguably provide explicit guidelines on the most pressing language issues for minorities.¹²⁸

1.5.2. The concept of a minority language

There is currently no agreed definition of a minority language. This lack of clarity emanates from the fact that the term ‘minority’ itself does not have a globally accepted definition. According to Capotorti:¹²⁹

The preparation of a definition capable of being universally accepted has always proved a task of such difficulty and complexity that neither the experts in this field nor the organs of the international agencies have been able to accomplish it today.

This lack of agreement provokes the question: ‘Do minority languages need to be defined in order to enjoy protection?’

The available authorities seem to suggest that there is no need to define minority languages in order for minority language speakers to enjoy protection. This is because there are a number of rights that are protected by international human rights even though there is no agreed definition of the group whose rights are protected. For instance, minority rights are protected by article 27 of the CCPR even though the term ‘minority’ is not defined in the CCPR. The Human Rights Committee did not define the term in the *Diergaardt* case.¹³⁰ Nor did the African Commission define the term ‘minority’ in *Malawi African Association and Others v Mauritania*.¹³¹ The term

¹²⁷ Henrard, The right to equality and non-discrimination and the protection of minorities in Africa in Dersso (n 7 above) 217-218.

¹²⁸ See also K Henrard *The impact of international non-discrimination norms in combination with general human rights for the protection of national minorities: Several United Nations human rights conventions* (2006) 17.

¹²⁹ 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 5.

¹³⁰ *Diergaardt* case (n 79 above).

¹³¹ *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

minority was not even defined by the Kenyan High Court in *IL Chamus v The Attorney General and Others*.¹³² Yet various human rights instruments protect minorities.

The argument that a group's protection is not contingent upon its definitive delineation or definition further finds support in that the term '*indigenous peoples*' does not have a universally acceptable definition and yet there is a whole body of human rights instruments protecting indigenous peoples. What is required is for objective criteria to be established that would identify a group as a 'minority.' Once a person possesses the criteria that identify him/her as a 'minority' then the person can be afforded legal protection.

The United Nations has to some degree adopted this approach. For instance, in the drafting of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities the Commission on Human Rights took the view that¹³³

[t]he question of definition was not a necessary prerequisite for drafting the declaration and that this question should not hinder the continuation of drafting work.

The working group established to draft the UN declaration argued that the declaration '*could function perfectly well without precisely defining the term as it was clear... to which groups the term referred to in concrete cases*.'¹³⁴

Along the same lines, Max van der Stoel, High Commissioner on National Minorities in the Organization for Security and Co-operation in Europe (OSCE), contends that¹³⁵

[g]iven the dynamism and diversity in the nature and manifestation of the minority phenomenon, the possibility and necessity of a universally agreed upon definition of the term minorities may indeed be doubted.

¹³² MISC Civil Application N0. 305/ 2004.

¹³³ UN Doc. E/CN.4/1986/43 3.

¹³⁴ UN Doc. E/CN.4/1991/53 para. 9.

¹³⁵ See M van der Stoel 'Key-note address to the human dimension seminar, case studies on national minorities issues' Warsaw 24-28 May 1993, reprinted in (1993) 1(1) *CSCE Office for Democratic Institutions and Human Rights Bulletin* 22.

It would follow from the preceding discussion that 'minority languages' do not need to first be defined in order for their speakers to enjoy legal protection of their minority language rights.

However, notwithstanding this position, it can be argued that it is possible to use existing literature to couch a working definition of a minority language to enhance clarity on the term 'minority language.' This approach is supported by Hannun's contention that the absence of a widely accepted definition of the term 'minority' does not bar scholars, judicial bodies and international organisations from using a common-sense conception of the term.¹³⁶ These sentiments implicitly recognize the need for some working definition of what constitutes a minority language. Such working definition helps bring clarity on the existing normative content of minority language rights in international law.¹³⁷

In attempting to define a minority language, the thesis takes a three-pronged roadmap. First, the thesis defines the term 'language.' Second, the thesis explores the concept of 'minority.' Third, the thesis uses the definitions of 'language,' 'minority' and 'minority languages' to come up with a working definition of 'minority language.'

i. What is a language?

There is no internationally agreed definition for the word 'language' so far. The Oxford English Dictionary defines a language as '*the method of human communication, either spoken or written, consisting of the use of words in an agreed way.*'¹³⁸ The major emphasis of this definition is human communication via the use of words. This implies that there can be no language if the method used does not facilitate human communication. Mumpande argues that language is a major vehicle for communication of ideas and culture.¹³⁹ Given that communication is a two way process, it becomes apparent that the deemed language needs to have at least two individuals that can understand it.

¹³⁶ H Hannun 'Contemporary developments in the international protection of the rights of minorities' (1991) 66 *Notre Dame Law Review* 1431. P Thornberry *International law and the rights of minorities* (1991) 164 acknowledges the need for a definition for purposes of clarity.

¹³⁷ Similar sentiments are expressed concerning a working definition of a minority by M Nowak *UN Covenant on Civil and Political Rights: CCPR commentary* (1993) 487 and MN Shaw 'The definition of minorities in international law' in Y Dinstien (ed) *The protection of minorities and human rights* (1992) 1 1-2.

¹³⁸ The Oxford English Dictionary (1989).

¹³⁹ I Mumpande *Silent voices: Indigenous languages in Zimbabwe* (2006) 1.

It is important to note that the Oxford Dictionary definition envisages spoken and written words as a medium of communication only. Its major weakness though is that it excludes sign language (which has been recognized as a language) from the definition. Sign language is neither written nor spoken. Neither does it use any words.

To this end, McDougal defines 'language' broadly as signs, symbols, both phonetic and phonemic, that are used for the sake of expression and communication.¹⁴⁰ In the same vein, Nordquist captures the definition of 'language' as '*a human system of communication that uses arbitrary signals, such as voice sounds, gestures, or written symbols.*'¹⁴¹ This definition is broad enough to include sign language.

From the above definitions, a language is, for purposes of this thesis, a system of human expression and communication (either spoken or written or gestured).

ii. *What is a minority?*

At the international level, Francesco Capotorti – Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities – couched a widely used definition of a minority based on article 27 of the CCPR when he defines a minority as:¹⁴²

[a] group numerically inferior to the rest of the population of a state, and in a non-dominant position whose members – being nationals of the state – poses ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religions and language.

¹⁴⁰ MS McDougal 'Human rights and world order: The basic politics of an international law of human dignity' (1980) cited by PJ Gromacki, Protection of language rights in international human rights law: A proposed Draft Declaration of linguistic rights' (1991-1992) 33 *Virginia Journal of International Law* 514.

¹⁴¹ <http://www.grammar.about.com> (accessed 1 May 2014)

¹⁴² Capotorti (n 129 above) 96. In the same light Jules Deschênes modified this definition to read that a minority is '*A group of citizens of a State, constituting a numerical minority and in a non dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.*' E/CN4/Sub2/1985/31, 14 May 1985 at 30.

According to Capotorti,¹⁴³ a minority can be identified by five distinct characteristics. Four of the five characteristics fall under the following objective criteria namely; a) Numerical inferiority of the group; b) The 'non-dominant position' that it has in the society; c) The 'ethnic, religious and linguistic characteristics' distinguishing the group from those of the 'rest of the population' of the state; and d) Members of the minority group must be nationals of the State where they seek to assert protection.

The one remaining subjective criterion relates to solidarity or the collective will to preserve their '*culture, traditions, religion or language*'. Alfredsson describes the objective and subjective criteria as '*two poles*' of minority identity.¹⁴⁴

The inevitable question that arises is 'to what extent does these five characteristics define or describe minorities (and in this thesis 'minority languages')?' An analysis of each of the five characteristics will help in answering this question.

a. Possession of distinct ethnic, religious and linguistic characteristics

Capotorti observes that a 'minority' should be a distinct group within a state possessing stable ethnic, religious and linguistic characteristics that differ sharply from those of the rest of the population. Nowak holds that groups within a population may be considered minorities only when they differ from the rest of the population of the state in which they exist by reference to ethnicity, religion or language.¹⁴⁵

This characteristic is hardly criticized as key in defining and describing a 'minority.' This thesis proceeds on the assumption that this characteristic is key in defining a 'minority language' as well.

b. Numerical inferiority

¹⁴³ Capotorti (n 129 above) 96.

¹⁴⁴ G Alfredsson 'Emerging or newly restored democracies – strengthening of democratic institutions and development' paper presented at *Workshop 1: Human rights, fundamental freedoms and the rights of minorities, essential components of democracy*, Conference on parliamentary democracy, Council of Europe (1991) 10.

¹⁴⁵ Nowak (n 137 above) 491.

Capotorti argues that *minorities must be numerical inferior to the rest of the population*.¹⁴⁶ Capotorti further avers that in countries where ethnic, religious and linguistic groups of roughly equal numerical size coexist, article 27 of the CCPR applies to them all. He further argues that a minority must constitute a sufficient number for the state to recognize it as a distinct part of the society and to justify the state making the effort to protect and promote it.

According to Capotorti, states should not grant special status to groups that are numerically small that it would be a disproportionate burden upon the resources of the state to grant them special status.¹⁴⁷ States should not be required to adopt special measures of protection beyond a reasonable proportionality between the effort involved and the benefit to be derived from it.¹⁴⁸ This approach is in line with the view of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in 1953 that provided that '*minorities must include a sufficient number of persons to preserve by themselves their traditional characteristics*'.¹⁴⁹ However, sufficiency of the group is certainly a question of fact depending on the nature of the characteristics and the social environment of the group.¹⁵⁰

The main question that has been posed is whether or not a comparison to '*the rest of the population*' relates to the population of the state in general or the population of other individual language groups individually.

In attempting to answer this key question, the first school of thought argues that the rest of the population refers to the population of other language groups individually. The main challenge with this approach lies with the group distribution in each country. One group may be a majority in one region and a minority (compared to other groupings) in another region. For instance, the Shona group is a majority in the Mashonaland region and the whole of Zimbabwe. They constitute more than 50 per cent of the total population of Zimbabwe. However, the Shona group is a minority in the Matabeleland region. This scenario creates an absurd situation where

¹⁴⁶ I Andrysek states that '[a]lready looking at the term minority we feel an arithmetical connotation: a minority is a smaller part of a whole'. 'Report on the definition of minorities' SIM Special No. 8 (1989).

¹⁴⁷ The test used is one of reasonable proportionality. See F Capotorti (n 46 above) 96.

¹⁴⁸ See also G Gilbert "The Legal Protection Accorded to Minority Groups in Europe" (1992) 23 *Netherlands Year Book of International Law* 72-73.

¹⁴⁹ MN Shaw, "The definition of minorities in international law" in Y Dinstein & M Tabory (eds) *The protection of minorities and human rights* (1992) 25.

¹⁵⁰ PV Ramaga 'The group concept in minority protection' (1993) 15 *Human Rights Quarterly* 577.

a majority group within a state can also be a minority within the same state if members of this group are few in another region or province of the same state.

The question of whether members of the majority community in a state can be considered minority if they are numerically inferior in a province or region arose in *Ballantyne, Davidson and McIntyre v Canada*.¹⁵¹ The UN Human Rights Committee (UNHRC), by a majority opinion, decided that members of such a community cannot be considered as a minority for the purpose of Article 27 of the CCPR. The UNHRC buttressed the notion that '*the minorities referred to in Article 27 are minorities within such a state (party to the CCPR), and not minorities within any province*'.¹⁵²

The second school of thought argues that '*the rest of the population*' refers to the population of the state in general. For instance, Jelena Pejic argues that numerical inferiority should be established by comparison to the entire population of a state.¹⁵³

Some scholars argue that if a group constitutes less than 50 per cent of the population of the state in general, that group qualifies as a minority.¹⁵⁴ They further argue that in a situation where there is no clear majority, the expression 'the rest of the population' is interpreted to refer to the aggregate of all groups of the population of the state concerned.¹⁵⁵

A number of problems arise from this approach. First, the comparison is between a culturally homogenous group and an amorphous one (the aggregate of all the rest). Second, this approach defines minority status mainly in terms of inter-group relations rather than in terms of power relations.

Third, it does not necessarily follow that the size of a group determines its dominant or

¹⁵¹ *Ballantyne case* (n 78 above).

¹⁵² *Ballantyne case* (n 78 above) para 11(2).

¹⁵³ J Pejic 'Minority rights in international law' (1997) 19(3) *Human Rights Quarterly* 666-685.

¹⁵⁴ For example A Eide in Working definition on minorities, Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities, E/CN4/Sub2/1993/34, 10 August 1993, SCPDPM (45th Session), para 29 says '*A minority is any group of persons resident within a sovereign State which constitutes less than half of the population of the national society and whose members share common characteristics of an ethnic, religious or linguistic nature that distinguish them from the rest of the population.*'

¹⁵⁵ Shaw 'The definition of minorities in international law' in Dinstein & Tabory (n 149 above) 25.

subordinated position in a society. For instance, pre-colonial Africa saw numerically inferior groups wielding political, economic and social power. This was the case in South Africa during the apartheid era and Zimbabwe during the colonial era. In terms of language, a numerically inferior group of language speakers can be in a position of domination and their language can indeed be the dominant language. This was the case in apartheid South Africa where the Afrikaans and English were the dominant languages in the public sector and English was dominant in the economic sector. Again, pre-colonial Zimbabwe saw numerically inferior English speakers dominant politically, socially and economically.

Fourth, Capotorti's argument that 'the rest of the population' refers to the population of the state in general does not take into considerations situations where there is a federal government and power is constitutionally vested in a provincial or regional government. In such states, minority issues arise at provincial and regional levels. De Varennes asserts the following:¹⁵⁶

It could be validly maintained that the drafters of Article 27 simply overlooked that in a federal state, even a national majority may find itself subjected to serious mistreatment if it is a numerical minority in one of the federal units and outside the reach of federal (national) protection.

For example, in the Indian case of *D.A.V. College, Jullunder v Punjab*, A.I.R., the Indian Supreme Court held that minority status can be determined not only nationally but also within the units of the federation, depending on the matter in question.¹⁵⁷ Also, Recommendation 1201 of the Parliamentary Assembly of the Council of Europe defines minority in a way that includes minorities at a regional level of a given federal state.¹⁵⁸

It is clear from the above that the numerical inferiority characteristic of a minority is very difficult to sustain as criterion to be used to define or describe a minority. This assertion is fortified by reference to the African context that is different from the European context where numerical inferiority plays a major role. Dersso¹⁵⁹ makes an interesting distinction between the European

¹⁵⁶ de Varennes (n 86 above) 143. See Ramaga (n 150 above) 105-110 & Henrad (n 12 above) 35.

¹⁵⁷ (1971) S. Ct. 1731.

¹⁵⁸ Parliamentary Assembly, Council of Europe, *Recommendation 1201* (1993), 'On an Additional Protocol on the Rights of National minorities to the European Convention on Human Rights', 1993.

¹⁵⁹ Unpublished: SA Dersso 'Taking ethno-cultural diversity seriously in constitutional design: Towards an adequate framework for addressing the issue of minorities in Africa' Unpublished PhD thesis, University of the Witwatersrand, 2010 8-9. In his words '*This difference means that in the context of Europe and similarly situated*

and African contexts when it comes to numerical inferiority. He argues that the European state emerged through a long history and organic process of state building by historically dominant groups. There is therefore a clear distinction between majority groups and minority groups in Europe. Again, minority rights issues become issues of number and cultural issues. On the other hand, the state in Africa was created as a result of colonialism and after independence, colonial borders were maintained. There are some states in Africa where it will be difficult to identify a majority group with more than 50 per cent of the total population. Minority rights issues in Africa therefore mainly focus on power relations and accommodation of population diversity.

The numerical inferiority characteristic, though not essential to defining a minority, can be used to assess the degree of vulnerability of a group and to help state parties ascertain the minimum numerical threshold required for a group to qualify for recognition as a minority and for the state to introduce special measures of protection. It can therefore be argued that if the numerical inferiority characteristic has been disqualified as essential to defining a minority, it is equally not an essential characteristic in defining a minority language.

c. *Non-dominance*

Capotorti argues that the minority group must be non-dominant in relation to the rest of the population. This characteristic relates to political,¹⁶⁰ economic¹⁶¹ and social¹⁶² non-dominance.

countries elsewhere in the world, the issue of minorities is about how to protect numerically smaller and ethno-culturally distinct groups from assimilation into and domination by the majority. Although it involves power relations, it has basically been seen as a statistical and cultural issue. The numerical factor has accordingly assumed particular importance in the definition of a minority in the European experience. In Africa, by contrast, the issue of minorities is not a statistical problem involving counter-balancing of the numerical strength of a majority. It is more about the accommodation of population diversity. The central thrust of minority issues in Africa is how to recognise and accommodate in the processes of the state the diverse identities and interests of members of the various ethno-cultural groups constituting the post-colonial African state in a way that provides sufficient structures and processes for the expression and accommodation of those identities and interests.'

¹⁶⁰ Ramaga (n 150 above) 113 argues that 'In modern times, political power is the major instrument of dominance. It may negate the possible influence of the majority by precluding the effect of all other elements of dominance.' C Palley *Constitutional law and minorities* (1978) 3 contends that 'minority' means '... any racial, tribal, linguistic, religious, caste or nationality groups within a nation state and which is not in control of the political machinery of the state.'

¹⁶¹ Pejic (n 153 above) 666-685.

¹⁶² Nowak (n 137 above) 188.

Non-dominance brings out the fact that ‘minority’ is a political, economic and social reality. Put differently, a minority is identified based on the degree of political and economic participation as well as social inclusion rather than on the number of members of a specific group. In fact, minorities are possibly undermined not so much by their weaknesses in numbers, but by their exclusion from power.¹⁶³ A minority is therefore generally regarded as lacking the political, economic and social clout to influence decision-making processes of a state. It is therefore justifiable to protect minorities based on their position of general vulnerability and weakness.

It is however important to point out that depending on the specific situation of a country, there will arise situations where different languages are dominant in different domains. For example, in 2002 Pandharipande¹⁶⁴ observed that in India Sanskrit was dominant in religion but not in economics, politics and business in India. The regional languages were dominant at home, but not in higher education and business at the national level. He further observed that English was dominant in higher education, business and politics but not in religion. As a result, the criterion of dominance indicated the same language as dominant and non-dominant in different domains. However, what is not discounted is the fact that non-dominance is a key criterion in determining whether or not a language is minority.

It is clear from the above that a minority is non-dominant politically, economically and socially. This is a key characteristic in defining a ‘minority’ and a ‘minority language.’

d. Nationality

Capotorti highlights that members of the minority group must be nationals or citizens of the state. It is argued below that this characteristic is no longer applicable in international law.

Jules Deschenes defines minorities as ‘... a group of citizens of a state...’¹⁶⁵ Stanislav Chernichenko also extends the definition to permanent residents.¹⁶⁶

¹⁶³ J Rehman *The weaknesses in the international protection of minority rights* (2000) 16.

¹⁶⁴ RV Pandharipande ‘Minority matters: Issues in minority languages in India’ (2002) 4 *International Journal on Multicultural Societies* 5-6

¹⁶⁵ E/CN4.Sub2/1985/31, 14 May 1985 at 30. Pejic (n 153 above) questions whether citizenship is a precondition for invoking article 27 and *whether indigenous groups are entitled to the rights for which it provides*. The issue of citizenship is dealt with below. As regard indigenous peoples, it is argued that indigenous peoples that have distinct ethnic, religious and linguistic characteristics and satisfy other criteria for minorities are covered by article 27. See clause 3.2 of the UNHRC General Comment 23.

However, paragraphs 5.1 and 5.2 of the UNHRC General Comment 23 extend the application of Article 27 of the CCPR to non-citizens.¹⁶⁷ The Kenyan High Court buttressed the position that minorities include non-citizens in *IL Chamus v Attorney General of Kenya and Others*.¹⁶⁸ Even Capotorti himself, in an article published 6 years after production of his 1979 special report, dropped the requirement that members of the minority need to be nationals of the state.¹⁶⁹

It is therefore clear from the above that the nationality characteristic is no longer a key characteristic in defining a 'minority' and a 'minority language.' Put differently, one does not need to be a citizen, national, or permanent resident for them to be regarded as a minority. Considerations of proportionality can be used to determine the extent of protection of minority language rights of nationals and non-nationals within a state.

e. Solidarity or Collective will

Finally, Capotorti observes that members of the minority group must have the collective will to preserve their own characteristics. Pejic¹⁷⁰ explains the meaning of solidarity as follows:

The sense of solidarity referred to in Capotorti's definition implies an awareness by persons belonging to a minority group of the ethnic, religious, or linguistic characteristics that set them apart from the majority, and a desire to preserve those characteristics as central to the common identity.

The solidarity¹⁷¹ or collective will in question can be ascertained from the fact that the group in question has kept its distinctive characteristics over a period of time. In Capotorti's words:¹⁷²

¹⁶⁶ 'Definition of minorities' Second working paper by Stanislav Chernichenko, UN DOC E/CN4/Sub2/AC5/1997/WP1, 2 April 1997, annex: Minorities – a working definition: article 1.

¹⁶⁷ It says '... migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights.'

¹⁶⁸ *IL Chamus v The Attorney General and Others* MISC Civil Application NO. 305/ 2004.

¹⁶⁹ F Capotorti 'Minorities' in R Bernhardt (ed) (1985) 8 *Encyclopedia of public international law* 385.

¹⁷⁰ Pejic (n 153 above) 666-685.

¹⁷¹ For a further discussion of this issue see JA Sigler *Minority rights: A comparative analysis* (1983) 5. Sigler defines minority as 'In its simplest form we can regard as a minority group any category of people who can be identified by a sizable segment of the population as objects for prejudice or discrimination or who, for reasons of deprivation, require the positive assistance of the state. A persistent non-dominant position of the group in political, social, and cultural matters is the common feature of the minority'.

Once the existence of a group or particular community having its own identity (ethnic, religious or linguistic) in relation to the population as a whole is established, this identity implies solidarity between members of the group and consequently a common will on their part to contribute to the preservation of their distinct characteristics. Bearing these observations in mind, it can be said that the subjective factor is implicit in the basic objective element, or at all events in the behavior of the members of the group.

Solidarity can also be gleaned from the group's refusal to assimilate. According to Shaw¹⁷³ *'[i]t is axiomatic that a group that has survived historically as a community with a distinct identity could hardly have done so unless it had positively so wished.'* Deschenes defines solidarity as *'a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.'*¹⁷⁴ Solidarity is therefore an essential characteristic in defining a 'minority' and 'minority language.'

It is apparent from the above analysis that only three characteristics are indisputably key in defining or describing a minority. These are a) Possession of stable ethnic, religious and linguistic characteristics that differ sharply from those of the rest of the population; b) Political, economic and social non-dominance and c) Collective will to survive and maintain these distinct characteristics.

A minority therefore can then be defined as a political, economic and social non-dominant population group within a nation that is distinguished by reference to its stable ethnicity, religion and language and has a collective will to survive and maintain its ethnicity, practice its religion and use its language.¹⁷⁵

¹⁷² Capotorti (n 129 above) 96.

¹⁷³ MN Shaw 'The definition of minorities in international law' (1991) 20 *Israel Yearbook on Human Rights* 13-42 40.

¹⁷⁴ J Deschenes E/CN4/Sub2/1985/31, 14 May 1985 30.

¹⁷⁵ K Henrard 'The Interrelationship between Individual Human Rights, Minority Rights and the Right to Self-Determination and Its Importance for the Adequate Protection of Linguistic Minorities' (2001) 1 *The Global Review of Ethnopolitics* 41-61 43 argues that *'[a] minority is a population group with ethnic, religious and linguistic characteristics differing from the rest of the population, which is non-dominant, numerically smaller than the rest of the population and has the wish to hold on to its separate identity.'*

iii. *What then is a 'minority language?'*

Before attempting to define a minority language using the three outstanding characteristics summarized above, it may be useful to analyse the definition of a minority language enshrined in article 1 of the European Charter for Regional or Minority Languages (European Languages Charter). It defines minority or regional languages as:

Languages different from the official language(s) of that State traditionally used by part of the population of a state that are not dialects of official languages of the state, languages of migrants or artificially created languages.

An analysis of the above definition reveals two glaring weaknesses. The first weakness is that the definition excludes the languages of migrants. It seems to follow Capotorti's view that minority languages are limited to nationals or citizens. As argued above, such an approach is inconsistent with article 27 of the CCPR as read with the UNHRC General Comment 23.

The second weakness is that it seems to presuppose that once a language is accorded official language status by the state, it (together with its dialects) ceases to become a 'minority language.' Put differently, the European Language Charter presupposes that a language is a 'minority language' if it is not recognized and accorded official language status by the state.

This approach is not supported by international jurisprudence and creates four problems. The first problem is that there is nothing in International law that suggests that once a language has been accorded official language status it ceases to be a minority. Clause 5.2 of UNHRC General Comment 23 makes it clear that the existence of minorities (in this case linguistic minorities) is not subject to the recognition by the state involved. This essentially means that the granting of official language status to a minority language does not eliminate or invalidate its real minority condition or its minority language status. The definition of a minority in article 1 of the European Language Charter is in direct conflict with article 27 of the CCPR as interpreted by clause 5.2 of General Comment 23 of the UN Human Rights Committee.¹⁷⁶

¹⁷⁶ EJR Vieytez '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?* 26 supports this views when he argues that official language status does not automatically eliminate the minority condition.

The second problem is that there is no clearly defined meaning of an official language. No international legal document contains any definition of 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.*’¹⁷⁷ A UNESCO report defined an official language as ‘*a language used in the business or government – legislative, executive and judicial.*’¹⁷⁸

What is clear though from International law is 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*,¹⁷⁹ the European Court of Human Rights held that¹⁸⁰

... [s]imilarly, regard being had to the principle of respect for national characteristics enunciated above, 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 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*,¹⁸¹ the UNHRC did not spell out the criteria used to afford official status to a language. Instead, the Committee 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 other sources help reveal some of the criteria a state can use in considering to grant a language official status. For example, *Podkolzina v Latvia et al* establishes that the sovereign state can take into account historical and political considerations. The UN

¹⁷⁷ 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.*’

¹⁷⁸ UNESCO Report entitled ‘The use of vernacular languages in education,’ (1953) 46.

¹⁷⁹ *Podkolzina v Latvia* 2002 ECHR 34.

¹⁸⁰ See *Birk-Levy v France*, application no. 39426/06, published on 6 October 2010 .

¹⁸¹ ‘n 79 above.’ See also the *Ballantyne case* (n 78 above).

also took the view that the determination of an official language or languages is a historical, social and political process.¹⁸² 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.¹⁸³ 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.¹⁸⁴

The third problem is that there is no clarity in international law of what the content of official language status entails. Does it imply a more or less uniform legal status or else a status that can be compared between different countries? Is it legally binding or symbolic? What rights does official language status bring to a language?

There is also no clarity regarding the levels of official language status. In a study of constitutions throughout Europe, Vieyetz¹⁸⁵ 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.

The second level of official language status is what Vieyetz calls 'full officiality and non-

¹⁸² *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 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.'

¹⁸³ F Capotorti (n 129 above) 75-76.

¹⁸⁴ EJRVieyetz (n 176 above) 15.

¹⁸⁵ EJRVieyetz (n 176 above) 24-25.

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 Vieyetz 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 Vieyetz calls ‘partial or limited officiality and non-dominant language.’ Again, this has two variations. The first 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 substate 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. Language barely fulfils symbolic functions regarding the outside sphere although it may logically operate as an element of cohesion of the group and presents a certain tolerance of the state towards plurality. Examples include Slovenian in Italy, Sorbian languages in Germany, Hungarian in Slovenia or Sami in Norway.

Vieyetz’s observations and classification of official language status therefore reveals a need to clarify the content of official language status at international law.

The final problem is that the granting of official language status is in some cases only symbolic and does not guarantee the use of the language by authorities. Put differently, the use of a language by state authorities does not necessarily correspond to its official status. 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. The bottom line though is that declaring a language official does not guarantee its use unless there is national legislation defining the extent of use.

For example, in *Société des Acadiens du Nouveau-Brunswick v Association of Parents for Fairness in Education*,¹⁸⁶ 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.¹⁸⁷ De Varennes comments on this decision as follows:¹⁸⁸

Official language status in Canada was merely a political or symbolic gesture which had to be further developed in other constitutional or legal provisions. It was the latter which ultimately determine the degree and use of that country's official languages – or specific constitutional provisions on the actual use of these languages.

¹⁸⁶ *Société des Acadiens du Nouveau-Brunswick v Association of Parents for Fairness in Education* (1986) 1 S.C.R. 549 (Canada) para 59.

¹⁸⁷ A contrary view is expressed in *Mentzen alias Mencina v Latvia*, [Application no. 71074/01, admissibility decision of 7 December 2004] where the European Court on Human Rights held that “...the Court acknowledges that the official language is [...] one of the fundamental constitutional values in the same way as the national territory, the organisational structure of the State and the national flag. A language is not in any sense an abstract value. It 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 both to impart and to receive information, without hindrance not only in their private lives, but also in their dealings with the public authorities. In the Court's view, it is first and foremost from this perspective that measures intended to protect a given language must be considered. In other words, implicit in the notion of an official language is the existence of certain subjective rights for the speakers of that language.” Suffice to mention is that this decision does not accurately reflect the international law position as argued above. Varennes [on page 10 of the report cited above] tries to justify this decision when he 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.” The flipside of this argument is that through legislation, a government can limit or totally eliminate the use of a language that has been declared official. Varennes is indirectly acknowledging the dominant international law position that official language status does not guarantee use. National legislation defines the extent of use of a language.

¹⁸⁸ F de Varennes (n 86 above) 4.

This decision clearly highlights that official language status does not guarantee use of that language. It would be wrong then to assume that a minority language that is afforded official language status ceases to be a minority merely by the granting of the official language status. This is especially so if the official language status is merely symbolic or political and the language is not used in government spheres. The use of a language (and not official language status) therefore becomes fundamental in determining whether it is minority or majority. This is especially supported by the fact that even though English is not the official language of United Kingdom, United States of America, New Zealand and Australia, English has been the language predominantly used in these countries. English is not a minority language in these countries.

Accordingly, official language status cannot therefore be used to define a 'minority language' or to distinguish it from a majority language. So, a language can be official but if it is not used in spheres of government, its speakers remain discriminated against and the language is considered minority. The extent of use of a language in the public or government domain is therefore an essential criterion that can be used to define a minority language. This approach finds support in the last part of the definition of a minority language given by Batibo that states as follows:¹⁸⁹

Sociolinguistically, a minority language is defined not only by its relative demographic inferiority but also, and *more so, by its limited public functions*. Thus, a minority language can be identified horizontally by looking at its weak or non-dominant position in relation to other languages in the region or nation, and vertically on the basis of its *low status and absence of use in public or official areas*.

This argument fits perfectly well with the 'functional load' concept developed by Pandharipande which states as follows:¹⁹⁰

[t]he concept of "functional load" in this context refers to the ability of languages to successfully function in one or more social domain. The load is considered to be higher or lower on the basis of the number of domains it covers. The higher the number of domains, the higher the load... The higher the functional load, the more powerful the language is perceived to be. Thus, *minority languages are those that carry a lower functional load and thereby hold a lower position in the*

¹⁸⁹ HM Batibo *Language decline and death in Africa: Causes, consequences and challenges* (2005) 51.

¹⁹⁰ RV Pandharipande (n 164 above) 1-2.

power (political, economic and social) hierarchy.

It is clear from the above then that the use of a language in the public government domain is a determinant factor in establishing whether a language is a 'minority' or 'majority' language. This ties perfectly well with the non-dominance criterion of a minority. Therefore, a language is a 'minority language' if it is politically, economically and socially non-dominant in terms of use in the public or government domain.

In summary, the following characteristics are essential in defining a minority language a) its speakers must have a stable linguistic characteristic that differ sharply from those of the rest of the population; b) its speakers must be politically, economically and socially non-dominant; c) its speakers must have a collective will to survive and maintain these distinct linguistic characteristics and d) the language must have limited use in the public or government domain.

Taking these criteria into consideration, a minority language can be defined as 'a language (including sign language) that has limited or no use in the public or official or government domain. Its speakers are a politically, economically and socially non-dominant distinct linguistic population group within a nation and they show a collective will and mutual solidarity focused on preserving their language.'

1.6. Research methodology

The study employs three methods of investigation. First, the study identifies the problem of discrimination based on language in colonial and post-colonial Africa that emphasized on assimilation of linguistic minorities to create a nation state.¹⁹¹ The second investigation consists of the identification of the human rights framework for the protection of minority languages and linguistic minorities in Africa (in the light of international and European minority language rights norms) as an effective way of addressing the problem of discrimination of linguistic minorities.¹⁹² The third line of investigation examines the extent to which the human rights framework for the protection of minority languages and linguistic minorities has been implementation in African

¹⁹¹ This was addressed in the first parts of Chapters 1 and 3.

¹⁹² The human rights framework was derived from a study of the International, European and African human rights system in Chapters 2 and 3.

states through the national constitutional framework. To this end, the study employs the case studies of South Africa and Zimbabwe.

This thesis uses different research methods. For instance, the thesis uses qualitative analytical research to establish a human rights framework for the protection of minority languages and linguistic minorities. This process involves an analysis of human rights treaties, soft law, jurisprudence and opinions from supervisory bodies and works of other scholars.

Second, the thesis applies the conceptual study method to identify criteria for classifying a language as minority and coin a working definition of minority language. The same method is used to identify an adequate system for the protection of minority language rights and linguistic minorities. Concepts like linguistic identity, discrimination and affirmative action are explored in the definition section of this Chapter to conceptualise the application of substantive equality to minority language rights.

Third, the thesis does a comparative desk study of international human rights system, European human rights system and Africa human rights system to establish an effective system for the protection of minority languages and linguistic minorities. The same method is used to identify best practices that are then used to draft the proposed Protocol to the African Charter on Human and Peoples' Rights on Minority Languages in Chapter 6. The comparative study takes into consideration the circumstances that Africa and other regions are in terms of the content of minority language rights, linguistic diversity and availability of resources to implement the global and regional norms.

Fourth, the thesis also uses the case study method to assess how a robust constitutional application of the minority language rights framework in African countries can enable linguistic minorities to access their language rights. South Africa (SA) and Zimbabwe (ZIM) are chosen as case studies for a number of reasons. First, both countries have a diverse array of language speakers that fairly represent multilingualism and linguistic diversity in Africa.¹⁹³ A study of the two countries in chapters 4 and 5 reveals linguistic problems associated with the political power relations around languages that are common to most African states. Second, both countries

¹⁹³ Because ZIM and SA are party to key International human rights instruments that secure minority language rights, they have an obligation to recognize, promote, protect and fulfill the different languages spoken by its citizens. See M Sepúlveda *et al Human rights reference handbook* (2004) 16.

have a common colonial history of discrimination against linguistic minorities¹⁹⁴ which fairly represents a number of African countries as identified in Chapter 3. A study of the two case studies would fairly highlight how the identified problem of discrimination of linguistic minorities could be addressed by African states. Third, both countries have a common history of migration of linguistic minorities. This has seen similar linguistic minority groups (like Kalanga, Koisan, Ndebele, Sotho, Venda and Xhosa) being present in SA and ZIM but are differently marginalised. Hence justification to interrogate conditions in the two neighbouring countries yet with a common human rights policy in the SADC, AU and the UN including human rights policy on the treatment accorded to minorities. Fourth, both countries have tried to implement international language rights norms at the national level by adopting constitutions or constitutional reforms that are deliberately designed to provide for comprehensive institutional mechanisms for accommodating linguistic diversity. A study of the two could identify best practices that African countries could use to protect minority languages and linguistic minorities.

The point of departure is that SA has a relatively developed legal framework for the protection of minority language rights. It has constitutional provisions, a specific act of parliament dealing with the use of official languages and has institutions, like the Pan South African Language Board, that help promote the use of minority languages. On the other hand, ZIM's legal framework for the protection of minority language rights is less developed and heavily influenced by the SA framework. ZIM recently introduced a new constitution¹⁹⁵ that contains language rights provisions, has no Act of Parliament specifically dealing with minority language rights, has no minority language rights jurisprudence and has no institutions designed to promote the use of minority languages. Case studying ZIM not only identifies the weaknesses of this emerging constitutional design but also popularises minority language rights issues and presents lessons that ZIM could use in the development of its constitutional framework for accommodating linguistic diversity and implementing minority language rights. Because ZIM constitutional language provisions are heavily influenced by SA, a study of the two countries is helpful in identifying best practices in SA that ZIM can use to strengthen its framework for the protection of minority languages and linguistic minorities. Finally, the lessons drawn from ZIM and SA can then be applied in other African countries to enhance the protection of minority language rights. It is interesting to point out that SA has developed an interesting jurisprudence on non-

¹⁹⁴ This history is explored in detail in Chapters 4 and 5 of this thesis.

¹⁹⁵ Constitution of Zimbabwe Amendment Act 20 of 2013.

discrimination¹⁹⁶ that could be used by other African countries and even international supervisory bodies.

Fifth, the thesis uses applied research to show how the human rights framework for the protection of minority rights can effectively be used to eliminate discrimination and foster substantive equality between linguistic majorities and linguistic minorities. The final observation on research methodology is that the thesis is a combination of approaches, among them, critical analysis, comparative international law approach, comparative foreign law, comparative constitutional law, positive law approach and so on. These research methods cover the entire spectrum of the research work from data collection to analysis and justification of conclusions.

1.7. Significance of the study

The significance of this thesis is in that this would be one of the rare theses to tackle the issue of minority language as a human right. This has both theoretical and practical significance. On a theoretical front, the study of language is in itself significant because language is a vehicle of communication, carrier of culture and mirrors identity. Second, there are currently few resources on the human rights protection of minority languages in Africa, particularly the ones that case study ZIM in light of SA. This thesis covers that gap by becoming one of the useful resources. Third, the thesis contributes to the on-going debate on how to devise an adequate system for the protection of minorities generally and minority languages specifically.

Fourth, the thesis contributes to an improved theoretical framework about how to accommodate linguistic diversity within states using human rights. Fifth, the thesis analyses the legal significance of declaring a language official and proposes some legal frameworks that can help ensure that languages that are declared official are not only symbolic but are used. Sixth, the thesis further suggests the strengthening of protection of linguistic minorities and minority languages in Africa through the progressive interpretation model and the norm standard setting model that proposes the adoption of either a charter or a protocol on minority languages. Finally, the thesis proposes ways in which global and regional human rights norms can be practically implemented at a national level by African states represented by ZIM and SA.

¹⁹⁶ This is discussed in detail in Chapter 4.

On the practical front, this thesis aims to lay a foundation for provoking scholarship on minority language rights and engenders a visibility of minority language rights issues in Africa. It can be a useful practical tool for research, campaigns on law and policy reforms, litigating on minority language rights issues and crafting an African treaty or protocol, constitutional provisions and national laws on minority languages.

For SA, the thesis may be useful in the discourse around the use of official languages in government and may also influencing SA jurisprudence in this area. For ZIM, the thesis can be a useful resource that can help legislators and drafters with content that can be used to couch a specific language statute. It will inform on the nature of the language rights afforded by the new constitution (rights or state obligations or both), the language rights approach to be taken (territorial or unitary), the normative content of language rights (informed by international human rights law), the use of official languages, etc.

1.8. Literature review

A literature review done reveals a gap in the literature in a number of aspects. First, there is no definition of minority languages. The preceding discussion analyses the objective and subjective criteria used to identify minorities and boldly couch a working definition of minority languages.

Second, there is no clearly defined human rights framework for the protection of minority languages and linguistic minorities in Africa. It is interesting to note that most writings on minority languages are found in the sociology, anthropology, linguistics, economics and politics. For instance, Preece informs this thesis in establishing that the problem of minorities is historically situated.¹⁹⁷ Other authors argue that the protection of minority languages does not lie in the law but in politics, sociology, linguistics and anthropology. Kymlicka and Patten¹⁹⁸ establish a literature gap when they argue that the existing human rights instruments say little about language rights. They then use this to dismiss the desirability of protecting language rights through human rights law.

The point of departure from Kymlicka and Patten's observations is that human rights provide a framework of the protection of minority languages and linguistic minorities. The thesis uses the

¹⁹⁷ JJ Preece *Minority rights: between diversity and community* (2005) 3.

¹⁹⁸ Kymlicka & Patten (n 2 above) 33.

two pillars of a ‘fully fledged’ system of minority protection couched by Henrard¹⁹⁹ to develop and apply a human rights framework for the protection of minority languages and linguistic minorities in Africa. This thesis argues that even though the international and regional standards are general and often qualified and have some gaps and deficiencies, they provide a human rights framework for the protection of minority languages in Africa.²⁰⁰ This contention finds support in *State v Makwanyane and Another*, where the Court justified judicial review as follows:²⁰¹

The 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.

The thesis therefore contributes to the normative legal theory of language rights and protection of minority languages and linguistic minorities in Africa.

Third, there is no specific treaty dealing with the protection of minority languages in Africa. The thesis analyses the African human rights instruments to establish the normative content of minority language rights in Africa. Beyond analysis, the thesis uses its findings to propose a Protocol to the African Charter on Human and Peoples’ Rights on Minority Language Rights in Africa.

Fourth, there is no book and very few articles written specifically about the legal protection of minority languages and linguistic minorities in Africa. This thesis adds on to the current literature on minority language rights in Africa.

Fifth, there is limited literature that views minority languages as a human right. This thesis intends to add to such literature by intricately linking minority languages to human rights. Put differently, the thesis contends that the use of a minority language is a fundamental and basic

¹⁹⁹ Henrard (n 13 above).

²⁰⁰ Even though the current human rights instruments (except the European Languages Charter discussed in Chapter 2) technically protect individuals who speak minority languages and not minority languages themselves, this human rights protection is arguably extended to minority languages themselves.

²⁰¹ *State v T Makwanyane and M Mchunu* 1995 3 SA 391 (CC) (my emphasis).

human right afforded to a minority language speaker that is protected by international and regional human rights instruments, national constitutions, laws and policies. It provides a human rights framework for the protection of minority languages in Africa.

Finally, there is scarcity of literature that explains why minority languages must be protected. This thesis fills this literature gap by analyzing literature in law, politics, sociology, anthropology and linguistics below and establishing that languages [especially minority languages] should be promoted, protected and fulfilled for at least the following eight reasons:

First, language mirrors one's identity and is an integral part of culture. Ngugi wa Thiongo referred to language as the soul of culture.²⁰² Put differently a person's language is a vehicle of their particular culture. According to Wright,²⁰³

[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.

Dooley and Maruska argue that²⁰⁴

[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.

In the same vein, Mumpande²⁰⁵ contends as follows:

This is clearly shown in proverbs and riddles. The former, for example, have dual meanings: a literal meaning and a metaphoric or cultural significance. When literally translated into another language, a proverb frequently loses its meaning and flavor.

²⁰² N wa Thiongo *Decolonizing the mind, the politics of language in African literature* (1986).

²⁰³ S Wright, *Language policy and language planning: From nationalism to globalization* (2004) 2.

²⁰⁴ 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.

²⁰⁵ Mumpande (n 139 above) 1 argues that 'a community without a language is like a person without a soul.'

According to Kwesi Kwaa Prah, language is a central feature used to transmit, interpret and configure culture, distinguishes us from the animal world and is the most important means of human intercourse.²⁰⁶

Makoni and Trudell observe that in sub-Saharan Africa, language functions as one of the most obvious markers of culture.²⁰⁷ 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.'*²⁰⁸ Examples include the Tonga, Ndebele and Shona in ZIM and the Xhosa and Zulu in SA. Serpell notes that the Zambian languages are intimately bound up with many of the society's traditional practices, and enshrine in multiplex and subtle ways the epistemological foundations of indigenous moral values.²⁰⁹ In this sense, linguistic diversity becomes symbolic of cultural diversity, and the maintenance or revitalization of language signals on going or renewed validity of the culture associated with that language.²¹⁰ Accordingly, protecting linguistic diversity becomes symbolic of protection and preservation of cultural diversity. The maintenance or revitalisation of language signals on going or renewed validity of the culture associated with that language. Conversely, denying minorities their language rights robs them of their medium of communication, identity and culture.

Ngubane refers to a person's language as a 'second skin' used to express our hopes and ideals, articulate our thoughts, explore our experiences and customs and construct our society and the laws that govern it.²¹¹

Second, language is a medium of communication, is a means of expression and allows a person to participate in community activities. Every language is a unique form of expression and conceptualisation of the world, and of the specific culture's history, traditions and ideas. It can be used as a medium of fostering a democratic culture. In this sense, language policy plays a

²⁰⁶ 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.

²⁰⁷ S Makoni & B Trudell 'Complementary and conflicting discourses of linguistic diversity: Implications for language planning' (2006) 22(2): 14-28 *Per Linguam* 21.

²⁰⁸ Webb & Kembo-Sure (n 28 above) 5

²⁰⁹ R Serpell *The significance of schooling* (1993).

²¹⁰ Makoni & Trudell (n 205 above) 21.

²¹¹ Page 3 of the South African National Policy Framework, 12 February 2003.

vital role in the process of democratic transition.²¹² According to the African Commission on Human and Peoples' Rights,²¹³

[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 identity.

It therefore follows that the discrimination on the basis of a minority language infringes the speaker's freedom of expression and participation in community activities.

Third, languages are also valuable as collective human accomplishments and on-going manifestations of human creativity and originality. This is buttressed by the argument for language preservation by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) that²¹⁴

[t]he world's languages represent an extraordinary wealth of human creativity. They contain and express the total 'pool of ideas' nurtured over time through heritage, local traditions and customs communicated through local languages.

Therefore, language assimilation and marginalisation as well as discrimination on the basis of language violate the right to intellectual property.

Fourth, language can be a source of power, social mobility and opportunities.²¹⁵ Williams and Snipper emphasize that in some quarters, language is a form of power.²¹⁶ The linguistic situation of a country's society usually reflects its power structure, as language is an effective instrument of societal control. According to Makoni and Trudell *'it is undeniably true that communities of*

²¹² F Grin & F Daftary F *Nation building, ethnicity and language politics in transition countries* (2003).

²¹³ *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 136.

²¹⁴ Makoni & Trudell (n 205 above) 16.

²¹⁵ R Phillipson (2003) *English-only Europe? Challenging language policy* 17.

²¹⁶ JD Williams and GC Snipper *Literacy and bilingualism*, (1990).

*speakers of smaller languages tend also to be the less politically empowered communities.*²¹⁷
May contends that²¹⁸

[I]language loss is not only, perhaps not even primarily, a linguistic issue – it has much more to do with power, prejudice, (unequal) competition and, in many cases, overt discrimination and subordination... Language death seldom occurs in communities of wealth and privilege, but rather to the dispossessed and disempowered.

This normally leads to situations where majority or minority communities within African states become vociferous in support of their own identity and desire to ensure that their language, customs and traditions are not lost. In this regard, language becomes an almost inevitable point of contention between communities. Marginalization of minority languages is therefore tantamount to discrimination, inequality before the law and deprivation of the right to political participation.

Fifth, linguistic loss is sometimes seen as a symbol of a more general crisis of biodiversity, especially indigenous languages that are seen as containing within them a wealth of ecological information that will be lost as the language is lost. This ecolinguistic school of thought regards saving endangered languages as an important part of the larger challenge of preserving biodiversity.²¹⁹ In Keebe's words, *'the loss of a language is the permanent, irrevocable loss of a certain vision of the world, comparable to the loss of an animal or a plant.'*²²⁰ Nettle and Romaine further argue that:²²¹

Losing a language, irrespective of the number of speakers of that language, deprives humanity of a part of our universal human heritage insofar as the language embodies a unique worldview and knowledge of local ecosystems.

²¹⁷ Makoni & Trudell (n 205 above) 23.

²¹⁸ S May (n 16 above) 368.

²¹⁹ R Phillipson, *Linguistic imperialism* (1991) 321.

²²⁰ D Keebe 'Language policy and linguistic theory' in J Marais & M Morris (eds) *Languages in a globalising world* (2003) 47-58.

²²¹ D Nettle & S Romaine *Vanishing voices: The extinction of the world's languages* (2000) 5; D Crystal *Language death* (2000).

The biodiversity analogy has engendered the use of metaphors such as '*language survival and death*'²²² and even more emotively, '*killer languages*' and '*linguistic genocide*.'²²³ Makoni and Trudell contend that this terminology highlights an ethical judgment that language loss is morally wrong, regardless of the particular conditions of its social uses, and that linguistic diversity is inherently good.²²⁴

Sixth, language has served both as a reason (or pretext) for brutal conflict, and as a touchstone of tolerance. Language can serve, in all spheres of social life, to bring people together or to divide them. According to Helen O'Nions,²²⁵

Recent history has shown the world that minority rights cannot be ignored and that rather than increasing irredentist tendencies they may be a prerequisite for the peaceful stable societies which benefit us all.

In the same vein, Eide argues that the protection of minorities through the rights to equality, human dignity and identity is aimed at advancing stability and peace domestically and internationally.²²⁶ Tocqueville says '*[t]he tie of language is, perhaps, the strongest and most durable that can unite mankind*.'²²⁷ The preamble of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities provides that

The promotion and the protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live.

Language rights can therefore serve to unite societies, whereas violations of language rights can trigger and inflame conflict. There is, therefore, every reason to clarify the position of language rights in various African states and in international human rights law, and to analyse

²²² D Crystal *Language death* (2000).

²²³ R Phillipson (1997) Realities and Myths of Linguistic Imperialism, *Journal of Multilingual and Multicultural Development*, 18:3, 238-248

²²⁴ Makoni & Trudell (n 205 above) 23.

²²⁵ H O'Nions *Minority rights protection in international law: The Roma of Europe* (2007) 179.

²²⁶ A Eide *New approaches to minority protection* (1993) 12.

²²⁷ A de Tocqueville *Democracy in America* Translated by George Lawrence (1969) J.P Meyer (Ed) Doubleday Achor: New York 1.

the experience of the management of multilingualism in diverse societies. This thesis becomes useful in this regard.

Seventh, language is the means by which knowledge is transferred from one person to another. Dooley and Maruska contend as follows:²²⁸

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.

Eighth, language can be used as a weapon of discrimination. Again, Dooley and Maruska argue that²²⁹

[I]language can be a measure of success or failure, a key to accessing privileges set aside for specific groups, and a point of difference by which 'Others' can be accepted and through which they can be ostracized. It is this last point—the access to privileges based on language and the attendant conflicts that may occur because of language discrimination—especially in multilingual states, that informs the need for language policies.

It is this negative use of language [discrimination] that this thesis seeks to address.

It is therefore clear from the above gaps that exist in the literature that this thesis is important in filling such gaps by defining minority languages; justifying their promotion, protection and fulfilment; picturing minority languages issues as human rights; establishing a human rights framework for the protection of 'minority language' rights; providing a working draft African Languages Charter and suggesting possible ways in which African states can implement global and regional norms (that they have bound themselves to) in national laws and policies.

1.9. Chapter overview

In this thesis, Chapter 2 assesses the extent to which the UN and European human rights systems use the two-pillar minority protection system to protect linguistic minorities and minority

²²⁸ Dooley & Maruska (n 202 above) 2.

²²⁹ Dooley & Maruska (n 202 above) 2.

languages. Chapter 3 explores the linguistic history of Africa and assesses the extent to which the African human rights system protects minority languages using the two-pillar minority protection system. Chapters 4 and 5 analyse the SA and ZIM constitutional frameworks for the protection of minority languages to investigate the extent to which international and regional human rights norms are implemented at national levels in Africa.

Throughout Chapters 2, 3, 4 and 5, the thesis analyses of the interrelation between individual human rights and minority language rights in the effective protection of minority languages and linguistic minorities. Relevant international and regional human rights provisions as well as constitutional provisions are analysed and evaluated in terms of the right to identity of minority language speakers and the principle of substantive equality.

Chapter 6 concludes the discourse by highlighting the findings. It further proposes two possible solutions to an adequate protection of minority languages and linguistic minorities at the African continent level. The first is the progressive interpretation of existing language norms through articles 60 and 61 of the African Charter on Human and Peoples' Rights. The second is the adoption of either a protocol or treaty for the protection of minority languages and linguistic minorities. The thesis drafts a working Protocol to the African Charter on Human and Peoples' Rights on Minority Language Rights in Africa for Africa to consider adopting.

Chapter 2

Towards the global normative framework for the protection of minority language rights

Introduction

Chapter 1 established that the human rights framework for the protection of linguistic minorities and minority languages should aim to effectively integrate linguistic minorities while allowing them to preserve their linguistic identity. This process identifies a two-pillar system for the protection of the identity of linguistic minorities and minority languages. The first pillar consists of individual human rights of special relevance to linguistic minorities that ensure that linguistic minorities are placed on a substantially equal footing with other nationals of the state. Such rights include equality, non-discrimination, freedom of expression, fair trial, culture, education and participation. The second pillar consists of specific minority rights and measures designed to protect and promote the separate identity of minority language groups. These include the right to identity, the right to use a minority language in the public and private spheres.

This chapter analyses the extent to which the UN and European human rights systems contribute to an adequate protection of linguistic minorities and minority language rights through the two-pillar system of minority protection reflected throughout the thesis. The Chapter focuses mainly on minority language rights norms emanating from binding treaties from the United Nations and Council of Europe. The treaties are analysed on the understanding that rights are not absolute but can be limited whenever there is reasonable and objective justification. The treaties are also analysed in the light of the jurisprudence from the UNHRC, European Court on Human Rights (European Court) and European Commission on Human Rights (European Commission). Where necessary, reference will also be made to minority language rights norms emanating from UNHRC General Comments, the views or opinions of supervisory bodies about state reports to UN supervisory bodies, opinions of the Advisory Committee of the Framework Convention for the Protection of National Minorities, opinions of the Committee of Experts of the European Charter on Regional or Minority Languages and thematic Recommendations and Guidelines of the Organisation for Security and Co-operation in Europe (OSCE) High Commissioner on National Minorities (HCNM).

The importance of studying the UN system is that it presents global minority language norms from which the African regional human rights system will be evaluated. In any case, African states are part of the UN and the norms contained in the UN system bind African states that have ratified specific treaties related to minority language rights. A study of the European system is crucial to this thesis for three reasons. The first reason is that the European system is arguably the most developed regional human rights system when it comes to the protection of minority language rights. The second is that the European system has a number of minority language rights norms and best practices that the African human rights system can draw lessons from. The third is that the final Chapter of this thesis draws inspiration from the European Charter for Regional or Minority Languages.

The Chapter is divided into three sections. The first section discusses the four prominent classifications of language rights. Section 2 focuses on how the UN human rights system contributes to an adequate protection of linguistic minorities and minority language rights through the two-pillar system of minority protection. The third section analyses the European human rights system to assess how the two-pillar system of minority protection contributes to an adequate protection of linguistic minorities and minority language rights.

2.1 Classification of minority language rights

Before analysing the UN and European human rights systems, it is crucial to highlight that minority language rights have been classified into a number of categories. The following are the prominent four categories:

*a. Individual language rights, collective language rights and group rights*²³⁰

²³⁰ There have been differences in approach amongst different authors concerning the categorization of rights. Some authors argue that rights can be divided into individual and collective rights only depending on the holder of rights. For instance, MM Toscano 'Language rights as collective rights: some conceptual considerations on language rights' (2012) 27 *Res Publica: Revista de Filosofía Política* 109-118 identified individual rights as the ones held by individuals whilst collective rights are held by groups. W Kymlicka, 'Individual and community rights' in J Baker (ed), *Group rights* (1994) 17-33 argues that collective rights can be subdivided into two namely a) right a group or b) rights of individuals within a group in their capacity as members of a group. Other authors use the terms collective rights and group rights interchangeably (see e.g M Malik, 'Communal goods as human rights' in C Gearty & T Tomkins (eds) *Understanding human rights* (1996) 138-169 157-158).

For purposes of this study, individual language rights are rights that are given to and exercised by individuals without association with any group.²³¹ Lubbe *et al* refer to individual language rights as linguistic rights meaning ‘... *the rights possessed by mankind to use language...*’²³² Individual language rights are justified on the basis of individual humanity. They include the right to speak and use one's own language in legal, administrative and judicial acts.²³³

Collective language rights refer to rights given to individuals but in their capacity as members of a certain group. ‘Persons belonging to minorities’ in article 27 of the CCPR refers to these rights. This concept recognizes linguistic minorities as a protectable group, but opts to protect individuals belonging to the group rather than protecting the group as such. The rights themselves are vested in individuals, but only those individuals who are members of a cultural and linguistic group. It can be argued that collective rights enshrined in article 27 of the CCPR imply the existence and preservation of a larger minority group in that the right of an individual member of a linguistic group would not be meaningfully exercised alone.²³⁴ Collective rights may possibly refer to the possible collective exercise of such rights as envisaged in article 27 of the CCPR.²³⁵

Group rights refer to rights granted to groups as such, and of which the group is the legal subject.²³⁶

b. Express language rights and implied language rights

Express language rights are those explicitly stated in a treaty. On the other hand, implied or un-enumerated rights entails that explicitly guaranteed rights in a treaty by necessary implication

²³¹ X Arzoz ‘The nature of language rights’ (2007) 6 *Journal on Ethnopolitics and Minority Issues* 2 7.

²³² *South African language rights monitor* (2002) 9. See RF Weber ‘Individual rights and group rights in the European community’s approach to minority languages’ (2007) 17 *Duke Journal of Comparative and International Law* 361.

²³³ <http://www.minorityrights.org/?lid=2810> (accessed 14 May 2013).

²³⁴ See I Currie, ‘Minority rights: Culture, education and language’ in M Chakalson (ed) *Constitutional law of South Africa* 35.10

²³⁵ As a point of departure, J Donnelly, ‘Third generation rights’ in C Brolmann (ed) *People and minorities in International law* (1993) 119-150 notes that there are several human rights that are exercised by individuals in their capacity as members of a social group without these rights qualifying as collective rights.

²³⁶ Henrard (n 13 above) 153.

may 'imply' the existence of the rights not explicitly guaranteed.²³⁷ This implied rights doctrine was applied in the landmark case of *Griswold v Connecticut* where the United States Supreme Court held that the unmentioned right to privacy was part of the 'penumbra' of the Ninth Amendment due process liberty clause. The implied rights doctrine was also applied by the African Human Rights Commission in the *Social and Economic Rights Action Centre (SERAC) and another v Nigeria*²³⁸ where the African Commission implied the right to shelter from the combined effects of the rights to property, health and the protection of the family.

The implied rights doctrine is used in analyzing minority language rights in the international bill of rights in Chapter 2. For instance, the right to use one's language can be implied from freedom of expression. This argument found favour in the Canadian case of *Ford v Quebec (Attorney General)*²³⁹ where the court held that:

Language is so intimately linked to the form and content of expression that there can be no real freedom of linguistic expression if one is forbidden to use the language of one's choice.

De Varennes argues that under international law, freedom of expression includes the right to linguistic expression.²⁴⁰ This argument finds support in *Ballantyne, Davidson & McIntyre v Canada* where the UNHR Committee established that freedom of expression entails use of one's language as envisaged in article 27 of the CCPR.²⁴¹ Freedom of expression therefore implies the right to use one's minority language.

The implied rights doctrine is very crucial in the language rights discourse within the African human rights system especially in view of articles 60 and 61 of the African Charter on Human and Peoples' Rights which allows the African Commission to draw inspiration from international,

²³⁷ F Viljoen *International human rights law in Africa* (2012) 327.

²³⁸ Communication 155/96, *Social and Economic Rights Action Centre (SERAC) and another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (15th Annual Activity Report).

²³⁹ [1988] 2 S.C.R. 712. A similar view was expressed in *Reference Re Criminal Code (Manitoba)* [1990] 1 S.C.R. 1123 (Canada) 1181 where the Canadian Supreme Court held that '[t]he choice of the language through which one communicates is central to one's freedom of expression. The choice of language is more than a utilitarian decision; language is, indeed, an expression of one's culture and often one's sense of dignity and self-worth. Language is, shortly put, both content and form.'

²⁴⁰ 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.

²⁴¹ *Ballantyne case* (n 78 above).

regional and national human rights norms to interpret African Charter provisions. Chapter 6 argues that the African Commission could use articles 60 and 61 of the ACHPR to draw inspiration from international, regional and national human rights norms to imply the right to use a minority language from the rights not to be discriminated against on the basis of language,²⁴² equality,²⁴³ freedom of expression,²⁴⁴ right to culture,²⁴⁵ right to work,²⁴⁶ right to education,²⁴⁷ right to the protection of the family,²⁴⁸ the right of every child to a name²⁴⁹ and the right to a fair trial.²⁵⁰

Throughout the thesis, the implied rights doctrine is used to analyse minority language rights norms at the international and African regional levels.

c. Personality and territorial language rights

This classification is based on where minority language rights should be conferred and enjoyed. Personality language rights refer to the notion that individuals should enjoy the same set of (official) language rights no matter where they are in a country. In terms of this principle, rights follow an individual wherever they choose to stay in the state.²⁵¹ The personality principle is used to a large degree in Canada where French and English enjoy official language status for all purposes of the federal government.²⁵²

The personality approach has been criticised for tending to perpetuate the dominant position that a historically privileged language group enjoys in a state and may pressure linguistic minorities to assimilate to linguistic majority groups.²⁵³ In any case, the practical application of

²⁴² Arts 2 of the ACHPR, 3 of the ACRWC and 2 of the African Youth Charter.

²⁴³ Arts 3 and 19 of the ACHPR.

²⁴⁴ Arts 9 & 25 of the ACHPR, 7 of the ACRWC and 4 of the African Youth Charter.

²⁴⁵ Arts 17(2) and (3) and 22 of the ACHPR, 12(1) of the ACRWC and 10 and 20 of the African Youth Charter.

²⁴⁶ Arts 13 and 15 of the ACHPR.

²⁴⁷ Arts 17(1) of the ACHPR and 11 of the ACRWC.

²⁴⁸ Arts 18 of the ACHPR, 18(1) of the ACRWC and 8 of the African Youth Charter.

²⁴⁹ Art 6 of the ACRWC.

²⁵⁰ Art 17 of the ACRWC.

²⁵¹ Kymlicka & Patten (n 17 above) 29.

²⁵² GM Balmer 'Does the United States need an official language? The examples of Belgium and Canada' (1992) 2 *Indiana International and Comparative Law Review* 445.

²⁵³ YT Fessha 'A tale of two federations: Comparing language rights in South Africa and Ethiopia' (2009) 9(2) *African Human Rights Law Journal* 501 506.

the personality language rights approach in multilingual African countries like South Africa with 11 official languages and Zimbabwe with 16 official languages is questionable.

On the other hand, the territorial language rights principle establishes that language rights should vary from region to region according to the local conditions. The territorial rights approach attempts to divide a multilingual state into unilingual regions where a local majority language is afforded official language status and is used in the public domain. Territorial rights apply only within established language boundaries or territories.

This approach is possible only when language communities are concentrated in linguistically homogeneous areas. Language borders may or may not be permeable. They are not permeable when no group can cross the border without losing its rights (as in Switzerland, Belgium, Bosnia-Herzegovina or Cameroon). They are permeable when the majority's rights accompany them when they cross into the minority zone. Language rights may also be granted on both an individual and a territorial basis, as happens in Finland. The European Charter for Regional or Minority Languages' core is about languages with a territorial basis (but there is also attention for non-territorial languages).

Another example of the territorial approach to language rights is India. Hindi and English are official languages for the national (Union) government. However, each Indian state has the power to select its own official language(s). This has led to India having about 30 official languages that are supposed to be used at the national, state or regional levels.²⁵⁴

In Denmark, the Danish language is official at the national level. However, local legislation guarantees the official recognition and use of three other languages at the territorial levels: German in the South Jutland, Faroese in the Faroe Islands, Greenlandic (or Kalaallisut) in Greenland despite these languages having few speakers.²⁵⁵

²⁵⁴ Assamese, Bengali, Bodo, Chhattisgarhi, English, French, Garo, Gujarati, Haveli, Hindi, Kannada, Khasi, Kodava, Kokborok, Konkani, Maithili, Malayalam, Marathi, Meiteilon, Mizo, Nepali, Oriya, Punjabi, Rajasthani, Sanskrit, Santali, Tamil, Telugu, Tulu, and Urdu.

²⁵⁵ Varennes (n 177 above) argues that there are about 60,000 speakers of Greenlandic in Denmark and 40,000 speakers of Faroese. It should be noted that Faroese and Greenlandic are spoken by a majority of the population in both Greenland and the Faroe Islands. There are less than 10,000 native speakers of German in South Jutland.

The major challenge with territorial language rights is that they cannot be exercised outside the territory in which minority language speakers are concentrated. This classification is normally used when individual states are implementing language rights using the official languages regime.

De Varennes interestingly suggests the use of a 'sliding-scale' approach²⁵⁶ to arrive at an equilibrium between state interests and minority language rights. This approach urges local authorities where linguistic minorities 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 progressively to the higher end.²⁵⁷ 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.

d. Tolerance and promotion oriented language rights

This classification was developed in a bid to try to distinguish between the public and private use of language. Tolerance language rights are deemed to be the rights that individuals have to the private use of language. These rights protect individuals from government interference with the private language choices. Tolerance rights include the use of a language in homes, associations and institutions of civil society, in the workplace, etc.²⁵⁸ Arzoz argues that tolerance rights are negative rights including rights that protect minority language speakers from discrimination and assimilation.²⁵⁹

Promotional language rights refer to the rights individuals have to use their language in public institutions like courts, public schools, the legislature, delivery of public services etc. Arzoz calls promotional language rights 'positive rights'.²⁶⁰ This distinction therefore hinges on the use of

²⁵⁶ de Varennes (n 86 above) 177-178.

²⁵⁷ de Varennes (n 86 above) 177.

²⁵⁸ Kymlicka & Patten (n 2 above) 26.

²⁵⁹ Arzoz (n 229 above) 5.

²⁶⁰ Arzoz (n 229 above) 5.

languages in the private and public domains. It does not apply in circumstances when international law guarantees both the private and public use of languages.²⁶¹

2.2 The protection of linguistic minorities and minority languages under the UN human rights system

Some scholars have argued that international human rights law has very few provisions dealing with language rights generally and minority language rights specifically. For instance, Kymlicka and Patten²⁶² argue that the existing human rights instruments say little about language rights. They then use this to dismiss the desirability of protecting language rights through human rights law.

This thesis refutes this argument by contenting that international human rights law contains language rights norms that can indeed be used to protect linguistic minorities and minority languages. These rights are either individual rights or minority specific rights. Some of those norms are expressly provided for, like the right of individuals belonging to minority groups to use their language contained in article 27 of the CCPR. Other rights can be inferred from the rights of every human being not to be discriminated against on the basis of language, the right to equality, freedom of expression, etc. This thesis argues that even though the international and regional standards are general, often qualified, can be reasonably limited and have some gaps and deficiencies, they provide a human rights framework for the protection of minority languages and linguistic minorities In Africa.

This section is structured around the two-pillar system for the protection of minority languages and linguistic minorities. The first sub-section analyses the contribution of individual human rights to the effective protection of linguistic minorities and minority languages. The approach is to analyse the individual rights themselves with reference to different treaties where they are provided for. In the process, differences in interpretation by supervisory bodies are highlighted. The second subsection assesses the contribution of specific minority rights to an adequate system for the protection of minority languages and linguistic minorities. The first focus is article 27 of the CCPR and then the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UDM).

²⁶¹ See a discussion of section 27 of the CCPR below.

²⁶² Kymlicka & Patten (n 2 above) 33.

2.2.1 Individual human rights and their contribution to an adequate protection of linguistic minorities and minority languages in the UN human rights system

The individual human rights discussed in this subsection are not specific to linguistic minorities but can be exercised by any human being within a state. However, linguistic minorities can use these individual human rights to secure their language rights. This category of rights falls under the first pillar of a system for the protection of minority languages and linguistic minorities. It includes the right to equality and non-discrimination, freedom of expression, fair trial, culture, education and participation. As will be shown later in this section, rights are not absolute but can be limited when there is reasonable and objective justification. These rights are derived from various UN treaties like the UN Charter, Universal Declaration of Human Rights (Universal Declaration), CCPR, International Covenant in Economic, Social and Cultural Rights (CESCR), CERD, UNESCO Convention on the Elimination of Discrimination in education, Convention on the Rights of the Child (CRC), Convention on the Rights of Migrant Workers and Members of their Families (CMW), UDM, etc. The subsection will highlight any differences in the interpretation of individual rights by supervisory bodies.

a. Equality and non-discrimination

Chapter 1 established seven observations on equality that are worth highlighting and expanding in this subsection. First, equality and non-discrimination mainly constitute the first pillar of an adequate system for the protection of linguistic minorities and minority languages. Equality²⁶³ is key in ensure that linguistic minorities are placed on a substantially equal footing with other nationals of the state.

Second, The equality principle is formulated in different ways in international human rights instruments such as prohibition of discrimination,²⁶⁴ equality before the law, equal protection of

²⁶³ Motala & Ramaphosa (n 50 above) 253 argue that '[t]he right to equality is part of customary international law, if not *jus cogens*.' See also GE Devenish *The South African Constitution* (2005) 47.

²⁶⁴ 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, articles 2, 24 and 26 of the CCPR, 2 of the CESCR, 1, 7 of the CMW and preamble of CERD and 1 of the UNESCO Constitution. More specifically, article 26 of the CCPR prohibits the use of language as a basis for discrimination, article 3(1) of the ACHPR and article 24 of the American Convention on Human Rights. Article 4(1) further proscribes discrimination on the basis of language even in emergency situations.

the law.²⁶⁵ Such formulations vindicate the assertion that equality and non-discrimination are interrelated.²⁶⁶ On one hand, equality guarantees that the law will protect and benefit people equally by ensuring that they fully and equally enjoy their rights and freedoms. On the other hand, non-discrimination prohibits unfair differential treatment on the basis of a number of grounds including language and enjoins the state to take special measures to protect or advance persons that were historically disadvantaged by unfair discrimination. To this end, equality and non-discrimination become positive and negative statements of the same principle.²⁶⁷

Third, equality can be formal or substantive. Formal equality means sameness of treatment in that similar people that are similarly situated in relevant ways should be treated similarly and people that are not similar should be treated dissimilarly.²⁶⁸ The limitation of the concept of formal equality is that although all language speakers are granted the same rights, the actual political, economic and social disparities produce a different impact on linguistic minorities.²⁶⁹

Substantive equality requires an examination of the actual political, economic and social disparities between language speakers to determine whether the linguistic minorities should be treated similarly or differently.²⁷⁰ Substantive equality has two components. First, there is equality of results that requires that the result of the measure under review must be equal. Second, there is equality of opportunities that suggests that all individuals must have an equal opportunity to gain access to the desired benefit, taking into consideration their different starting

Article 24(1) prohibits the state from discriminating a child on the basis of language whenever the state takes measures to protect minors.

²⁶⁵ 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.

²⁶⁶ This possibly explains the formulation of article 26 of the CCPR that says '*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*'

²⁶⁷ Bayefsky (n 73 above) 5.

²⁶⁸ Currie & de Waal (n 58 above) 210. Aristotle argues that equality entails that likes should be treated alike, and unalikes unlike in proportion to their unalikehood. See Aristotle 'Nicomachean Ethics' in Jonathan Barnes (ed) (1984) 2 *The Complete Works of Aristotle: The Revised Oxford Translation* 1729.

²⁶⁹ See J Turi 'The importance of the conference theme: language and equality' in Prinsloo (n 59 above) 18.

²⁷⁰ *The South West Africa Case (Second Phase)*.

positions.

Currie and de Waal²⁷¹ argue that substantive equality²⁷² requires the law to ensure equality of outcome and is prepared to tolerate social and economic disparity of treatment (in the form of affirmative action) to achieve this goal.²⁷³ Substantive equality therefore contributes to the inclusion of disadvantaged linguistic minorities since unequal factual patterns are treated unequally to attain an equal result. The difference between the two forms of equality is that formal equality concerns the nature of the treatment, while substantive equality deals with the result of a certain treatment.

Fourth, the strongest focus of the equality discussion both in UN instruments, related jurisprudence, and literature is on the prohibition of discrimination based on language, including its relationship to positive action.²⁷⁴ The UN system recognizes direct²⁷⁵ and indirect discrimination.²⁷⁶ Indirect discrimination refers to a practice, rule, requirement or condition which is neutral on its face, but which nevertheless has a disproportionate impact on a particular group, without there being a reasonable and objective justification for this impact.²⁷⁷ Indirect discrimination is relevant to the protection of minority languages and linguistic minorities because it reveals that apparently neutral criteria *de facto* favour the dominant culture. Even though the UN Human Rights Committee initially did not recognize indirect discrimination in *Ballantyne & Others v Canada*,²⁷⁸ the Committee accepted indirect discrimination in *Diergaardt v Namibia*,²⁷⁹ *Althammer v Austria*²⁸⁰ and *Derksen v The Netherlands*.²⁸¹

²⁷¹ Currie & de Waal (n 58 above) 213.

²⁷² Henrard (n 65 above) 13 refers to substantive equality as real or full equality.

²⁷³ W Mc Kean (1983) *Equality and discrimination under international law* 65 highlights that Roosevelt, the then Chairperson of the UN Commission on Human Rights argued that '*equality does not mean identical treatment for men and women in all matters...*' Paragraph 8 of the UNHRC General Comment 18 highlights that '*[t]he enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance...*'

²⁷⁴ Henrard, The right to equality and non-discrimination and the protection of minorities in Africa in Dersso (n 7 above) 218.

²⁷⁵ Direct discrimination occurs when persons who should be treated equally are explicitly treated unequally.

²⁷⁶ Indirect discrimination occurs when a neutral regulation that applies equally to all persons has a discriminatory effect and there exists no objective justification for this result.

²⁷⁷ See C Tobler Indirect discrimination: A case study into the development of the legal concept of indirect discrimination under EC law (2005) 57.

²⁷⁸ Ballantyne case (n 78 above) para 11.5.

²⁷⁹ *Diergaardt case* (n 79 above) para 10.10.

Fifth, in international law, not every difference in treatment amounts to prohibited discrimination. Difference in treatment is permissible if there is a reasonable and objective justification. Supervisory bodies have established a two-step test to assess whether a differentiation in treatment has a reasonable and objective justification.²⁸² The first step establishes whether or not there is a *prima facie* case of discrimination.²⁸³ The second step assesses whether there is reasonable and objective justification for the discrimination.²⁸⁴ Reasonable and objective justification implies a requirement of a legitimate aim and proportionality vis a vis that aim.²⁸⁵

As regards the proportionality test, attention is drawn to the fact that there are a number of considerations²⁸⁶ that need to be taken into account to ensure that the means used by a state²⁸⁷ to limit a right are proportional to the aim sought. In a nutshell, proportionality includes aspects of suitability, subsidiarity and proportionality in the narrow sense.²⁸⁸ Suitability requires that the differential treatment should in principle lead to the legitimate aim which is sought after. Proportionality in the narrow sense requires a reasonable relationship between the infringement

²⁸⁰ Communication 998/2001, *Althammer v Austria*, UNHR Committee, para 10.2.

²⁸¹ Communication 976/2001, *Derksen v The Netherlands*, UNHR Committee, para 9.3.

²⁸² *Henrard*, The right to equality and non-discrimination and the protection of minorities in Africa in *Dersso* (n 7 above) 219.

²⁸³ For example, Also the CERD Committee acknowledges that only once a *prima facie* case of discrimination has been established by the claimant, the duty rests on the respondent state to offer the required justifications (General Comment 3 on Discrimination against Non-citizens, CERD Committee, para 24).

²⁸⁴ See G Barrett 'Re-examining the concept and principle of equality in EC Law' (2003) 22 *Yearbook of European Law* 130-136.

²⁸⁵ Paragraph 13 of the UNHRC General Comment 18 highlights that '[n]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'

²⁸⁶ *de Varennes* (n 86 above) 127 identifies that some relevant considerations to be used to determine reasonableness of differentiation based on language to 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 language in a state, g) available resources and practicality, h) the state's goal in favouring one 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.

²⁸⁷ States are afforded some margin of discretion in this regard. The concept of margin of appreciation is discussed in Chapter 2 under the European human rights system because its origins are traced in the European system and it is predominantly applied in that system.

²⁸⁸ *Henrard*, The right to equality and non-discrimination and the protection of minorities in Africa in *Dersso* (n 7 above) 220.

and the legitimate aim. It essentially follows that a greater infringement should further a heavier legitimate aim. The subsidiary test reviews whether there are other alternative less restrictive means to reach the legitimate aim.²⁸⁹ Essentially, differentiation of treatment based on language is acceptable if it has a reasonable and objective justification.²⁹⁰

Sixth, differential treatment may include affirmative action measures for linguistic minorities aimed at eliminating the enduring effects of past discrimination, reducing the vulnerability of linguistic minorities²⁹¹ and placing linguistic minorities on a substantially equal footing with the rest of the population.²⁹² Generally, affirmative action measures should only be allowed on a temporary basis and should be ended once the goal of substantive equality is reached.²⁹³

Finally, the equality principle could be a potentially important avenue to enhance linguistic minority protection because it is not minority specific.²⁹⁴ However, the scope of protection of minority language rights and linguistic minorities through the equality principle depends on the willingness of international and regional supervisory bodies to interpret prohibition of discrimination in a way that furthers substantive equality and the right to identity of minorities.

b. Freedom of opinion and expression

Minority language rights can arguably be inferred from the right to freedom of opinion and expression enshrined in articles 19 of the Universal Declaration, 19 of the CCPR, article 13 of

²⁸⁹ JH Gerards *Judicial review in equal treatment cases* (2004) 49-55 52.

²⁹⁰ For instance, in the *South West Africa Case (Second Phase)* [1966] International Court of Justice 284 differential treatment in mother tongue education was accepted because it was reasonable. The *Belgian Linguistic case* (1968) 1 EHRR 252 held that the non-discrimination principle can only be violated if the distinction had no 'reasonable and objective justification.' The United States case of *Lau v Nicholas* 414 U.S. 563 (1974) (United States) 6, 16-17 established the following '[D]ifferentiation as to... language... is discriminatory when it is unreasonable, arbitrary, unfair, capricious or invidious; and conversely, differentiation that occurs for a legitimate purpose and is rationally related to the purpose and necessary to its achievement is non-discriminatory... Everyone accepts the rule that for a right to be implemented there must be a relationship of proportionality between the benefits and the costs.'

²⁹¹ Kymlicka 'Individual and community right' in J Baker (n 95 above) 20.

²⁹² See Eide (n 96 above) 1341-1342.

²⁹³ Henrard (n 13 above) 148.

²⁹⁴ Clause 4 of UNHRC General Comment 23 establishes that '[t]he entitlement, under article 2(1), to enjoy the rights under the Covenant without discrimination applies to all individuals within the territory or under the jurisdiction of the State whether or not those persons belong to a minority.'

the CRC and article 13 of the CMW. As argued in Chapter 1, language is a means of expression par excellence. Linguistic minorities can best express themselves in a language they speak.²⁹⁵ In the Canadian case of *Ford v Quebec (Attorney General)*²⁹⁶ the court held that *'[l]anguage is so intimately linked to the form and content of expression that there can be no real freedom of linguistic expression if one is forbidden to use the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression.'*²⁹⁷

De Varennes was therefore correct when he argued that under international law, freedom of expression includes the right to linguistic expression.²⁹⁸ In *Ballantyne, Davidson & McIntyre v Canada* the UNHR Committee established that freedom of expression entails use of one's

²⁹⁵ Article 19 of the CCPR says *'this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'*

²⁹⁶ [1988] 2 S.C.R. 712. A similar view was expressed in *Reference Re Criminal Code (Manitoba)* [1990] 1 S.C.R. 1123 (Canada) 1181 where the Canadian Supreme Court held that *'[t]he choice of the language through which one communicates is central to one's freedom of expression. The choice of language is more than a utilitarian decision; language is, indeed, an expression of one's culture and often one's sense of dignity and self-worth. Language is, shortly put, both content and form.'*

²⁹⁷ The Canadian Supreme Court arrived at a similar decision in *Devine v Quebec* [1998] 2 S.C.R. 712 (Canada). See also Unpublished: MM Chere 'The recognition of language rights under international human rights law: analysis of its protection in Ethiopia and Mauritius' unpublished LLM dissertation, 2009 20 says *'It will not be prudent to guarantee these rights to an individual while he has no means to exercise it. This provision has safeguarded the rights to use one's own language implicitly if not expressly. Non-recognition of the right to language will definitely paralyse the basic rights to freedom of expression, assembly and association.'*

²⁹⁸ 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. De Varennes makes some interesting observations. First, freedom of expression is breached where a government authority bans the private use of a minority language in public areas (for example banning individuals from having a private conversation in their own language in public streets, or banning the use of a particular language in a public park). Second, a state cannot forbid individuals to use a minority language in private correspondence or communications (including private business or commercial correspondence by telephone, electronic means, etc). Third, a prohibition making it illegal to play any song, or to stage theatre presentations, operas, etc, either in private or in public, in a particular language would be violation of freedom of expression. Finally, members of linguistic minorities – as well as all other individuals – have the right to use their language of choice in private activities involving expression. This includes the use of outdoor commercial signs and posters and applies to the language used in the private display of signs, posters, or other notices of a commercial, cultural and even political nature.

language as envisaged in article 27 of the CCPR.²⁹⁹ Implied in freedom of expression is therefore the right to use of one's minority language.

It is interesting to note that UN treaties are silent on whether or not freedom of expression guarantees access to media³⁰⁰ by linguistic minorities in view of the fact that media is one of the important means of linguistic and cultural reproduction.³⁰¹ Access to media for linguistic minorities helps in the maintenance of that language and enhances the accommodation of linguistic diversity. Henrard argues that on the basis of general principles of equality and non-discrimination enshrined in articles 2 and 26 of the CCPR as well as the right to identity, article 27 of the CCPR can be interpreted as guaranteeing the right for members of linguistic minorities to establish their own media.³⁰²

If this position is acceptable, it would follow that the state obligations applicable to article 27 of the CCPR would apply.³⁰³ This may mean that in order for the state not to violate articles 2, 26 and 27 of the CCPR, a state that grants one or several linguistic minority groups a frequency and or an amount of airtime on radio or television should also allocate an equivalent grant to the other remaining linguistic minority groups unless there is reasonable and objective justification for differential treatment.³⁰⁴ This would foster substantive equality and help preserve linguistic identity.

c. The right to culture

A number of international instruments recognise the right to culture. The possible limitation of this right will be discussed later in this section. For example, article 27 of the CCPR recognises the rights of linguistic minorities to practice their culture. Article 15 of the CESCPR protects

²⁹⁹ *Ballantyne case* (n 78 above) paras 11.3 & 11.4. The United Nations Human Rights Committee clearly indicated that legislation making French the exclusive language of outdoor commercial signs in Québec to the exclusion of all other languages in private matters breached the freedom of expression guaranteed to all by Article 19 of the International Covenant on Civil and Political Rights.

³⁰⁰ Media in this context includes written press, radio and television.

³⁰¹ See D Gomien, "Pluralism and minority access to media" in A Rosas *et al* (eds) *The strength of diversity: Human rights and pluralist democracy* (1992) 49.

³⁰² See Henrard (n 13 above) 268 and de Varennes (n 86 above) 156.

³⁰³ The article 27 state obligations are discussed in detail below.

³⁰⁴ Henrard (n 13 above) 268-269.

everyone's right to participate in cultural life. Article 5 of the UNESCO Universal Declaration on Cultural Diversity recognises cultural rights as an integral part of fundamental human rights.³⁰⁵

Minority language rights can arguably be inferred from the right to culture.³⁰⁶ Chapter 1 established that language is a carrier of culture. Further, Makgoba argues that '*language is a culture and in language we carry our identity*'.³⁰⁷ According to Kwesi Kwaa Prah, language is a central feature used to transmit, interpret and configure culture, distinguishes us from the animal world and is the most important means of human intercourse.³⁰⁸ Makoni and Trudell observe that in sub-Saharan Africa, language functions as one of the most obvious markers of culture.³⁰⁹ 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*'.³¹⁰ Examples include the Tonga, Ndebele and Shona in ZIM and the Xhosa and Zulu in SA. Implicit in the right to culture are minority language rights.

Accordingly, protecting linguistic minorities and their languages becomes symbolic of protection and preservation of cultural diversity. The maintenance or revitalisation of language signals on going or renewed validity of the culture associated with that language. Conversely, denying minorities their language rights robs them of their cultural expression.

De Varennes contends further that a government that prevents an individual from having a name or surname which is not in an official language or which does not feature in a prescribed list violates the right to use one's name and the right to culture which falls under the ambit of article 27 of the CCPR.³¹¹ In any case, he argues, names and surnames constitute a means of identifying persons within their families and the community, and as such are an inseparable part

³⁰⁵ It further stipulates that '*[a]ll persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice and particularly in their mother tongue*.'

³⁰⁶ For instance, the 2001 UNESCO Universal Declaration on Cultural Diversity provides for the right to cultural expression in a language of a person's choice.

³⁰⁷ Makgoba (1999) as cited in E Maloka & E le Roux (eds) *Africa in the new milenium, challenges and prospects* (2001) 34

³⁰⁸ 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.

³⁰⁹ Makoni & Trudell (n 205 above) 21.

³¹⁰ Webb & Kembo-Sure (n 28 above) 5

³¹¹ de Varennes (n 86 above) 120.

of private, family and cultural life.

Article 15 of the CESCER obliges state parties to take positive reasonable measures to ensure that everyone's right to culture is fully realised. It would follow that such positive reasonable measures are required to ensure that linguistic minorities use their languages.³¹²

d. Right to participation

Minority language rights can be inferred from the right to participation.³¹³ Article 25 of the CCPR further provides the right to participate in 'conduct of public affairs, directly or through freely chosen representatives' without any discrimination. Article 6 of the ILO convention No. 169 provides for the rights of indigenous people and national minorities to participate in all aspects of the society. For linguistic minorities, the right to participation is essential for the protection and promotion of minority language interests.

The Right to participate entails reasonable participating in elections, formulation and implementation of government policies, to hold public office, etc. Minority languages may also be used during religious worship or other religious practices, during a private part of a marriage ceremony, in private economic activities, within private groups and organisations and by political associations or parties.³¹⁴

Eide argues that the right to participation can be implemented where segments of the population obtain a degree of autonomy and several forms of territorial decentralisation like federalism, regional or local self-government.³¹⁵ Territorial decentralisation plays a very pivotal role in the protection of minority languages in instances where linguistic minorities are concentrated in certain regions.³¹⁶

³¹² See R O'Keefe 'The "Right to take part in cultural life" under article 15 of the CESCER' (1998) 47(4) The International and Comparative Law Quarterly 904, 917-918.

³¹³ See article 21 of the Universal Declaration.

³¹⁴ de Varennes (n 86 above) 126.

³¹⁵ A Eide, "Approaches to minority protection" in A Phillips & A Rosas (eds), *The UN minority declaration* (1993) 89.

³¹⁶ Henrard (n 13 above) 273 argues that '[b]y granting a measure of autonomy to the various segments of a state's population while guaranteeing a degree of political participation in matters of common concern, consociational democracy arguably amounts to a technique of minority protection that qualifies as an implementation of the right to

Territorial decentralisation is analysed in Chapters 4 and 5 in the context of the SA and ZIM constitutions. The application of territorial minority language rights is easy the best approach whenever territorial decentralisation obtains in a state.

e. The right to education

Minority language rights are implied in the right to education.³¹⁷ Education plays a crucial role in preserving and promoting linguistic identity.³¹⁸ The right to education in UN treaties was not initially intended to include the right to education in the mother tongue.³¹⁹ However, there was later a realisation that the right to education cannot be fully enjoyed without involvement of the mother tongue.³²⁰ Education involves the transfer of information and this can be effectively done when the recipient understands the language used in transmitting education.³²¹ Mother tongue education is also important for the preservation of the language and traditions of the culture conveyed through it to future generations.³²² Also, mother-tongue education impacts the emotional, cognitive and socio-cultural development of students.³²³ In any event, substantive equality and equality of opportunity demands that education be offered in the mother tongue to facilitate equal access to education by marginalised, disadvantaged and vulnerable linguistic

self-determination in its internal dimension for these segments/ population groups/ minorities concerns. Self-determination is outside the scope of this study.

³¹⁷ The right to education is provided for in articles 26 of the Universal Declaration, 13 & 14 of the CESC, 28, 29 & 40 of the CRC, 5 of the CERD as well as 10 & 14 of CEDAW. The right to education obliges the state to ensure that education is available, accessible, acceptable and adaptable. Soft law also recognizes the right to education. For instance, the 1978 UNESCO Declaration on Race and Racial Prejudice encourages governments to take steps to ensure that children of migrant workers are taught in their mother tongue. The 1993 Draft Declaration on the Rights of Indigenous Peoples provides for the rights of indigenous people to be taught in their mother tongue and to transmit their language and culture.

³¹⁸ Y Dinstein 'The degree of self rule for minorities in unitarian and federal states' in C Brolmann (ed) (1993) *Peoples and minorities in international law* 228.

³¹⁹ See article 26 of the Universal Declaration, the *travaux preparatoires* of the Universal Declaration and the *Belgian Linguistic Case* 1 EHRR 252 (1965)

³²⁰ 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.

³²¹ T Skutnabb-Kangas 'Language policy and political issues in education' in S May & N Hornberger (eds) *Encyclopedia of Language and Education* (2008) 107-119.

³²² Henrard (n 13 above) 257-258.

³²³ T Skutnabb-Kangas, *Bilingualism or not: The education of minorities* (1981) 118-119.

minorities. Unequal access to education has repercussions on access to jobs and political power.

The reasons cited above have influenced the wide acceptance of mother tongue education in international law and the prohibition of discrimination in education.³²⁴ For instance, the right of migrant workers' children³²⁵ and indigenous people to be educated in their mother tongue is vividly recognised under the International Labour Organisation Conventions (ILO) No. 107³²⁶ and 169.³²⁷ Policies like additive bilingualism have been developed to ensure that learning a second language should not be to the detriment of the mother tongue.³²⁸ This enables linguistic minorities to access dominant culture whilst retaining their minority culture. Such an approach accommodates linguistic diversity.

There are a number of restrictions to the enjoyment of the right to mother tongue education. First, minority languages need to be developed in order for them to be used at different levels of education. Curriculum, course books and teachers who are able to teach should be developed if mother tongue education is to be realised. This requires time, effort and money. Since linguistic minorities are usually in an economic and political non-dominant position, government assistance plays a crucial role in making mother tongue education a reality. Practically, the sliding scale approach could play a crucial role in determining the minority languages that should be developed and taught.³²⁹ The state would be expected to provide education in a certain minority language if the linguistic group is of a certain size and are concentrated in a certain area.³³⁰ Second, mother tongue education can be denied if the limitation is reasonable and justifiable.³³¹ The proportionality requirement discussed above would apply.

³²⁴ See article 1 of the UNESCO Convention against Discrimination in Education which defines discrimination as '*... any distinction, exclusion, limitation or preference which, based on... language... has the purpose or effect of nullifying or impairing equality of treatment in education...*'

³²⁵ Articles 45(3) and (4) of the CMW

³²⁶ Article 23

³²⁷ Article 28(1)

³²⁸ 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) 63 68 argues that the mother tongue should continue to be used throughout various levels of education even when a second language is introduced.

³²⁹ Henrard (n 13 above) 260-261.

³³⁰ de Varennes (n 86 above) 189.

³³¹ The *Belgian Linguistic case* (n 288 above) 284-254 held that the denial of mother-tongue education may not be for arbitrary reasons but must have an objective and reasonable justification.

It is important to highlight that under the UN human rights system, states are neither obliged to establish educational institutions for linguistic minorities nor to financially support private linguistic minority educational institutions.³³² However, article 5(1)(c) of the UNESCO Convention against Discrimination in Education recognizes 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.³³³

f. Language rights during criminal proceedings

Language rights in criminal proceedings are afforded to everyone and are not peculiar to minority language speakers. However, linguistic minorities can access their minority language rights through general language rights in criminal proceedings. Article 14(3) of the CCPR provides the following:

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...³³⁴

A number of issues arise from this provision. First, language rights in criminal proceedings are positive rights for everyone (including minority language speakers). Second, the cause of

³³² See Henrard (n 13 above) 265. At 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 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.*

³³³ Henrard (n 13 above) 266.

³³⁴ They are also enshrined in article 40(2)(b)(VI) of the CRC which guarantees language rights of children in criminal proceedings if the child cannot understand the language used by the court. Similarly, article 16(8) and 18(3)(a)(f) of the CMW safeguards the rights to free interpretation in court during criminal proceedings and to be informed of a charge in the language they can understand respectively.

charge should be conveyed in a language that the accused person understands. There is no guarantee in this regard that the charge must be conveyed in the language that the accused speaks. Clause 5.3 of the UNHRC General Comment 23 makes it clear that '*[a]rticle 14(3)(f) does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings.*'

There are times when a language that one understands is different from the language that one speaks. In *Guesdon v France*,³³⁵ 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*³³⁶ 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.

Third, 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.

Limitation of rights in the UN human rights system

Suffice to mention that the rights provided for in UN treaties are not absolute but are subject to limitations. The key provisions in this regard are article 29(2) of the Universal Declaration,³³⁷

³³⁵ Communication 219/1986 *Guesdon v France* UNHR Committee (23 August 1990), UN Doc CCPR/C/39/D/219/(1986) (*Guesdon case*).

³³⁶ Communication 451/1991 *Harward v Norway* UNHR Committee (16 August 1994), UN Doc CCPR/C/51/D/451/(1991).

³³⁷ Article 29(2) of the Universal Declaration provides that '*In the exercise of his rights and freedoms, everyone*

articles 19(3) and 25 of the CCPR³³⁸ and article 4 and 5 of the CESC.R.³³⁹ Such a discussion is crucial because the extent to which limitations to rights are considered legitimate determines the actual application and effectiveness of these rights.

There are, generally speaking, three conditions for legitimate limitation of rights provided for by the UN treaties namely:

a. The limitation must be provided by the law

This condition requires that the limitation must have a clear legal basis. The law authorising the limit of the right must be a) publicly accessible; b) sufficiently precise to enable people to regulate behaviour and c) it must not confer unfettered discretion on the state to prevent risk of abuse and arbitrary exercise of discretion.³⁴⁰

b. The limitation must serve a legitimate aim

The question that is normally asked is '[w]hat is the problem that is being addressed by the limitation? The legitimate aims refer to the interests of the state and the rights of others. Some of the enumerated aims include:

shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

³³⁸ Article 19(3) of the CCPR states that '*The exercise of the rights to [freedom of expression], carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary, (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order or of public health or morals.*' Article 25 of the CCPR insinuates that the limitation of a right should be a reasonable restriction.

³³⁹ Article 4 of the CESC.R states that '*The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.*'

³⁴⁰ Note 4 paragraph 25 of the UNHRC General Comment No. 34 says '*For the purposes of paragraph 3, a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.*'

- i. respect for the rights and reputations of others;
- ii. respect for public morals;
- iii. protection of public order;
- iv. promoting the general welfare in a democratic society..

c. Proportionality between end and means

The proportionality principle demands that the means used by a state to limit a right must be proportional to the aim sought. Note 4, paragraph 35 of the UNHRC General Comment No. 34 states as follows:

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

There are a number of considerations³⁴¹ that need to be taken into account to justify that the means used by a state³⁴² to limit a right is proportional to the aim sought.

In a nutshell, proportionality includes aspects of suitability, subsidiarity and proportionality in the narrow sense.³⁴³ Suitability requires that the limitation should in principle lead to the legitimate aim which is sought after. Proportionality in the narrow sense requires a reasonable relationship between the infringement and the legitimate aim. It essentially follows that a greater infringement should further a heavier legitimate aim. The subsidiary test reviews whether there

³⁴¹ de Varennes (n 86 above) 127 identifies that some relevant considerations to be used to determine reasonableness of differentiation based on language to 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 language in a state, g) available resources and practicality, h) the state's goal in favouring one 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.

³⁴² States are afforded some margin of discretion in this regard. The concept of margin of appreciation is discussed in Chapter 2 under the European human rights system because its origins are traced in the European system and it is predominantly applied in that system.

³⁴³ Henrard, The right to equality and non-discrimination and the protection of minorities in Africa in Dersso (n 7 above) 220.

are other alternative less restrictive means to reach the legitimate aim.³⁴⁴

Section summary

The discussion in this section reveals that the UN human rights system has the first pillar for the effective protection of linguistic minorities and minority languages namely non-discrimination and other individual human rights of special relevance to linguistic that ensure that linguistic minorities are placed on a substantially equal footing with other nationals of the state. Such rights include equality, non-discrimination, freedom of expression, fair trial, culture, education, participation and fair trial.³⁴⁵ Although these rights are qualified and can be limited when there is reasonable and objective justification, they *'provide a flexible framework capable of responding to many of the more important demands of individuals, minorities or linguistic minorities.'*³⁴⁶

2.2.2 UN Specific minority rights and how they contribute to the adequate protection of linguistic minorities and minority languages

It has been established above that the second pillar for the protection of linguistic minorities and minority languages is minority rights designed to protect and promote the separate identity of minority language groups.³⁴⁷ This subsection first analyses article 27 of the CCPR. The second part analyses minority language rights in the UDM. The UDM is considered a direct implementation of article 27 of the CCPR³⁴⁸ and an interpretative declaration of article 27 of the

³⁴⁴ Gerards (n 287 above) 52.

³⁴⁵ It is interesting to note that even non-UN documents confirm the rights enshrined in the UN treaties. For instance, the 1996 Universal Declaration of Linguistic Rights provides for the rights to use minority languages in media, education, courts, business, local government; the right to language development; the right to linguistic identity and the right to freedom of linguistic expression. This is not a United Nations document. It is a product of a World conference on linguistic rights held in Barcelona, Spain, from 6 to 9 1996 on the initiative of International PEN. More than 100 Associations, NGOs, Institutions concerned with language issues and Persons all over 90 states came together and participated for the final its adoption. The final Declaration has gone through 12 drafts before.

³⁴⁶ de Varennes (n 86 above) 275.

³⁴⁷ 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), '...Protection of minorities is the protection of non-dominant groups 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.'

³⁴⁸ Henrard (n 13 above) 158.

CCPR.³⁴⁹ The analysis will take into account General Comments from and decisions of the UNHRC as well as writings of eminent authors. The UNHRC General comments have a considerable degree of authority in that they bind UN bodies and influence decisions of the UNHRC.³⁵⁰ However, the views expressed by the UNHRC are not legally binding to states and the states' implementation of the UNHRC depends on the political willingness and legal culture of each state.³⁵¹

Perhaps before analysing minority rights, a brief comment about why minority rights were developed is warranted. The need for specific minority rights was recognised after realisation that the post second world war approach that universal respect for human rights in combination with the prohibition of discrimination was not sufficient to solve the minority problem. This is seen in the establishment of the UN Sub-Commission in 1946 with the double function to prevent discrimination and protect minorities. The 1948 General Assembly Resolution 217 C (III) entitled Fate of Minorities also requested a thorough study of the problems of minorities so that specific minority rights provisions may be couched to specifically deal with minority issues.³⁵² This culminated in the crafting of article 27 of the CCPR and the 1992 UDM to cater for minority specific needs. Capotorti argues that article 27 of the CCPR acknowledges:³⁵³

³⁴⁹ RL Barsh 'Minorities: The struggle for a universal approach' in Alfredson & Mac Alister-Smith (n 103 above) 150.

³⁵⁰ D Mc Goldrick, *The human rights committee: its roles in the development of the CCPR* (1991) 92-93 & 152-152.

³⁵¹ See Pejic (n 153 above) 682.

³⁵² General Assembly Resolution 217 C (III). Fate of Minorities, 10 December 1948 A/RES/3/217C says '*Considering that it is difficult to adopt a uniform solution of this complex and delicate question, which has special aspects in each State in which it arises, Considering the **universal character** of the Declaration of Human Rights, Decides not to deal in a specific provision with the question of minorities in the text of this Declaration; Refers to the Economic and Social Council the texts submitted by the delegations of the Union of Soviet Socialist Republics, Yugoslavia and Denmark on this subject contained in document A/C.3/307/Rev.2, and requests the Council to ask the Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities to make a thorough study of the problem of minorities, in order that the United Nations may be able to take effective measures for the protection of racial, national, religious or linguistic minorities.*'

³⁵³ F Capotorti, "The protection of minorities under multinational agreements on human rights" (1976) *Italian yearbook of international law* (3) 22. According to the United Nations General Assembly Official Records, Document A/2929, para. 183. (New York, 1955), '*[i]t was agreed that, while article 2, paragraph 1, and article 24 (the later article 26) of the draft Covenant on Civil and Political Rights contained a general prohibition of discrimination, differential treatment might be granted to minorities in order to ensure them real equality of status with the other elements of the*

[t]he need to make, for the benefit of minorities, special provision which is capable of ensuring that they receive genuinely equal treatment compared to the inhabitants of the state (and this) calls for a number of specific proactive measures over and above the treatment guaranteed, without distinction, to all. If the intention had been to restrict the protection of minorities to the enjoyment of certain freedoms, this would not have required a special clause.

A. Article 27 of the CCPR

Article 27 of the CCPR states that

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.³⁵⁴

Article 27 of the CCPR is regarded as the *Grundnorm* regarding minority rights.³⁵⁵ It is interesting to note that paragraph 8 of the UNHRC General Comment 24 establishes that the rights provided for in article 27 of the CCPR are peremptory norms that represents customary international law and is not subject to reservations by state parties to the CCPR. Clause 8 states as follows:

Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be subject to reservations. Accordingly, a state may not reserve the right... to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language...³⁵⁶

population. It was felt that an article on this question should be included in the draft Covenant on Civil and Political Rights.'

³⁵⁴ Even soft law recognizes this right. For example, the 1985 United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country in Which They Live provide for the right to retain their own language, culture and tradition. Also the 1993 Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights provides for the right of minority language speaker to use their own language in private and in public, freely and without interference or any form of discrimination.

³⁵⁵ Henrard (n 13 above) 156.

³⁵⁶ France made a reservation on article 27 of the CCPR. The effect of that reservation *vis a viz* General Comment 24 was not dealt with in the *Guesdon* case (n 333 above) because there was no allegation of violation of article 27 of the CCPR. It is crucial to note that sec 38(1) of the International Court of Justice Statute defines customary international law as '*general practice of states accepted as law*.' JP Grant & JC Barker (Eds) *Parry and*

However, some authors have argued that Article 27 does not necessarily seem to regard the minority question as a universal problem. The opening statement that *'[i]n those states in which minorities exist'* appears to suggest that minorities do not exist in some states. O'Nions³⁵⁷ argues that this opening statement clearly gives member states an opportunity to refuse to acknowledge the existence of minority groups within a state. However, such opportunity can be taken away by paragraph 4 of UNHRC General Comment 18 that indicates that the protection in Article 27 of the CCPR does not depend on national classifications.

The following five crucial questions are worth answering regarding the normative content of article 27 of the CCPR:

(i) Does article 27 confer any rights to linguistic minorities?

In trying to answer this question, Pejic argues that because article 27 is negatively phrased, it does not confer rights on ethnic, religious and linguistic minorities.³⁵⁸

With respect, this argument is bereft of merit. The fact that article 27 is negatively phrased does not mean that the right is not provided for. For example, the United Nations Convention Against Torture, Inhuman or Degrading Treatment or Punishment (CAT) has a number of rights that are negatively phrased. Yet the prohibition against torture in the Convention is absolute. In any event, the UNHRC General Comment 23 establishes that article 27 confers rights to minorities.³⁵⁹

Grant encyclopaedic dictionary of international law (2009) 109 argues that customary international law results when states follow certain practices generally (state practice) and consistently out of a sense of legal obligation (*opinio juris*). Put differently, customary international law is the term used to describe a widely accepted practice followed by States which derives from a sense of legal obligation. Customary international law binds all states (except those that may have objected to it during its formation) irrespective of whether they have ratified any relevant treaty.

³⁵⁷ O'Nions (n 223 above) 197.

³⁵⁸ Pejic (n 153 above) 669-670 says *'The third limiting element is that Article 27 is the only provision in the Covenant which is negatively phrased. Instead of stating that persons belonging to minorities "shall have" the rights specified, it declares that they "shall not be denied" those rights. The exact meaning of this phrase has been the subject of much debate, carried on to this day.'*

³⁵⁹ Paras 1, 5.1, 5.2 & 6.1 say *'The Committee observes that this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the*

The inevitable question is which minority language rights are provided for in article 27 of the CCPR?

It can be argued that at least three language rights are impliedly protected by article 27 of the CCPR. The first right is the prohibition of assimilation. The negative formulation of article 27 of the CCPR points to a minimum state obligation to abstain or refrain from interfering with language use of linguistic minorities³⁶⁰ and adopt an attitude of tolerance.³⁶¹ It will be argued below that article 27 also imposes positive state obligations that prevent assimilation of linguistic minorities.³⁶²

The second right implied in article 27 of the CCPR is the right to identity. Thornberry supports this view when he argues that *'article 27 is concerned with the right to identity of minorities even if this right is not named.'*³⁶³ Thornberry further postulates that the right to identity can be

Covenant... Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a "right" and requires that it shall not be denied.'

³⁶⁰ See de Varennes (n 86 above) 135-136. The non-interference approach appears to be the approach of the UNHRC in the *Kitok* case (n 113 above) & *Ominayak v Canada* Communication 167/1984, UN Document A/42/40.

³⁶¹ Thornberry (n 37 above) 179. He says *'The feeling among the majority of delegates to the Third Committee was that the draft Article provided represented a minimum rather than a maximum of rights for minorities, a situation which a number of states apparently found acceptable... [T]he only new duty represented by Article 27 was that of tolerance. It was widely assumed that the text submitted by the Sub-Commission would not place states and Governments under the obligation, for example, of providing special schools for persons belonging to linguistic minorities.'*

³⁶² For instance, paragraph 6 of the UNHRC General Comment 23 states that *'[a]lthough article 27 is expressed in negative terms, that article, nevertheless, does recognise the existence of a "right" and requires that it shall not be denied. Consequently, a state party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measure of protection are, therefore, required not only against acts of the state party itself... but also against acts of other persons within the state party... positive measures by states may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their... language... such positive measures must respect the provisions of Article 2(1) and 26 of the Covenant both as regards the treatment between different minorities and the treatment between persons belonging to them and the remaining population... as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under Article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.'*

³⁶³ 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 Phillips & Rosas (n 110 above) 20.

regarded as constitution 'the whole of minority rights.'³⁶⁴ This is fortified by the fact that article 1 of the UDM (considered a direct implementation of article 27 of the CCPR and an interpretative declaration of article 27 of the CCPR) specifically provides for the right to identity. It has already been argued above that the essence of minority protection is to preserve the linguistic identity of minorities and ensure that linguistic minorities are placed on a substantively equal footing with linguistic majorities.

The third right implied in article 27 of the CCPR is the qualified right to non-state interference in the use minority languages. Capotorti argues that even though Article 27 is phrased negatively it obliges states to take positive action (including an enabling legal framework and financial assistance) to ensure that minorities use their own language.³⁶⁵ This argument is supported by paragraphs 6.1 and 6.2 of the UNHRC General Comment 23 that highlights that Article 27 imposes a positive right and obliges member states to even use affirmative action³⁶⁶ to guarantee the right of minorities to use their language.

Perhaps the moot question becomes 'what does use of language entail?' Does it mean use in private only or use in public only or use in both private and public? One school of thought believes that the right to use a minority language is only limited to the private arena and another argues that it should be extended to the public sphere.³⁶⁷ Clause 5.3 of the UNHRC General comment 23 holds that language use envisaged in article 27 of the CCPR includes qualified use in public and private domains. For linguistic minorities, this right would include qualified use of minority languages in names, education,³⁶⁸ public media, courts, communication with public officials and official recognition of minority languages as official languages.

Clearly, article 27 affords linguistic minorities the right to use their language (among

³⁶⁴ Thornberry (n 136) 392.

³⁶⁵ Capotorti (n 129 above) 568.

³⁶⁶ M Scheinin 'The United Nations International Covenant on Civil and Political Rights: Article 27 and other provisions' in K Henrard & R Dunbar *Synergies in minority protection: European and international law perspectives* (2008) 30 contends that the scope of the positive obligations may be made to depend on matters such as the size of the group, its degree of concentration and the its degree of permanence in a particular country.

³⁶⁷ For this discussion see F de Varennes (n 86 above).

³⁶⁸ This right includes mother-tongue education, participation in curriculum development and the right to establish private educational institutions.

themselves) in private and in public transactions (including the business of government).³⁶⁹ In the *Diergaardt* case, even though matter concerned a violation of article 26 of the CCPR, the UNHRC held that minority Afrikaans speakers in Namibia were entitled to the use of their mother tongue in administration, justice, education and public life.³⁷⁰

ii. Are the minority language right provided for in article 27 of the CCPR absolute?

The rights contained in article 27 of the CCPR are not absolute but can be limited.³⁷¹ In *Lovelace v Canada*³⁷² and *Kitok v Sweden*,³⁷³ 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,³⁷⁴ is consistent with other provisions of the CCPR particularly prohibition of discrimination and is necessary for the continued viability and welfare of the minority as a whole.³⁷⁵

³⁶⁹ F de Varennes 'A Guide to the rights of minorities and language' COLPI Paper No. 4 (Nov 2001) 9. I Currie & J de Waal *The bill of rights handbook* (2005) have also offered the same argument at 632.

³⁷⁰ *Diergaardt case* (n 79 above). A contrary view was expressed in its 22/1996 judgment, where the Italian Constitutional Court invoked a second argument not to review domestic legislation in the light of Article 27: that its content only guarantees the use of the minority language with the members of the minority, but not to the external use of the language in relationships with individuals or authorities which do not belong to that minority. The Italian decision does not accord with the UNHRC reasoning in the *Diergaardt* case and also with the state obligations imposed by article 27 of the CCPR as will be discussed below.

³⁷¹ de Varennes (n 86 above) 117 says '[t]here is not in the present state of international law an unqualified 'right to use a minority language' but there are a number of existing rights and freedoms that affect the issue of language preferences and use by members of a minority or by the state.'

³⁷² *Lovelace case* (n 112 above) 10 (1984). Para 9.8 says '... 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...'

³⁷³ *Kitok case* (n 113 above) 221-230.

³⁷⁴ 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.'

³⁷⁵ See para 9.8 of the *Kitok case* (n 113 above).

The regulation of the right to use a minority language in communication with public authorities is evaluated against the principle of substantive equality.³⁷⁶ 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.³⁷⁷ 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,³⁷⁸ h) the state's goal in favouring one 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.³⁷⁹ The proportionality principle demands that there be a proportional relation between the goals of a certain language policy and the means to achieve them.

(iii) Are the rights conferred individual or collective rights?

Some arguments have been presented regarding whether or not the rights enshrined in article 27 of the CCPR are individual, collective or group rights. The *travaux préparatoires*³⁸⁰ indicates that article 27 was originally formulated in terms of group rights to accommodate the wish by minorities for group rights but later changes to 'persons belonging to minorities' due to the fear by states that recognising group rights would stimulate secession.³⁸¹

However, the dominant thinking is that article 27 has a hybrid character in the sense that although it is framed in terms of individual rights, their holders should be members of a linguistic

³⁷⁶ 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.

³⁷⁷ Henrard (n 13 above) 248.

³⁷⁸ This requirement should be looked at in terms of political will and budgetary priorities.

³⁷⁹ de Varennes (n 86 above) 87, 93, 95, 99, 121 & 127.

³⁸⁰ Report of the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, UB Doc. E/CN.4/358, 39-48.

³⁸¹ See LB Sohn, "The rights of minorities" in L Henkin (ed) *The international bill of right: The Covenant on Civil and Political Rights* (1981) 270 271.

minority group. Thornberry describes article 27 as *a right of individuals premised on the existence of a community*.³⁸² Similarly, clause 1 of the UNHRC General Comment 23 says:

The Committee observes that this article establishes and recognizes *a right which is conferred on individuals belonging to minority groups* and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.³⁸³

It is interesting to highlight that clause 5.1 of UNHRC General Comment 23 makes it clear that the holder of the rights in article 27 is a person that belongs to a linguistic minority (a group that shares a distinct common language) and not every human being.³⁸⁴ The reasoning is that the right of a member of a linguistic community cannot meaningfully be exercised alone. Enjoyment of this right presupposes the existence of a community of fellow users of the language.

Group interests are taken into account whenever the UNHRC considers the rights enshrined in article 27 of the CCPR. Clause 6.1 of General Comment 23 highlights that the continued existence and exercise of this right depends on the ability of the linguistic minority group's ability to maintain its language.³⁸⁵ This may mean that once a linguistic minority decides not to maintain its language and decides to join linguistic majorities, the individual right of a person belonging to a minority group to use his language enshrined in article 27 of the CCPR ceases to exist.

Interestingly though, the UNHRC has established that group interests should not be used to limit the rights of members of linguistic minority groups. For instance, in *Lovelace v Canada*³⁸⁶ the

³⁸² P Thornberry 'Images of autonomy and individual collective rights in international instruments on the rights of minorities' in M Suksi (ed) *Autonomy: Applications and implications*, (1998) 97 106. Pejic (n 153 above) 669-670 says '...the text also leaves ample room for interpretation regarding the subjects--individuals or groups--to which it applies. While it obviously confers rights on individual members of minority groups, the phrase "in community with the other members of their group" suggests that a collective element was intended as well.'

³⁸³ J Donnelly 'Third generation rights' in C Brolmann (ed) *People and minorities in International law*, (1993) 119-150 notes that there are several human rights that are exercised by individuals in their capacity as members of a social group without these rights qualifying as collective rights.

³⁸⁴ It says 'The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language.'

³⁸⁵ It says 'Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion.'

³⁸⁶ *Lovelace case* (n 113 above).

UNHRC held that the preservation of the identity of certain Indian tribes did not justify limitations to the rights of members of that tribe.³⁸⁷

It is therefore clear that the right enshrined in article 27 of the CCPR are collective rights. As argued above, collective language rights refer to rights given to individuals but in their capacity as members of a certain group. 'Persons belonging to minorities' in article 27 of the CCPR refers to these rights. This concept recognizes linguistic minorities as a protectable group, but opts to protect individuals belonging to the group rather than protecting the group as such. The rights themselves are vested in individuals, but only those individuals who are members of a cultural and linguistic group. It can be argued that collective rights enshrined in article 27 of the CCPR imply the existence and preservation of a larger minority group in that the right of an individual member of a linguistic group would not be meaningfully exercised alone.³⁸⁸ Currie and de Waal call this right '*an individual right exercised communally*.'³⁸⁹

(iv) Does article 27 impose any positive state obligations?

One of the contentious issues is whether or not article 27 of the CCPR imposes any positive state obligations.

There are basically three schools of thought in this regard. The first school of thought contends that article 27 does not impose any positive state obligations. It relies on the *travaux préparatoires* which reflects the intention of state parties to exclude and avoid positive state obligations towards minorities.³⁹⁰ It further argues that the negative formulation of article 27 merely enjoins the state to be tolerant towards minorities by abstaining and non-interference in language use.³⁹¹ It would follow from this argument that stretching article 27 to include positive

³⁸⁷ The UNHRC declared section 14 of the Indian Act (1970) that provided that '[an Indian] woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band' a violation of article 27 of the CCPR. Paragraph 15 says '... The right of Sandra Lovelace to access to her native culture and language, "in community with other members" of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists.'

³⁸⁸ See I Currie 'Minority rights: Culture, education and language' in M Chakalson (ed) *Constitutional law of South Africa* 35.10

³⁸⁹ Currie & de Waal (n 367 above) 623.

³⁹⁰ See UN Doc. E/CN.4/SR. 368-371.

³⁹¹ See Henrard (n 13 above) 167.

obligations would be contrary to the intention of state parties when they drafted article 27 of the CCPR.

The second school of thought invokes a minority friendly interpretation and argues that article 27 imposes positive state obligations.³⁹² The justification is that article 27 rights should be interpreted in such a way that they can be realised and are able to have concrete content.³⁹³ Given the need for human and financial resources to actualise article 27 rights and non-dominant financial position that linguistic minorities are usually in, the rights enshrined in article 27 would lose their meaning if there is no assistance from government.³⁹⁴ Inspiration is drawn from article 15 of the CESCRR which requires the state to take positive measures to ensure that everyone's right to participate in cultural life is fully realised. In any case, linguistic minorities would remain in a situation of inequality (given the historical marginalisation of linguistic minorities) if states do not take positive measures to cure the inequality and enhance substantive equality between linguistic minorities and linguistic majorities.³⁹⁵

The third school of thought is moderate in that it holds that article 27 of the CCPR contains a non-interference state obligation and also an obligation to take supporting measures. However, states are afforded a wide discretion and broad margin of appreciation to determine the scope of the supporting measures.³⁹⁶ In states that are not minority friendly, the wide discretion could be used to disadvantage minorities considering their vulnerable and non-dominant position in society.³⁹⁷

This thesis subscribes to the second school of thought namely that article 27 imposes positive state obligations. If the right to use a minority language in private and in public is to be enjoyed

³⁹² Henrard (n 13 above) 170 contends that a positive reading of article 27 can be gleaned from state practices and reports to the UNHRC. Examples include the UNHRC comments on the 1993 report by Romania (*Comments of the HRC on the Report of Romania*, Part D para 9 5.11.93 (CCPR/C/79/Add. 30) and Bulgarian (*Comments of the HRC on the Report of Bulgaria*, Part D, para. 8 3.8.93 (CCPR/C/79/Add. 24) where the UNHRC criticised the absence of measures to prevent discrimination of the Roma.

³⁹³ Henrard (n 13 above) 168.

³⁹⁴ See Capotorti (n 129 above) 390.

³⁹⁵ See Pejick (n 153 above) 676.

³⁹⁶ See Henrard (n 13 above) 169.

³⁹⁷ SA Anaya, "On justifying special ethnic group rights: Comments on Pogge" in I Shapiro & W Kymlicka (eds), *Ethnicity and group rights* (1997) 222 224.

by linguistic minorities, it arguably requires states to take positive measures to make language use in public a reality. In *Lubikon Lake Band v Canada*, the UNHRC established that beyond the state duty of non-intervention, article 27 required state parties to adopt measures aimed to assist minorities preserve their identity.³⁹⁸

Suffice to mention that human rights treaties generally (and article 27 of the CCPR specifically), oblige states to respect, protect and fulfil human rights (the tripartite typology). The obligation to respect obliges states to refrain from any measures that deprive minority language speakers from enjoying their right to use their language.³⁹⁹

Clause 5.1 of the UNHRC General Comment 23 establishes that state parties have an obligation to respect minority language rights contained in article 27 of the CCPR. Put differently, the state parties should refrain from any measures that deprive minority language speakers from enjoyment of their right to use their language under article 27 of the CCPR. Measures that deprive minority language speakers from enjoying the use of their languages include limiting the application of this right to citizens and permanent residence alone.⁴⁰⁰

The obligation to protect obliges states to prevent non-state actors from violating a specific right.⁴⁰¹ Clause 6.1 of General Comment 23 obliges the state to put in place positive measures to ensure that non-state actors do not violate the right to use a minority language or prevent minority language speakers from using their language.⁴⁰²

³⁹⁸ UNHRC, *Lubikon Lake Band v Canada*, Communication No 1267/1984, UN Doc. Supplement No 40 (A/45/40) 33.

³⁹⁹ M Sepúlveda *et al* (n 191 above) 16 says ‘...*The obligation to respect requires the state to refrain from any measure that may deprive individuals of the enjoyment of their rights or of the ability to satisfy those rights by their own efforts...*’

⁴⁰⁰ Clauses 5.1, 5.2 of and 6.1 UNHRC General Comment 23.

⁴⁰¹ M Sepúlveda *et al* (n 191 above) 16 states that ‘The obligation to protect requires the state to prevent violations of human rights by third parties.... The state is obliged to prevent violations of rights by any individual or non-state actor; to avoid and eliminate incentives to violate rights by third parties; and to provide access to legal remedies when violations have occurred in order to prevent further deprivations...’

⁴⁰² It states that ‘*Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.*’

The obligation to fulfil obliges states to put up mechanisms that ensure that minority language rights speakers enjoy the right to use their language.⁴⁰³ General Comment 23 recognises the duty of the state to fulfil the right of persons belonging to linguistic minorities to use their language. For instance, clause 6.1 enjoins the state to take legislative, judicial, administrative and affirmative action measures to ensure that the right to use a minority language is enjoyed. The exact details of the legislative, judicial, administrative and affirmative action measures will depend on the provisions of each state's constitution, legislation, policies and jurisprudence. Capotorti suggests that states can promote minority language use through institutional mechanism such as official language policies, measures promoting mother tongue education and permitting the use of a language of choice in court proceedings.⁴⁰⁴ These aspects have been discussed elsewhere in the thesis.

Clause 6.2 of General Comment 23 enjoins the state to take positive measures (or affirmative action) to protect the identity of linguistic minorities and protect their rights to enjoy and develop their culture and language, in community with the other members of the group. Clause 7 of the UNHRC General Comment 23 enjoins the state to put in place legal and other measures that *'ensure the effective participation of members of minority communities in decisions which affect them.'* Clause 9 of UNHRC General Comment 23 obliges states to put in place measures that ensure *'the survival and continued development of the cultural, religious and social identity of the minorities concerned.'* It further obliges the state to periodically report to the UNHRC on the state of protection of its minorities.

It is therefore clear from the above that article 27 of the CCPR imposes positive obligations⁴⁰⁵ upon state parties to respect, protect and fulfil article 27 rights.

(v) *Does article 27 of the CCPR apply to indigenous peoples?*

⁴⁰³ M Sepúlveda *et al* (n 191 above) 16 says *'The obligation to fulfil requires the state to take measures to ensure, for persons within its jurisdiction, opportunities to obtain satisfaction of the basic needs as recognised in human rights instruments, which cannot be secured by personal efforts.'*

⁴⁰⁴ Capotorti (n 129 above) 75-89

⁴⁰⁵ See also clause 9 of the UNHRC General Comment 23 that states that *'The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties...'*

Perhaps before concluding a discussion of the content of minority language rights, the question of whether article 27 of the CCPR applies to indigenous peoples⁴⁰⁶ should be briefly addressed. Two approaches have been made to the language rights of indigenous peoples.

The first approach indicates that whenever indigenous peoples find themselves in a minority like situation, they can claim the language rights of minorities.⁴⁰⁷ In *Kitok v Sweden*⁴⁰⁸ and *Ominayak v Canada*⁴⁰⁹ the UNHRC established that indigenous peoples could be minorities pursuant to Article 27 of the CCPR. Clause 3.2 of the UNHRC General Comment 23 indicates that it is possible for indigenous peoples to constitute a minority.

The other approach is that indigenous peoples are different from minorities. Kymlicka⁴¹⁰ gives a threefold distinction between minorities and indigenous peoples. He contends that (a) minorities seek institutional integration while indigenous peoples seek to preserve a degree of institutional separateness; (b) minorities seek to exercise individual rights while indigenous peoples seek to exercise collective rights; (c) minorities seek non-discrimination while indigenous peoples seek self-government. As such the language rights of indigenous peoples are different from those of minorities.

The prominent human rights instruments that deal with indigenous peoples' rights are the Indigenous and Tribal Population Convention, 1957 (No. 107) (ILO Convention 107),⁴¹¹

⁴⁰⁶ Martinez-Gobo, a special Rapporteur of the UN Sub-Commission, UN Doc. E/CN.4/Sub.2/L.556 said '*Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevalent in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to the future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.*' The two main distinctions between minorities and indigenous peoples are a) the absence of the numerical requirement for qualification as an indigenous people and b) indigenous people have historical ties with land which minorities lack.

⁴⁰⁷ 'Minority rights: international standards and guidance for implementation' – United Nations New York & Geneva (2010) 3.

⁴⁰⁸ Communication 197/1985, UN Document A/43/40.

⁴⁰⁹ Communication 167/1984, UN Document A/42/40.

⁴¹⁰ W Kymlicka 'The internationalization of minority rights' (2008) 6 *International Journal of Constitutional Law* 14.

⁴¹¹ It was ratified by 18 countries and is no longer open to ratifications after ILO convention 169 came into force.

Indigenous and Tribal Population Convention, 1989 (No. 169) (ILO Convention 169) and the 2007 Declaration on the Rights of Indigenous Peoples. Two major differences between the two conventions are a) Convention No. 107 was founded on the assumption that Indigenous and Tribal Populations were temporary societies destined to disappear with modernization whilst Convention No. 169 is founded on the belief that Indigenous and Tribal Populations are permanent societies. Secondly, Convention No. 107 encourages integration⁴¹² whereas Convention No. 169 recognises and respects ethnic and cultural diversity.⁴¹³

The specific language rights enshrined in these instruments are the right to freedom from discrimination on the basis of language,⁴¹⁴ the right to establish private indigenous institutions,⁴¹⁵ of indigenous peoples to form their own educational institutions,⁴¹⁶ the right to interpretation in judicial proceedings,⁴¹⁷ the right to education at equal footing,⁴¹⁸ the right to mother-tongue education,⁴¹⁹ the right to use an indigenous language in social, artistic and economic, government etc activities and⁴²⁰ the right to establish the media in indigenous languages.⁴²¹

An individual analysis of these rights has already been done under minority language rights above.

D. The 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UDM)

⁴¹² Art 23(2) particularly encourages ‘a progressive transition from the mother tongue or the vernacular language to the national language or to one of the official languages of the country.’

⁴¹³ See ILO Convention 107 and ILO Convention 169.

⁴¹⁴ Art 3 of both ILO Conventions 107 & 169. Suffice to mention is that the non-discrimination does not specify language.

⁴¹⁵ Art 8 of ILO Convention No. 169.

⁴¹⁶ Art 27(3) of ILO Convention No. 169.

⁴¹⁷ Art 12 of ILO Convention No. 169.

⁴¹⁸ Art 21 of ILO Convention No. 107 and article 26 of ILO Convention No. 169.

⁴¹⁹ Art 23 of ILO Convention No. 107, art 28 of ILO Convention No. 169 art 15 of the Declaration on the Rights of Indigenous Peoples.

⁴²⁰ Art 30 of ILO Convention No. 169.

⁴²¹ Art 17 of the Declaration on the Rights of Indigenous Peoples.

It has been argued above that the 1992 UDM is considered a direct implementation of article 27 of the CCPR⁴²² and an interpretative declaration of article 27 of the CCPR.⁴²³ However, a detailed analysis at the UDM reveals that the UDM enshrines rights that go beyond the scope of article 27 of the CCPR and Thornberry describes the UDM as the new minimum standard regarding minority rights.⁴²⁴

It is interesting to note that even though UN Declarations are not *per se* binding on UN member states, the UDM derives some authority from the fact that it was adopted by consensus by a resolution of the UN General Assembly. This consensus expresses a certain *opinio juris* which could evolve into international customary law if the necessary supporting state practice develops.⁴²⁵ In any event, the UDM arguably concerns a universal standard.⁴²⁶ As argued above, paragraph 8 of the UNHRC General Comment 24 establishes that the rights provided for in article 27 of the CCPR (which the UDM to a degree interprets) are peremptory norms that represents customary international law.⁴²⁷

It is interesting to note that the preamble of the UDM acknowledges that the protection of minority rights contributes to the political and social stability of the states in which they live. The UDM provides for a number of specific rights applicable to linguistic minorities and minority languages (persons belonging to minorities). The rights include the right to identity and existence,⁴²⁸ to participate in cultural life,⁴²⁹ right to national or regional participation,⁴³⁰ to establish and maintain minority associations,⁴³¹ equality,⁴³² prohibition of discrimination on the

⁴²² Henrard (n 13 above) 158.

⁴²³ RL Barsh 'Minorities: The struggle for a universal approach' in Alfredson & Mac Alister-Smith (n 103 above) 150.

⁴²⁴ P Thornberry, "International and European standards on minority rights" in H Miall (ed) *Minority rights in Europe: The scope of a transitional regime* (1994) 14 16.

⁴²⁵ Henrard (n 13 above) 187.

⁴²⁶ P Thornberry (n 37 above) 60.

⁴²⁷ Article 9 of the UDM highlights that UN bodies are obliged to respect the UDM.

⁴²⁸ Article 1 of the UDM.

⁴²⁹ Article 2(2) of the UDM.

⁴³⁰ Article 2(3) of the UDM. Interestingly, the participation spans through cultural, religious, social, economic and political life of the state.

⁴³¹ Article 2(4) of the UDM. A minority language can also be used when maintaining contacts with members of their group, other minority groups and foreigners as provided for in art 2(5).

basis of language,⁴³³ language development⁴³⁴ and progressive realisation of the right to mother tongue education.⁴³⁵ These rights to a degree cover the spectrum of the two-pillar minority protection system⁴³⁶ with the prohibition of discrimination and individual rights of special relevance to minorities on one hand and special measures designed to protect and promote the separate identity of minority groups on the other hand.⁴³⁷ Eide confirms this when he argues that the UDM marks a departure from the common domain where equality is the predominant value to the lasting manifestation of difference.⁴³⁸

Three provisions are crucial to note. The first is that, unlike article 27 of the CCPR, article 1 of the UDM expressly guarantees the right to identity for minorities. Again, unlike article 27 of the CCPR, articles 1(2) and 4(2) provide for express positive state obligations designed to maintain and promote minority identity.⁴³⁹ These provisions support the second pillar for the protection of linguistic minorities and minority languages that is designed to protect the identity of linguistic minorities.

The second provision is article 2 that provide for the private and public use of languages. The most reasonable approach in ensuring that minorities use their languages in public is the sliding-scale approach discussed above.⁴⁴⁰ When authorities at the national, regional or local

⁴³² Article 4(1) of the UDM. Cf. Arti 8(3) of the UDM, art 7(2) of the European Charter for Regional or Minority Languages & art 4(3) of the Framework Convention for the Protection of National Minorities.

⁴³³ Article 3 of the UDM.

⁴³⁴ Article 4(2) of the UDM.

⁴³⁵ Article 4(3) of the UDM.

⁴³⁶ Henrard (n 13 above) 8.

⁴³⁷ The formulation of the preamble suggests a two pillar minority protection system.

⁴³⁸ A Eide 'Peaceful group accommodation as an alternative to secession in sovereign states' in Clark & Williamson (1996) *Self-determination. International perspectives* 100.

⁴³⁹ A Eide, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/ Sub.2/AC.5/1998/WP.1, 13 May 1998.

⁴⁴⁰ F de Varennes *To speak or not to speak. The rights of persons belonging to linguistic minorities – Working paper for the UN Working Group on Minorities*, UN Doc. E/CN.4/Sub.2/AC.5/1997/WP.6, 18 April 1997 8. He further argues that a number of International treaties embody the sliding scale approach. For example, the Central European Initiative Instrument for the Protection of Minority Rights (Article 13: "whenever in an area the number of persons...reaches...a significant level"), the Framework Convention for the Protection of National Minorities (Article 10: "in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need"), and the European Charter for Minority or Regional Languages (Article 10: "within the administrative districts...in which the number of residents...justifies the

levels face a sufficiently high number of individuals whose primary language is a minority language, these states tend to accept that they must provide a level of service appropriate to the relative number of individuals involved.

The third is article 4 that gives states a wide discretion in providing mother tongue education. A state party that is not minority friendly may limit the enjoyment of this right.

The final observation is that the UDM has a number of weaknesses. First, the goal of the declaration as a whole is not quite clear. Second, minorities were not consulted during the drafting process. Third, the UDM does not say anything about the right of minorities to use their language in communication between linguistic minorities and public authorities and in private and public media.

Finally, some of the state obligations in the UDM are formulated in a vague⁴⁴¹ and cautious way that easily allows states to escape responsibility.⁴⁴² For instance, formulations like 'wherever possible', 'when appropriate', 'appropriate measures' and 'adequate opportunities' give states a very wide margin of discretion that may compromise the fulfilment of the rights enshrined in the UDM. This wide state discretion essentially leaves the effective protection of linguistic minorities and minority languages to the goodwill of the states.⁴⁴³

2.3 The European regional human rights system

This section⁴⁴⁴ focuses in some detail on the European⁴⁴⁵ regional human rights system in as far as it relates to minority language rights norms. A study of the European system is crucial to this

measures specified below and according to the situation of each language"), to name but a few, all embody the implicit recognition that minorities and their languages must be respected and accommodated in certain situations, where appropriate.

⁴⁴¹ See A Eide, *Comprehensive examination of the thematic issues relating to racism, xenophobia, minorities and migrant workers – Working paper for the UN Working Group on Minorities* UN Doc. E/CN.4/Sub.2/1996/30, 25 July 1996, 7.

⁴⁴² de Varennes (n 438 above) 4 argues that in this respect the UN Declaration is non-committal.

⁴⁴³ See Henrard (n 13 above) 193.

⁴⁴⁴ I have heavily relied on Henrard (n 12 above) in formulating this section.

⁴⁴⁵ A study of the Inter-American system is beyond the scope of this study. However, the following general comments are worth noting. The Inter-American system has neither a specific treaty dealing with minority languages nor any specific provision expressly providing for minority languages. However, minority language rights can be

thesis for three reasons. The first reason is that the European system is arguably the most developed regional human rights system when it comes to the protection of minority language rights. The second is that the European system has a number of minority language rights norms and best practices from which this thesis draws lessons, as exemplified in the final Chapter of this thesis, where the European Charter for Regional or Minority Languages serves as a source of information for an African treaty on minority language rights.

It has been underscored in Chapter 1 that there exists a two pillar system for the protection of the identity of linguistic minorities and minority languages, namely, prohibition of discrimination on one hand and 'special' measures designed to enable the members of minorities to preserve and develop their own, separate characteristics on the other. This section analyses the extent to which the European human rights system protects linguistic minorities and minority language rights through this two-pillar system of minority protection reflected throughout the thesis.

This section focuses mainly on minority language rights norms emanating from binding treaties from the Council of Europe namely European Convention on Human Rights (ECHR), the Framework Convention for the Protection of National Minorities (Framework Convention) and European Charter for Regional or Minority Languages (European Language Charter).⁴⁴⁶ The treaties are analysed on the understanding that rights are not absolute but can be limited whenever there is reasonable and objective justification. The treaties are also analysed in the light of the jurisprudence from the UNHRC, European Court on Human Rights (European Court) and European Commission on Human Rights (European Commission). Where necessary, reference will also be made to minority language rights norms emanating from UNHRC General Comments, the views or opinions of supervisory bodies about state reports to UN supervisory bodies, opinions of the Advisory Committee of the Framework Convention for the Protection of

inferred from rights like freedom of expression (art 13 of the American Convention on Human Rights), freedom from discrimination on the ground of language and equality provisions (arts 2 of the American Declaration of the Rights and Duties of Man, 1 & 8 of the American Convention on Human Rights and 3 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights) as well as the right to an interpreter in criminal proceedings (art 8(2) of the American Convention on Human Rights). Also, the Draft American Convention on the Rights of Indigenous People recognises the rights of indigenous people to use their own language (arts II, VII, VII, IX and XVI). There is therefore possibility of applying the two-pillar minority rights protection system within the inter-American human rights system.

⁴⁴⁶ Non-binding norms include the 1998 Oslo Recommendations for the Linguistic Rights of National Minorities (Oslo Recommendations).

National Minorities, opinions of the Committee of Experts of the European Charter on Regional or Minority Languages and thematic Recommendations and Guidelines of the Organisation for Security and Co-operation in Europe (OSCE) High Commissioner on National Minorities (HCNM).⁴⁴⁷

A. The European Convention on Human Rights (ECHR)

It should be pointed from the outset that the ECHR does not have a specific or 'special' minority language rights provision. *X v Austria* specifically established that the ECHR does not include a right for linguistic minorities.⁴⁴⁸ However a study of the provisions of the ECHR as read with the jurisprudence of the European Court and European Commission of Human Rights shows some fundamental rights and freedoms that contribute to the separate identity of linguistic minorities and protection of minority language rights. Such rights include the qualified right to fair trial, prohibition from discrimination, freedom of expression and the right to education as will be analysed below.

i. Right to fair trial

Articles 5(2), 6(3)(a) and 6(3)(e) expressly mention language in the context of dealing with the right of an arrested person to be advised of the reason of his arrest and charge in a language they understand as well as a right to an interpreter during trial. As these rights apply to everyone, they can potentially be used to protect minority language speakers in criminal proceedings.

However, a review of the jurisprudence of the European Court and European Commission presents a different story. In the cases of *Bideault v France*⁴⁴⁹ and *K v France*,⁴⁵⁰ the European

⁴⁴⁷ Eg, the Oslo Recommendations of the Linguistic Rights of National Minorities (February 1998), Guidelines on the Use of Minority Languages in the Broadcast Media (October 2003) and the Hague Recommendations Regarding the Education Rights of National Minorities (October 1996).

⁴⁴⁸ *X v Austria* 1979 ECHR 6 88, 93. In this case, a member of the Slovene minority who was not able to express her association to a minority in a linguistic census because her mother tongue was German alleged a violation of article 3 of the ECHR. The European Commission on Human Rights dismissed the application on the basis that the situation complained of 'fell outside the scope of the provisions of the Convention and in particular article 3.'

⁴⁴⁹ [1986] ECHR 232 234.

Commission established that the fair trial rights enshrined in articles 5 and 6 of the ECHR merely refer to a language the accused person understands and not mother tongue or language choice. Obviously, the language one understands is different from mother tongue or the language one speaks. For instance, an accused person that understands the language of the court cannot claim a right to use his or her mother tongue or language of choice in court proceedings using articles 5 and 6 of the ECHR. In *Kamasinski v Austria*⁴⁵¹ the European Court established that article 6 did not afford any person a right to receive court documents (including a judgment) in mother tongue but in a language that one understands.

In *Isop v Austria*,⁴⁵² the European Commission observed that article 6 as read with article 14 of the ECHR does not guarantee the right of linguistic freedom of individuals in their relation to public authorities, including courts. This finding is consistent with the jurisprudence of the European Commission that there is no right to linguistic freedom in general administrative procedures in relation to municipal authorities, regarding language use in municipal councils and regarding registration for elections.

It is clear from the European Commission and European Court jurisprudence that the degree to which minority language rights are guaranteed in articles 5 and 6 of the ECHR is very limited and minimal.

ii. Prohibition from discrimination

It can be observed that the ECHR does not have a general equality clause. However, one of the key provisions that contribute to the protection of minority language rights is article 14, which provides for the prohibition of discrimination.⁴⁵³

Four salient observations are worth noting concerning article 14 of the ECHR. First, unlike article 26 of the CCPR, article 14 of the ECHR only has an accessory or complimentary

⁴⁵⁰ [1983] ECHR 203 207.

⁴⁵¹ [1991] 13 EHRR 36.

⁴⁵² [1962] ECHR 2.

⁴⁵³ It states that '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' This European Commission has interpreted article 14 to canvass both direct and indirect discrimination.

character in that the prohibition of discrimination should not be invoked in isolation but in combination with another right enshrined in the ECHR.⁴⁵⁴ The European Court and European Commission have interpreted the accessory character of article 14 of the ECHR with increased flexibility. For instance, in *Airey v Ireland*,⁴⁵⁵ the European Court established that when violation of a certain article in the ECHR is established, it is generally not necessary to assess whether there is also a violation of that article in combination with article 14.

Second, article 14 of the ECHR specifically lists 'language' and 'association with a national minority' as legitimate grounds of prohibited discrimination. Members of linguistic minorities can use these two grounds when relying on prohibition from discrimination. In *X v Austria*,⁴⁵⁶ for instance, the European Court observed that language rights are predominantly protected by the non-discrimination clause in article 14 of the ECHR and not other rights. This strengthens the first pillar of minority protection namely prohibition from discrimination.

The third observation is that the jurisprudence of the European Court allows discrimination on the basis of language or association with a national minority if there is an objective and reasonable justification for the discrimination. The *Belgian Linguistic case*,⁴⁵⁷ *Petrovic v Australia*⁴⁵⁸ and *Larkos v Cyprus*⁴⁵⁹ establish that article 14 is violated when the difference in treatment of analogous or comparable situations does not have an objective and reasonable justification. Henrard argues that the justification of the distinction or differentiation has to be evaluated taking into account its goal, as well as its effect, assessed against the background of the principles inherent in democratic societies.⁴⁶⁰ The difference in treatment has to have a legitimate aim and there must be a reasonable and proportional relationship between this aim and the differentiating (and arguably discriminatory) means. The required proportionality is evaluated using the basic values of a democratic society such as tolerance, diversity and

⁴⁵⁴ Henrard (n 13 above) 71-72

⁴⁵⁵ *Airey v Ireland* ECHR (9 October 1979) Ser A 32 16.

⁴⁵⁶ 1979 ECHR.

⁴⁵⁷ Case "relating to certain aspects of the laws on the use of languages in education in Belgium" Eur. Ct. H. R., 23 July 1968, *Series A no 6*, 10.

⁴⁵⁸ *Petrovic v Australia* [1998] ECHR 30.

⁴⁵⁹ *Larkos v Cyprus* (1999) EHRR 29.

⁴⁶⁰ Henrard (n 13 above) 74.

broadmindedness.⁴⁶¹ These values indirectly and potentially imply protection of the language rights of linguistic minorities.

The final observation is that the jurisprudence of the European Court seems to suggest the possibility of state parties to take measures of affirmative action to achieve substantive equality. The *Belgian Linguistic case* observed that not all cases of differential treatment violate article 14 of the ECHR and that '*certain legal inequalities tend only to correct factual inequalities*.'⁴⁶² Although this observation does not oblige state parties to actually take affirmative action measures to remedy an inequality, it creates a possibility for state parties to do so. This would potentially protect linguistic minorities if parties choose to take such measures of affirmative action.

It is clear from the above that article 14 of the ECHR is one of the key provisions that contribute to the protection of minority language rights in Europe.

iii. Freedom of expression

Article 10 of the ECHR provides for a qualified right to freedom of expression. The European Court and Commission have underscored that freedom of expression is a 'super-freedom' of which the limitations need to be strictly supervised.⁴⁶³ Freedom of expression is foundational to a democratic and pluralistic society and essential for the protection of human rights.

A liberal interpretation that favours minority language rights protection may be that language is a vehicle which a member of a linguistic minority may use to express his or her divergent ideas, culture, religion and convictions.⁴⁶⁴ The protection of freedom of expression therefore potentially protects minority language rights.

⁴⁶¹ Henrard (n 13 above) 74.

⁴⁶² *Belgian Linguistic case* (n 288 above) 10.

⁴⁶³ See *Rekvenyi v Hungary* (1999) EHRR and *Telesystem Tirol Kabeltelevision v Australia* [1995] ECHR 40.

⁴⁶⁴ Principle 9 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information states that '*[e]xpression, whether written or oral, can never be prohibited on the ground that it is in a particular language, especially the language of a national minority.*'

However, the jurisprudence of the European Commission speaks a different story. For instance, in *Inhabitants of Alsemberg and Beersel v Belgium*,⁴⁶⁵ the European Commission held that no right to linguistic and cultural identity can be inferred from article 10. It further found that the parents' wish to have their linguistic culture predominate in the education of their children is not guaranteed by article 10 of the ECHR. *Fryske Nasjonale Partij and others v Netherlands*⁴⁶⁶ reiterated that article 10 does not guarantee linguistic freedom and particularly do not guarantee the right to use one's language for administrative purposes.

The European Commission has further highlighted that there is no linguistic freedom in general administrative procedures in relation to municipal authorities,⁴⁶⁷ nor language use in councils,⁴⁶⁸ nor regarding registration for elections.⁴⁶⁹

iv. The right to education

The right to education is enshrined in article 2 of the First additional Protocol to the ECHR. The right to education is one of the rights that potentially protect minority language rights on paper given that education is one of the tools used to inculcate the values, cultures and languages of linguistic minorities.

Aspects of choice of language of instruction and the regulation of private education potentially contribute to the protection and promotion of the linguistic identity of minorities.

The jurisprudence of the European Court limits the extent to which the right to education guarantees minority language rights. For instance, the *Belgian Linguistic case*⁴⁷⁰ clarified that the right to education does not cover the issue of language use in public education.⁴⁷¹

⁴⁶⁵ 1963 ECHR.

⁴⁶⁶ *Fryske Nasjonale Partij and others v Netherlands* [1985] ECHR 240.

⁴⁶⁷ *Inhabitants of Alsemberg and Beersel v Belgium* 1963 ECHR.

⁴⁶⁸ *Clerfayt, Legros and others v Belgium* [1986] ECHR 217.

⁴⁶⁹ *Fryske Nasjonale Partij and others v Netherlands* [1985] ECHR 240.

⁴⁷⁰ *Belgian Linguistic case* (n 288 above) 31-32.

⁴⁷¹ It is interesting to note that in the *Belgian Linguistic case* [1965] ECHR 1, the European Commission contended that the Belgian regulation was aimed at preventing linguistic hegemony and also 'assimilating minorities against their will into a language of their surroundings.'

In *Catan and Others v Moldova and Russia*,⁴⁷² the European Court held that although the text of article 2 of the First additional Protocol to the ECHR does not specify the language in which education must be conducted, the right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be. The European Court further established that the right to education is not absolute, but may be subject to limitations if the limitation pursues a legitimate aim, has a reasonable and objective justification and the restrictions imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness.

In *Velyo Velez v Bulgaria*,⁴⁷³ the European Court further established that the right to education does not in itself imply the right to establish or receive subsidization for schools offering education in the language of choice. Put differently, contracting states generally do not have an obligation to finance private educational institutions.

v. The right to respect for private and family life

Article 8 of the ECHR provides for the right to private and family life. Minority language rights can be implied in the rights to private and family life. This right includes private family communication and correspondence, the right to a first name, surname or family name in a minority language, right to use a language at home, right to culturally express oneself at home, right to learn family traditions in a minority language, etc. A government, either by legislation or other conduct, cannot forbid family members to use a language amongst themselves.⁴⁷⁴

Suffice to mention that the European Court has established that the right to respect to family and private life was not absolute but could be limited where there is reasonable and objective justification. For instance, in *Nusret Kaya and Others v Turkey*,⁴⁷⁵ the European Court established that article 8 rights could only be interfered with “in accordance with the law”, the limitation pursues one or more of the legitimate aims referred to in article 8(2) of the ECHR,⁴⁷⁶

⁴⁷² ECHR (19 October 2012) 47-48.

⁴⁷³ ECHR (27 May 2014) 12. See also *Leyla Şahin v. Turkey* ECHR 2005-XI.

⁴⁷⁴ See de Varennes (n 86 above)

⁴⁷⁵ ECHR (22 April 2014).

⁴⁷⁶ Being ‘... the interests of national security, public safety ..., for the prevention of disorder or crime ...’

and is “necessary in a democratic society” to achieve the aim or aims concerned. In *Kemal Taskin and Others v Turkey*,⁴⁷⁷ the European Court held that the requirement for first names in official documents to be spelt only with twenty nine letters from official Turkish alphabet did not violate article 8 of the ECHR because it was a reasonable limitation legitimately aimed at preventing disorder and protecting the rights of others.

v. Limitation of rights in the ECHR

Chapter 1 has established that human rights do not apply absolutely but may be restricted through legitimate limitations. This section analyses how the ECHR limits individual human rights relating to linguistic minorities. Such a discussion is crucial because the extent to which limitations to rights are considered legitimate determines the actual application and effectiveness of these rights. There are, generally speaking, three⁴⁷⁸ conditions for legitimate limitation of rights provided for by the ECHR.

a. Law of general application

The limitation of rights provided for in the ECHR should have a basis in national law to avoid arbitrary limitations to rights.⁴⁷⁹

b. Legitimate aim

The limitation’s object should belong to one of the explicitly enumerated legitimate aims. Even though the enumerated goals are broadly formulated, they all refer to the interests of the state and the rights of others.⁴⁸⁰

c. Proportionality between end and means

⁴⁷⁷ ECHR (2 February 2010).

⁴⁷⁸ The fourth instance where rights may be temporarily limited is found in article 15 of the ECHR which allows temporary limitation of rights when there is a state of emergency.

⁴⁷⁹ See *Kopp v Switzerland Eur. Ct. H. R.*, 25 March 1998 55-75 where the European Court stated that the regulation should be sufficiently precise in its formulation and accessible for the subjects.

⁴⁸⁰ Henrard (n 13 above) 133.

The limitation should be necessary in a democratic society to meet the legitimate goal. The European Court interpreted the characteristics of a democratic society to include pluralism, tolerance, broadmindedness and respect for individual and minority rights.⁴⁸¹ An example includes article 10(2) of the ECHR that permits limitation of the right to freedom of expression if it is limited by 'law' that is 'necessary in a democratic society' to serve certain circumscribed interests such as 'the protection of health or morals' and 'the reputation or rights of others.'

The jurisprudence of the European Court introduced two key principles to regulate the justification of state interference with human rights namely the proportionality principle and the deference or margin of appreciation principle. This section will analyse these two principles to evaluate how they impact the limitation of individual human rights related to linguistic minorities provided for in the ECHR.

ci. Proportionality principle

It has already been established above that a state can limit a right minority if there is an objective and reasonable justification and the justification has to be evaluated taking into account its goal, as well as its effect, assessed against the background of the principles inherent in democratic societies. The limitation has to have a legitimate aim and there must be a reasonable and proportional relationship between this aim and the means used to limit the right. The required proportionality is evaluated using the basic values of a democratic society such as tolerance, diversity and broadmindedness.⁴⁸²

The proportionality principle was introduced in the Belgian Linguistic Case⁴⁸³ where it was established that the means used by a state to limit a right must be proportional to the aim sought. Ever since then, the proportionality principle has been developed by the European Court to police the justification of state interference with human rights, ensuring that the state

⁴⁸¹ *Dudgeon v UK* ECHR (22 October 1981) Ser A 45.

⁴⁸² See the recent cases of *Tanase v Moldova* ECHR (27 April 2010) 41-44 and *Animal Defenders International v United Kingdom* ECHR (22 April 2013) 39-43.

⁴⁸³ *Belgian Linguistic case* (n 288 above) specifically states that 'Article 14 is violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.' See also the 2002 Inter-American Court decision of *Cantos v Argentina* Series C No. 97 (2002) IACtHR [54].

places no greater limitation on rights than necessary.⁴⁸⁴ Examples include *Olsson v Sweden*⁴⁸⁵ and *Glaserapp v Germany*⁴⁸⁶ where the European Court reiterated that the means used by a state to limit a right must be proportional to the aim sought.

The proportionality test is used to assess the means and side effects of state action. For instance, in *Dudgeon v UK*,⁴⁸⁷ the European Court assessed the proportionality of the means used by the state to 'preserve public order and decency' in regulating homosexual conduct in criminal law. It is minimally used to assess the legitimacy of the state's aims.⁴⁸⁸

Because human rights are based on interests, the assessment employed by the proportionality principle involves a flexible balancing of the competing interests of an individual and the state as a whole.⁴⁸⁹ In *Hatton v UK*, the European Court explained that in assessing whether the means used by the state to limit rights is justifiable, '*regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.*'⁴⁹⁰

In terms of the language rights discourse, the balancing act involves accommodation of linguistic diversity on one hand and national unity on the other to ascertain whether the means use by a state to limit a language right is proportional to the aim sought. This sentiment finds support in *Young, James & Webster v UK*, the European Court's words '*democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved*

⁴⁸⁴ A Legg, *The margin of appreciation in international human rights law: Deference and proportionality*, (2012), Oxford University Press, 178.

⁴⁸⁵ *Olsson v Sweden*, ECHR (24 March 1988) Ser A 130 67.

⁴⁸⁶ *Glaserapp v Germany*, ECHR (28 August 1986) Ser A 104 90.

⁴⁸⁷ *Dudgeon v UK* ECHR (22 October 1981) Ser A 45. See also *Christine Godwin v UK* No. (2002) EHRR.

⁴⁸⁸ *Thlimmenos v Greece* No. 34369/97 (2000) EHRR) where the European Court found that, as a result of disproportionality, the state's conduct lacked a legitimate aim.

⁴⁸⁹ S Tsakyrakis, 'Proportionality: An assault on human right?' (2009) 7 (3) *International Journal on Constitutional Law* 468 expresses concern that is rights can be overridden by other interests when placed in the balance, then human rights are themselves at risk.

⁴⁹⁰ *Hatton v UK* No. 36022/97 (2003) (ECtHR) (GC) [98]. See also *Cossey v UK* No. 10843/84 (1990) (ECtHR) [41] that highlights that '*... the notion of proportionality between a measure or a restriction and the aim which it seeks to achieve. Yet that notion is already encompassed within that of the fair balance that has to be struck between the general interest of the community and the interests of the individual.*'

which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.⁴⁹¹

cii. The margin of appreciation or deference principle

Related to the principle of proportionality is the concept of margin of appreciation or deference.⁴⁹² The margin of appreciation refers to the discretion given State Parties to the ECHR to strike a balance between the common good of society (national interests) and the interests of the individual (individual rights) when they restrict human rights.⁴⁹³ It allows states a 'margin' or latitude to determine issues that sovereign national institutions are better placed to 'appreciate' such as the exact content of rights and the necessity of a restriction.⁴⁹⁴

It is important to note that the discretion given to states is limited in that the European Court supervises it. In *Handyside v UK*, the European Court made it clear that the state does not have unlimited power of appreciation and the margin of appreciation has to be supervised.⁴⁹⁵ *Sunday Times v UK* makes it clear that in supervising the state's margin of appreciation, the European

⁴⁹¹ *Young, James & Webster v UK*, ECHR (13 August 1981) Ser A 44 63.

⁴⁹² The precise definition of the margin of appreciation is illusive. A number of authors have attempted to describe it. For example, P Mahoney, 'Universality versus subsidiarity in the Strasbourg case law of free speech: Explaining some recent judgments' (1997) EHRLR 364, 370 describes it as an interpretational tool that determines which human rights matters require a uniform international human rights standard and which one require variation from state to state. JG Merrills, *The development of international law by the European Court of Human rights*, 2nd Ed, Manchester UP, Manchester 1993) 174-5 describes it as a doctrine that establishes whether it is a matter of national sovereignty or for Tribunals to demarcate the contours of a particular human rights standard.

⁴⁹³ M Tümay, 'The "margin of appreciation doctrine" developed by case law of the European Court of Human Rights' (2008) 5(2) *Ankara Law Journal* 202.

⁴⁹⁴ *Handyside v UK*, ECHR (7 December 1976) Ser A 24 48-49 argues that 'It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.

⁴⁹⁵ *Handyside v UK*, ECHR (7 December 1976) Ser A 24 49 states that 'Article 10(2) does not give the Contracting States an unlimited power of appreciation. The Court... is responsible for ensuring the observance of those States' engagements, [and] is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression... The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measures challenged and its 'necessity'...'.

Court applies the proportionality principle⁴⁹⁶ to ascertain whether the means used by a state to limit a right is proportionate to the legitimate aim pursued. *Chassagnou v France*⁴⁹⁷ establishes that in a democratic society marked with pluralism, tolerance and broadmindedness, the state's margin of appreciation should be exercised in a way that ensures the protection of minorities.

However, the European Commission and European Court jurisprudence reveals that state interests often prevail in the balancing process.⁴⁹⁸ Although the state's margin of appreciation varies depending on the legitimate goal relied upon, the (non) existence of a European standard⁴⁹⁹ and the nature of the right infringed,⁵⁰⁰ states have generally been given a wide margin of appreciation regarding the actual implementation of rights enshrined in the ECHR.⁵⁰¹ In *Ireland v UK*, the European Court established that in article 15(1) of the ECHR gives the state a wide margin of appreciation when limiting rights during a state of emergency. Such a broad margin of appreciation has the effect of limiting the enjoyment of the rights concerned.

In *Sidiropoulos and five others v Greece*,⁵⁰² the European Commission accepted that the state's margin of appreciation concerning the assessment of the need in a democratic society for a limitation is wide where matters of national security are concerned.

Henrard⁵⁰³ observes that the state's wide margin of appreciation is strongly influenced by textual constraints and the way state interests and existent state structures often prevail in the

⁴⁹⁶ *Sunday Times v UK* (1991) EHRR 242 242 holds that '[t]he Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient.'

⁴⁹⁷ *Chassagnou v France* (1999) EHRR 112.

⁴⁹⁸ See *Handyside v UK*, ECHR (7 December 1976) Ser A 24 and *Silver and others v UK* ECHR (25 March 1983) Ser A 61.

⁴⁹⁹ See *Marckx v Belgium*, ECHR (13 June 1979) Ser A 31 41.

⁵⁰⁰ Like in *Campbell v UK*, ECHR (25 March 1992), Series A 233 46-47 and *Lingens v Australia*, ECHR (8 July 1986) Ser A 10342.

⁵⁰¹ *United Communist Party of Turkey and others v Turkey*, (1988) EHRR 57.

⁵⁰² *Sidiropoulos v Greece* [1997] ECHR 49.

⁵⁰³ Henrard (n 13 above) 75.

balancing process inherent in the assessment of a possible violation of a provision of the ECHR. This has led to the supervision by the European Court and European Commission to be criticised as too subsidiary and deferent to the Contracting state.⁵⁰⁴ Such deference reduces the level of protection of vulnerable linguistic minorities.

The preceding discussion of the ECHR highlights three key points. First, the ECHR indirectly protects minority language rights through individual human rights relating to linguistic minorities such as qualified right to fair trial, prohibition from discrimination, freedom of expression and the right to education.

Second, study of jurisprudence from the European Court and European Commission shows that the protection granted to linguistic minorities in the ECHR limited by claw-back clauses, norm-based limitations, the proportionality principle and the margin of appreciation given to states.

Finally, the ECHR (unlike article 27 of the CCPR) does not grant any specific or special rights to linguistic minorities. This limits the scope of protection of minority language rights.

B. The Framework Convention for the Protection of National Minorities

Unlike the ECHR that contains only individual human rights relating to linguistic minorities, the Framework Convention for the Protection of National Minorities (Framework Convention) contains both individual human rights protecting linguistic minorities and specific linguistic minority rights. It can be justifiably argued that the Framework Convention to a degree embodies a two-pillar minority language protection system with individual human rights (such as prohibition of discrimination on the basis of language⁵⁰⁵ and freedom of expression⁵⁰⁶) on one hand and specific or special minority language rights on the other.

It is interesting to note that Framework Convention protects at least four specific special minority language rights. First, article 4 imposes a positive state duty to ensure equality in fact and in

⁵⁰⁴ Henrard (n 13 above) 75.

⁵⁰⁵ See arts 14 of the European Convention, 2 of the European Convention on the Legal Status of Migrant Workers and 21 of the Charter of Fundamental Rights of the European Union.

⁵⁰⁶ See arts 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and 9 of the Framework Convention for the Protection of National Minorities.

law. Equality in fact would entail considering the situation of linguistic minorities within a state and the use of affirmative action to bring vulnerable and disadvantaged linguistic minorities on a substantive equal⁵⁰⁷ level as the rest of the population. This position was confirmed by the Advisory Committee's opinion on Austria⁵⁰⁸ which established that special measures were necessary to preserve the identity of a very small group. The net effect of affirmative action is to eliminate the enduring effects of past discrimination and allow for a measure of differential treatment aimed at substantive equality. If article 4 is used correctly, it can potentially lead to the protection minority language rights.

Second, articles 5 and 6 protect the rights existence and identity of national minorities. It specifically obliges states to be tolerant to, take measures and promote the conditions necessary to promote linguistic diversity. One of the components of identity also specifically protected by article 11(1) of the Framework Convention is the right of every person belonging to a national minority to use his or her surname (patronym) and first name⁵⁰⁹ in their minority language and the right to official recognition of such names.⁵¹⁰ The right to identity is one of the bedrocks to the protection of minority language rights⁵¹¹ because the aim of linguistic minority protection is to enable linguistic minorities to preserve and develop their linguistic characteristics.

⁵⁰⁷ Paragraph 39 of the Explanatory Memorandum on the Framework Convention for the Protection of National Minorities, H.R.L.R 1995 103 makes it clear that equality of fact requires state parties to adopt special measures that take into account the special conditions of the persons concerned.

⁵⁰⁸ 16 May 2002, at www.humanrights.coe.int/minorities.

⁵⁰⁹ de Varennes (n 86 above) 152 argues that having a name in a minority language would amount to a clear and important marker that the person belongs to a certain linguistic group. This also holds true in the African context especially in Zimbabwe where a name in Shona clearly shows that a person is a Shona speaker.

⁵¹⁰ See also art 11 of the Central European Initiative for the Protection of Minority Rights, Art7(2) of Recommendation 1201 (1993) on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights, and Paragraph 6 of the 30 October 1987 European Parliament Resolution on the Languages and Cultures of Regional and Ethnic Minorities. Also noteworthy, though not legally, nor politically, binding is Recommendation 1 of the Oslo Recommendations regarding the Linguistic Rights of National Minorities.

⁵¹¹ See M Elst, 'The protection of national minorities in the Council of Europe and the Commonwealth of Independent States: A comparison in standard-setting' in K Malfliet & R Laenen (eds), *Minority policy in Central and Eastern Europe: The link between domestic policy, foreign policy and European Integration* (1998) 182 who regards the explicit recognition of the right to identity of minorities as one of the key features of the Framework Convention.

Third, article 10 guarantees the right to use a minority language in private and in public. However, article 10(2) limits public use of language based upon traditional use, geographic concentration, request from linguistic minorities and need. This provision gives the state parties a wide discretion to determine which minority language should be used in which area. This effectively weakens the actual application and extent of enjoyment of the right to use a minority language in public in countries where governments are intolerant to linguistic diversity.⁵¹²

Fourth, article 14 provides for the right to learn in a minority language and to be taught or receive instruction in a minority language. The major challenge though is that article 14 is very tentatively phrased with phrases like 'as far as possible' and 'within the framework of their education system' and does not oblige (but merely encourage) states to provide mother tongue education. This gives states a very wide discretion that may see some states getting away with not providing mother tongue education.

It is clear from the above analysis that the Framework Convention not only extends individual human rights related to minority language rights to protect linguistic minorities but also provides for specific or special rights for minorities. However, the Framework Convention also contains several broad program declarations and escape clauses that give states a wide measure of discretion. In order for the protection offered by the Framework Convention to enhance the protection of linguistic minorities and minority languages, the margin of discretion needs to be exercised in a way that promotes linguistic diversity.⁵¹³

C. The European Charter for Regional or Minority Languages

The European Charter for Regional or Minority Languages⁵¹⁴ (European Languages Charter) to some degree dovetails non-discrimination clauses and special minority protection in the form of

⁵¹² Henrard (n 13 above) 212 argues that the implication of article 10(2) of the Framework Convention is seriously questionable.

⁵¹³ F Benoit-Rohmer *The Minority Question in Europe: Towards a coherent system of protection of national minorities* (1996) 49.

⁵¹⁴ It was adopted as a Convention on 25 June 1992, was opened for signature in Strasbourg on 5 November 1992 and entered into force on 1 March 1998 after ratification by 5 states. At present, the Charter has been ratified by twenty-five states (Armenia, Austria, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Finland, Germany, Hungary, Liechtenstein, Luxembourg, Montenegro, Netherlands, Norway, Poland, Romania, Serbia,

special measures provided for in article 7. Even though the European Languages Charter is not about rights of speakers of languages but it focuses on obligations of states to use minority languages in a broad range of contexts, its by-effect is on the one hand to protect and promote regional and minority languages as a threatened aspect of Europe's cultural heritage and on the other hand to enable speakers of a regional or minority language to use it in private and public life. Its overriding purpose is cultural. A Committee of Independent Experts established in terms of article 17 monitors the European Languages Charter. The Committee of Independent Experts examines state reports, prepares a report for the Committee of Ministers and organises an "on-the-spot" visit to the state, to meet authorities, non-governmental organisations or any other competent body in order to evaluate the application of the Charter.

The European Language Charter has five distinctive features. The first distinctive feature is that the European Language Charter does not grant rights to speakers of a minority language or linguistic groups but rather focuses on the protection of minority languages themselves.⁵¹⁵ Paragraphs 10 and 11 of the Explanatory Report on the European Languages Charter makes it clear that the overriding purpose of the Charter is to protect minority languages (not linguistic minorities) as a threatened aspect of Europe's cultural heritage. Henrard⁵¹⁶ contends that this *'presumably allows the Charter to transcend (and avoid) the sensitive debates on the definition of minorities and on individual, collective v group rights.'*⁵¹⁷ Unlike international treaties, the ECHR and the Framework Convention that focus on linguistic minorities, the European Languages Charter focuses on minority languages.

The second distinctive feature, related to the first, is that the Charter is formulated in terms of state obligations and not direct minority language rights. What remains to be seen is whether a breach of the provisions of the Charter would entitle any individuals to make any *'legal claims'* and remedy at the international or domestic level or the matter would be treated as a failure of a state's obligations in international law. Letschert is of the view that the European Languages Charter creates legal obligations on states, but does not award any *'language rights'* to

Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine and the United Kingdom). Another eight states have signed it, some of which are expected to ratify soon.

⁵¹⁵ Henrard (n 13 above) 215.

⁵¹⁶ Henrard (n 13 above) 215.

⁵¹⁷ This argument is consistent with paragraph 17 of the Explanatory Report on the Charter that says *'... the charter is able to refrain from defining the concept of linguistic minorities, since its aim is not to stipulate the rights of ethnic and or cultural minority groups, but to protect and promote regional or minority languages as such.'*

individuals (or minorities).⁵¹⁸ Its substantive provisions however point to the indirect protection of linguistic minorities.

The third distinctive feature is that the European Languages Charter takes a bold step of defining a minority or regional language in the European context. The definition focuses on languages traditionally used by nationals of a state, different from other languages, used in geographical areas and are not official languages.⁵¹⁹

The implications of this definition were analysed in Chapter 1. In summary the definition has two weaknesses. The first is that it limits minority languages to those spoken by citizens of a country only.⁵²⁰ Paragraph 31 of the Explanatory Report to the European Languages Charter explains that the reason for exclusion of languages of non-citizens was that the Charter was not designed to deal with the immigration phenomena (a subject for a different instrument to be created specifically for that). Dunbar⁵²¹ contends that by distinguishing between traditional minority languages and immigrant minority languages, the European Languages Charter to a degree compromises the notion that language rights are fundamental rights because it excludes immigrant minority languages from enjoying protection under the European Languages Charter.

The second weakness is that the definition of a minority language in European Languages Charter does not consider official languages as minority languages. Whilst this situation addresses the minority problem in Europe, it has implementation challenges in Africa where in some instances, the granting of official language status is symbolic especially when the language is not used in the government domain. Chapter 5 shows that the granting of official language status to 13 of the 16 languages in Zimbabwe (with the exception of English, Shona and Ndebele) is merely symbolic because the languages are not used in government business.

The fourth feature is that the European Languages Charter contains state obligations that could be useful in protecting the two-pillar system of minority protection – which in this case is a two-

⁵¹⁸ See RM Letschert *The impact of minority rights mechanisms* (2005) 217.

⁵¹⁹ See Paragraphs 31 to 37 of the Explanatory Report on the European Languages Charter.

⁵²⁰ A Aide 'The rights of "new" minorities: Scope and restrictions' in K Henrard *Double standards pertaining to minority protection* (2010) 165-193 observes that the definition that limits minorities to traditional minority language speakers creates a dichotomy between old and new minorities.

⁵²¹ R Dunbar 'Implications of the European Charter for Regional or Minority Languages for British Linguistic Minorities' (2000) 25 *European Law Review* 50-51.

pillar system for minority language rights protection since the Charter protects minority languages themselves. The Charter contains non-discrimination provisions⁵²² on one hand and on the other hand, state obligations for special measures⁵²³ to be introduced to promote use of minority languages in public and private,⁵²⁴ in education,⁵²⁵ in criminal and civil proceedings,⁵²⁶ in public service,⁵²⁷ in media,⁵²⁸ cultural activities⁵²⁹ and in economic and social life.⁵³⁰ The essence of these special measures is to compensate minority languages for unfavourable past conditions and develop Europe's cultural identity.⁵³¹ The Charter therefore arguably provides concrete measures for the promotion and protection of minority languages.⁵³²

One of the key provisions is article 7 that sets out the broad principles on which states' language legislation and practice must be based. Dunbar⁵³³ argues that section 7 is important for three reasons. The first is that it applies to all minority languages within a state. The second is that unlike part III, the provisions of Part II (article 7) apply to all minority languages within a state. The final reason is that article 7 sets out broad objectives and principles on which the State's "policies, legislation and practices" must be based.⁵³⁴ The eight fundamental principles and objectives include a) recognition of regional or minority languages as an expression of cultural wealth; b) respect for the geographical area of each regional or minority language; c) the need for resolute action to promote such languages; d) the facilitation and/or encouragement of the use of such languages, in speech and writing, in public and private life; e) the provision of appropriate forms and means for the teaching and study of such languages at

⁵²² Article 7. Article 7 (Part II of the European Languages Charter) applies to all minority languages.

⁵²³ See Committee of Experts, Opinion on Denmark (2004), 35 where the Committee of Experts encourages states to adopt pro-active policy and the appropriate positive measures.

⁵²⁴ Art 7.

⁵²⁵ Art 8

⁵²⁶ Art 9.

⁵²⁷ Art 10

⁵²⁸ Art 11.

⁵²⁹ Art 12.

⁵³⁰ Art 13.

⁵³¹ See paragraph 10 of the Explanatory Report on the European Languages Charter.

⁵³² Henrard (n 13 above) 216.

⁵³³ R Dunbar, Article 7 of the European Charter for Regional or Minority Languages, Xornadas de Análise sobre a Carta Europea das Linguas Rexionais ou Minoritarias Consello da Cultura Galega / 22 - 23 febreiro 2010, 1.

⁵³⁴ Paragraph 57 of the Explanatory Report highlights that article 7 sets out *'the necessary framework for the preservation of regional or minority languages.'*

all appropriate stages; f) the promotion of relevant transnational exchanges; g) the prohibition of all forms of unjustified distinction, exclusion, restriction or preference relating to the use of a regional or minority language and intended to discourage or endanger its maintenance or development and the promotion by states of mutual understanding between all the country's linguistic groups.

The final distinctive feature is that the European Languages Charter gives states a wide margin of appreciation⁵³⁵ in choosing which minority languages should be protected in which areas within a state. Article 2 for instance allows the state to determine what language in its territory part III of the Charter will apply to.⁵³⁶ Henrard⁵³⁷ argues that the Committee of Experts has accepted the state practice to qualify the Romany language as non-territorial language, even though that language can actually easily be identified with more than one particular area in many European Countries. The fear is that the discretion is too wide that states should be obliged to take into account minimum human rights standards when exercising the discretion if the minority languages are to enjoy protection through the provisions of the Charter.⁵³⁸ However, paragraph 46 of the Explanatory Report to the European Languages Charter offers useful guidelines on how this discretion is to be exercised. Essentially the choice should not be arbitrary, should consider the wide disparities in the *de facto* situation of a minority language, the number of minority language speakers in a region and must promote multilingualism.

Article 7 somehow limits the broad discretion to states in determining language policy by prescribing some key considerations like specific language situation, numerical thresholds, participation, elimination of discrimination, etc. Key among them is the involvement of linguistic minorities themselves in determining language policy. The Committee of Experts' 2001 Opinion

⁵³⁵ T Skutnabb-Kangas, 'Linguistic Diversity, Human Rights and the 'Free' Market', in Miklos Kontra et al (eds.), *Language: A Right and a Resource: Approaching Linguistic Human Rights*, (1999) 206 for example, criticizes the flexibility of the European Languages Charter arguing that it would make it all too easy for states to hide behind the various opt-outs and alternatives to justify a most minimalist stance

⁵³⁶ Paragraph 42 of the Explanatory Report to the Charter cites the possibility of the state not to extend to a language within its territory the benefit of the provisions of Part III of the Charter. This is confirmed by the Committee of Experts, opinion on Finland, ECRML (2001)3, 20 September 2001.

⁵³⁷ K Henrard, A new framework for all languages? (2004) II Mercator International Symposium: Europe 12.

⁵³⁸ F de Varennes "Ethnic conflicts and language in Eastern Europe and Central Asian States: Can human rights prevent them?" (1997) *International Journal on Group and Minority Rights* 156 strongly criticizes the wide margin of appreciation given to the states.

on Finland⁵³⁹ for instance, highlights that states have to give speakers of the languages concerned a possibility of being consulted on all issues pertaining to language policy, even if these speakers have not requested linguistic support.

D. Relevance of Organisation for Security and Co-operation in Europe (OSCE) norms

Because of the flexibility of the discretion that states have in this regard, progressive European state could use the guidelines contained in the 1998 Oslo recommendations Regarding the Linguistic Rights of National Minorities⁵⁴⁰ in making their choices. These include territorial concentration, the degree of disadvantage, the desirability of a common national language vis a vis accommodation of linguistic diversity,⁵⁴¹ the desire to correct past oppressive state practices and the limitation of human and financial resources of the state.⁵⁴²

E. Section conclusion

It is clear from the preceding discussion that the European regional human rights system has a two-pillar system for the protection of the identity of linguistic minorities and minority languages themselves. The two pillar system of minority (language) protection entails prohibition of discrimination on one hand and 'special' measures designed to enable the members of linguistic minorities to preserve and develop their own, separate characteristics on the other. Interestingly, this protection progresses from the ECHR's use of individual human rights related to linguistic minorities to the Framework Convention's protection of specific special minority rights and eventually to the European Languages Charter's state obligations that protect minority languages themselves. The rights are not absolute but can be limited by law of general application, the limitation should have a legitimate aim and there must be proportionality

⁵³⁹ Opinion on Finland, 2001, D.

⁵⁴⁰ The Oslo Recommendations are part of the thematic Recommendations and Guidelines of the Organisation for Security and Co-operation in Europe (OSCE) High Commissioner on National Minorities (HCNM). They are made by experts and endorsed by the HCNM. Even though they are not binding on state parties, they are of practical value.

⁵⁴¹ See inter alia the following author who point out the need to look for the right balance between the pursuit of unity and the accommodation of diversity: A Eide 'Minority Protection and World Order: Towards a Framework for Law and Policy' in A Phillips & A Rosas (eds) (1995) *Universal Minority Rights* 99.

⁵⁴² de Varennes (n 86 above) 87, 89, 93, 95, 99, 121 for instance, advocates for a sliding scale approach which takes into account all these factors to ensure a proportional relation between the goals of a certain language policy and the means used to achieve them.

between the aim and the means used to achieve the aim. States remain with a wide margin of appreciation in determining language laws and policies.

F. Chapter conclusion

It is clear from this Chapter that the UN and European human rights systems reflect a two-pillar system for the protection of linguistic minorities and minority languages that is aimed at effectively integrating linguistic minorities while allowing them to preserve their linguistic identity. The first pillar consists of individual human rights of special relevance to linguistic that ensure that linguistic minorities are placed on a substantially equal footing with other nationals of the state. Such rights include equality, non-discrimination, freedom of expression, fair trial, culture, education and participation. The second pillar consists of specific minority rights and measures designed to protect and promote the separate identity of minority language groups. These include the right to identity, the right to use a minority language in the public and private spheres. In the final analysis, this Chapter contains important building blocks for the development of a thesis that a combination of individual human rights and minority rights makes an important contribution to the effective protection of linguistic minorities and minority languages.

Chapter 3

Language situation of Africa

Introduction

This Chapter analyses the extent to which the African human rights systems contribute to an adequate protection of linguistic minorities and minority language rights through the two-pillar system of minority protection. The two-pillar system for the protection of linguistic minorities and minority languages comprises, on the one hand, equality provisions (including prohibition of discrimination) and individual human rights of special relevance to linguistic minorities that ensure that linguistic minorities are placed on a substantially equal footing with other nationals of the state and on the other hand, minority-specific standards (rights and measures) designed to protect and promote the separate identity of minority language groups.

The Chapter focuses mainly on minority language rights norms emanating from binding treaties from the African Union (AU). The treaties are analysed in the light of the jurisprudence from the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court). The Chapter is divided into three sections. The first section traces Africa's language history in a bid to identify the problem of discrimination of linguistic minorities that this thesis attempts to address. Section 2 focuses on how the African human rights system contributes to an adequate protection of linguistic minorities and minority language rights through the two-pillar system of minority protection. The third section does a survey of the practice of African states to assess the extent to which minority language rights norms are effectively protected at the national level.

3.1 Language history of Africa⁵⁴³

Africa has rich linguistic and ethnic diversity. It currently has at least 2 000 languages spoken in its 54 countries.⁵⁴⁴ Its languages are intricately linked to ethnicity. Webb and Kembo-Sure

⁵⁴³ This section was crafted using some information from: Unpublished: I Maja 'Towards the protection of minority languages in Africa' unpublished LLM dissertation, University of Pretoria, 2007 20-33. SA Dersso (n 67 above) was also relied on in crafting section 3.1 of this chapter.

⁵⁴⁴ See A Lodhi (n 20 above) 79 81.

further note that in Africa, *‘people are often identified culturally primarily (and even solely) on the basis of the language they speak.’*⁵⁴⁵ Examples include the Tonga, Ndebele and Shona in Zimbabwe and the Xhosa and Zulu in South Africa. Regarding ethnicity, virtually every African country has at least one ethnic group and mostly have many more.⁵⁴⁶ For example, Nigeria has more than 250 ethnic and linguistic groups,⁵⁴⁷ Sudan⁵⁴⁸ Chad⁵⁴⁹ and Cameroon⁵⁵⁰ have more than 200 ethnic and linguistic groups each and Tanzania⁵⁵¹ has more than 100 ethnic groups. Zimbabwe has more than 16 ethnic and linguistic groups⁵⁵² and South Africa has more than 12 ethnic and linguistic groups.⁵⁵³

The aim of this section is to trace the historical background of minority language rights in Africa. Such history helps us understand the basis for the claims of minority language rights. It also helps place the case studies of South Africa and Zimbabwe into context. The section explores three key aspects namely pre-colonial Africa, colonial Africa and post-colonial Africa.

3.1.1 Pre-colonial Africa

Before the European colonization of Africa, Africa had diverse ethnic groups bound by kinship ties. These historically evolved societies possessed their own culture and language. Language was the main vehicle of culture. The languages they spoke culturally identified people.⁵⁵⁴ Mutua argues that *‘a feature common to all pre- colonial African societies was their ethnic, cultural and linguistic homogeneity – a trait that gave them fundamental cohesion.’* They inhabited smaller

⁵⁴⁵ Webb & Kembo-Sure (n 28 above) 5.

⁵⁴⁶ Exceptions are Somalia with one ethnic group with numerous clans and to some extent Lesotho where 99% of the population of is composed of the Sotho ethnic group. See C Dammers & D Sogge ‘Central and Southern Africa’ in *World directory of minorities* (1997) 494. See also R Cornwell ‘Somalia: fourteenth time lucky?’ (April 2004) *Institute Social Studies Occasional Paper* 87.

⁵⁴⁷ Maxted & Zegeye (note 21 above) 405-408.

⁵⁴⁸ See Hitchcock ‘Human rights and indigenous peoples in Africa and Asia’ in Forsythe & McMahon (n 22 above) 209.

⁵⁴⁹ Maxted & Zegeye (n 21 above).

⁵⁵⁰ Dammers & Sogge (n 24 above) 479.

⁵⁵¹ See Howard (n 25 above) 97.

⁵⁵² Section 6 of the Constitution recognizes 16 languages.

⁵⁵³ Section 6 of the Constitution recognizes 11 languages and also list the San and Koi languages.

⁵⁵⁴ See chapter 1 that demonstrates that the relationship between culture, identity and language is still engrained in Africa today.

territories than most distinguishable groups do today, and had mostly smaller population size.

There are predominantly four patterns that emerged from pre-colonial African states.⁵⁵⁵ First, there were empires or kingdoms led by a culturally identified core group.⁵⁵⁶ They had one system of government even though there were different ethnic groups. Different languages were spoken within the empires or kingdoms. Second, there were homogenous communities of smaller size and territorial jurisdiction. They were polities with chiefdoms and kingdoms of various kinds with one centralized and hierarchical government.⁵⁵⁷ Again, different languages were spoken during this period. Third, there were villages where village elders wielded political power.⁵⁵⁸ Language was also an intrinsic part of the ethnic culture of these groupings. Finally, there were nomads (mainly hunters and gatherers or cattle herders) leading a pre-modern way of life with no identifiable political structure.⁵⁵⁹

One key observation about pre-colonial African states was that language formed an integral part of cultural identity. Discrimination on the basis of language was foreign. There was equal treatment of languages. Again, the issue of official languages was foreign to the pre-colonial African state.

3.1.2 Colonial Africa

The African problems associated with the protection of minority languages arguably have their genesis in the colonial domination of Africa. The advent of colonialism ushered in a number changes in Africa, five of which are critical to this study. First, the 1884-85 Berlin Conference divided Africa into various colonial units along geographical line. New states were created that were different from the pre-colonial ethnic communities.

⁵⁵⁵ See NKA Busia, Jr 'The status of human rights in pre-colonial Africa: implications for contemporary practices' in E McCarthy-Arnolds et al (eds) *Africa, human rights and the global system: The political economy of human rights in a changing world* (1994) 225-250.

⁵⁵⁶ For example, the Buganda, Ashanti, AmaZulu, Bakongo, Mossi, Munhumutapa, Rozvi, etc. See OC Okafor *Re-defining legitimate statehood: international law and state fragmentation in Africa* (2002) 23.

⁵⁵⁷ For example the Hausa and Niger Delta states of the current Nigeria and the Ndebele in Zimbabwe. See Wilson (note 15 above) 97.

⁵⁵⁸ Wilson calls them stateless societies divided into small village units. HS Wilson *The imperial experience in Sub-Saharan Africa Since 1870* (1977) 97. Examples include Igbo, Lou and Kikuyu.

⁵⁵⁹ IRIN News In-Depth Report *Minorities under siege: Pygmies today in Africa* (April 2006) 12.

Second, colonialism forcibly amalgamated numerous ethnic societies into one political unit. In some instance half of the ethnic group fell under one political unit whilst another unit fell under another political unit. The effect was that the pre-colonial ethnic groups were deprived of their independence and were subjected to the authority of the alien colonial state.

The third change brought in by colonialism is that it created states with culturally and linguistically divergent communities. Lewis aptly captures it as follows:⁵⁶⁰

The colonial frontiers rarely followed tribal boundaries; and even when they did, *grouped together different tribes and language groups* with little regard for ethnographic niceties. Each European Colony was thus typically a mosaic of peoples, many of whom had previously little knowledge of, or contact with those other communities with whom they were now inseparably associated under a common destiny.

Some of these groups brought together into one state had a history of conflict, animosity and hatred. Africa became riddled with ethnic plurality.⁵⁶¹ Suddenly, these groups became conscious of their ethnicity and began to fight on which ethnic group was better in the eyes of the new colonial master.⁵⁶² Some groups found themselves as numerical majorities and others were numerical minorities in the new states that they found themselves in. Two kinds of states emerged namely a) States with numerical majorities and minorities⁵⁶³ and b) states with no single majority group (no single group constituting more than half the population).⁵⁶⁴ This became one of the root causes of the problem of minorities in the newly formed states.

Fourth, colonialism brought with it an imposition of the colonial language as the official language of the newly created territories. When the colonialists occupied Africa, they viewed linguistic

⁵⁶⁰ IM Lewis 'The tribal factor in contemporary Africa' in C Legum & J Drysdale (eds) *Africa: contemporary record 1969-1970* (1971) 13.

⁵⁶¹ B Nwabueze *Constitutional democracy in Africa* Vol. 5 (2004) 298

⁵⁶² AG Selassie 'Ethnic identity and constitutional design for Africa' (1992-93) Fall 29 (1) *Stanford Journal of International Law* 1 9.

⁵⁶³ For example the now Zimbabwe where the Shona were and still remain the dominant group

⁵⁶⁴ Most African countries fall under this category. For example, in Nigeria, the Hausa-Fulani, Yoruba and Igbo account for 29, 20 and 17 per cent of the population respectively and in Ethiopia, the Amharas, Oromos and Tigreans together form more than 66 per cent of the total population.

diversity as a barrier to their hegemony and administration of their new colonies.⁵⁶⁵ The French, British and Portuguese particularly adopted language assimilation policies in most of their colonies. The French and Portuguese [through Lord Lugard's indirect rule policy] were more radical in their assimilation policies than the British who were a bit accommodative of African languages. The colonial powers accorded official language status to their foreign languages. African states were essentially divided into English-speaking, French-speaking and Portuguese-speaking.

Colonial language policies forced Africans to speak foreign languages as a medium of communication, a source of acquiring information and language of opportunity. Languages like the English-based Pidgin developed in British colonies in West Africa to affirm the belief that any variety of English was preferable to attempting to communicate in the plethora of African languages in use by the colonised populations.⁵⁶⁶ In Zeleza's words:⁵⁶⁷

Colonialism not only brought European languages to Africa, it also sought to invent indigenous languages, and to establish hierarchies between them, in which the European languages were hegemonic, as part of the process of constructing colonial states, spaces, and societies.

Finally, the new colonial state introduced the new system of divide and rule that essentially ranked ethnic groups as 'advantaged' and 'disadvantaged.' Jinadu argues that:⁵⁶⁸

This asymmetrical stratification system fractured or differentiated citizenship in many colonial territories, in such a way that it facilitated (for privileged ethnic groups) or constricted (for underprivileged ethnic groups) access to the state and its resources, in the public services, in commerce, trade and industry, in the judicial system and administration of justice.

Language also became one of the tools used in the divide and rule system. European languages were used as official languages at the expense of African languages. For instance in the field of education, European languages were used in African communities over the first

⁵⁶⁵ F Migeod *Through British Cameroons* (1925) 21.

⁵⁶⁶ For further discussion see Vernon-Jackson *Language, schools and government in Cameroon* (1967).

⁵⁶⁷ PT Zeleza 'The inventions of African identities and languages: the discursive and developmental implications' Selected Proceedings of the 36th Conference on African Linguistics (2006) 14-26 <http://www.lingref.com/cpp/acal/36/paper1402.pdf> (accessed 1 September 2007 and 2 February 2012).

⁵⁶⁸ LA Jinadu Explaining and managing ethnic conflict in Africa: Towards a cultural theory of democracy *Claude Ake Memorial Papers* No 1 (2007) 15.

decades of the colonial era when European-style education was introduced. Africans began to be discriminated against on the basis of their languages and cultures in the new world order. This became the culture of education. As a result, persons that had fluency in the colonial language had access to government services.

This scenario created a group of black elites who became superior by virtue of their mastery of the foreign language. The foreign language became a language of opportunity and a pathway to good jobs, material benefit and power in the colonial Africa. As the black elite grew in size and quality, they became far removed from their African culture. They denigrated and belittled African languages as primitive. According to Prah:⁵⁶⁹

Colonialism triumphed through the perpetration of various degrees of ethnocide. The cultural world of the colonized was condemned in the names of inferiority and irredeemable primitivism. The languages installed by the colonial overlords dethroned the supremacy of African languages in the affairs of Africans. These languages of conquest and empire slowly formed the linguistic basis for the creation of an indigenous elite, which in the language of the time was “acculturated” and was in “culture contact” with an overwhelming western colonial culture. Western languages did not triumph on account of their innate or inherent superiority. They were culturally and politically installed only after the armed and forcible subjugation of native peoples.

Colonialism therefore introduced numerous linguistic problems that Africa is still grappling with today. First, it separated language and culture. Second, competence in the foreign language became a medium of access to information, securing good jobs and dominating in politics. Third, indigenous (minority) languages were marginalized and their speakers discriminated against.

There were two reactions that came from the imposition of the colonial language. The first group of persons voluntarily embraced the new colonial language and colonial system. They began to learn and develop themselves in the system. They even began to reject teaching in the mother tongue as an appropriate way of teaching. For example, when the British tried to introduce adapted education⁵⁷⁰ – that advocated for a curriculum embedded in local knowledge and local languages – in their colonies, African parents vigorously rejected it arguing that it was an

⁵⁶⁹ KK Prah ‘Language, neo-colonialism and the African development challenge’ (2002) 150 *Tricontinental*.

⁵⁷⁰ For further discussion see K King *Pan-Africanism and education: a study of race, philanthropy and education in the Southern States of America and East Africa* (1971).

attempt to keep them from acquiring European knowledge and power.⁵⁷¹ They rejected both the local knowledge curriculum and the local language in which it was to be taught. This sense of the inappropriateness of African language as a medium of conveying knowledge in the formal classroom continues to be a widespread perception among African parents today. This group, which adapted to the colonial way of life and was educated in the colonial language, became the advantaged group and enjoyed access to education and employment opportunities, acquired skills in the running of European institutions and hence achieved higher levels of political and socio-economic integration.

The other group sought to maintain its cultures, languages and religions despite the pressure of assimilation they were getting from the colonial powers. As a result, their cultures, languages and religions were marginalized and their speakers were discriminated against. They became the 'disadvantaged' group with no (or limited) access to education and employment opportunities. They formed the fabric of colonial minorities.⁵⁷² The major claims of linguistic minorities were that they sought to maintain, enjoy, use and develop their languages that were different from the dominant colonial language and mainstream ethnic groups within the colonial states.

3.1.3 Post-colonial or independent Africa

At independence, Africa was still faced with the problem of how to manage and deal with the ethnic and linguistic diversity that obtained in the new independent state. Because of the colonial divide and rule system, ethnic groups within African states lacked cohesion and a shared consciousness of belonging to one country. It therefore became necessary for the independent African states to begin the process of nation building.⁵⁷³

⁵⁷¹ SJ Ball 'Imperialism, social control and the colonial curriculum in Africa' (1983) 15(3) *Journal of Curriculum Studies* 237-263.

⁵⁷² Three key minorities were created by the colonial African state namely, linguistic, ethnic and religious minorities. This thesis deals exclusively with linguistic minorities.

⁵⁷³ D Welsh 'Ethnicity in Sub-Saharan Africa' (1996) 72 *International Affairs* 477, 477 argues that 'In the heydays of independence, [beginning] in Ghana in 1957 and accelerating in the 1960s and beyond, "nation building" was assumed to be the priority of all the newly emerging [African] states.'

Africa had two options in their approach to nation building. The first approach was a multicultural model of nation building similar to the ones adopted by Switzerland and India.⁵⁷⁴ This approach recognizes the ethnic, cultural and linguistic diversity within a nation by coming up with effective state mechanisms and policies that accommodate, promote and ensure that such diversity finds expression. In this approach, national identity and unity is fostered through shared history, shared values and shared state institutions. It accommodated diversity.

The second approach was the nation state model which was supported by the following three arguments. First, possession of one national identity was as a precondition of democracy. Mill argues that:⁵⁷⁵

[f]ree institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion necessary to the working of representative government, cannot exist.

This argument was based on the false assumption that ethnic identity and national identity were mutually exclusive. It overlooked the fact that if a state protects ethnic members of a group that is strongly attached to their identity, such members tend to develop an attachment to that state. To this end, Makkonen rightly argues that:⁵⁷⁶

[t]he extent to which members of minorities feel accepted, through the accommodation of their specific needs, affects positively their ability to see the society as a common project. On the other hand, if people feel that society does not respect their particular identities and needs, they will feel harmed, and indeed are harmed, and will be less keen to participate in common affairs.

Second, possession of a shared state identity was necessary to the unity and political stability of the independent state. It was therefore suggested that the nation was the basis of the state. Barker argues that:⁵⁷⁷

⁵⁷⁴ See Unpublished: SA Dersso 'Taking ethno-cultural diversity seriously in constitutional design: Towards an adequate framework for addressing the issue of minorities in Africa' Unpublished PhD thesis, University of the Witwatersrand, 2010 70.

⁵⁷⁵ JS Mill 'Considerations on representative government' in H Acton (ed) *Utilitarianism, liberty, representative government* (1972) 230 233.

⁵⁷⁶ T Makkonen 'Is multiculturalism bad for the fight against discrimination?' in M Scheinin & R Toivanen (eds) *Rethinking non-discrimination and minority rights* (2004) 155 173.

⁵⁷⁷ E Barker *Principles of social and political theory* (1951) 3, 42.

[t]here must be a general social cohesion which serves, as it were, as a matrix, before the seal of legal association can be effectively imposed on a population. If the seal of the State is stamped on a population which is not held together in the matrix of a common tradition and sentiment, there is likely to be a cracking and splitting, as there was in Austria-Hungary.

Third (and also significant to this study), the new independent state needed a standardized language, a shared common culture and historical symbols to effectively function. There had to be a homogenous language, for example, in order to effectively run government, courts, media, education, etc. African states considered the formal recognition of multiple languages and language communities as a significant barrier to national integration.⁵⁷⁸ National integration necessarily involves the emergence of a nation state with only one national language.⁵⁷⁹ This argument overlooked two salient facts. First, linguistic diversity *per se* is not a political problem. Rather, ignoring linguistic diversity is the problem. Second, national unity does not imply cultural or linguistic uniformity. Instead, nation states can be more representative and achieve stronger and sustainable unity if they guarantee the right of minority communities and their individual members to distinct language and cultural practices.

Ultimately, almost all African states adopted the nation-state model of nation building⁵⁸⁰ that was characterized by assimilationist and integrationist nation building processes. This is clearly evident in laws, policies and practices that chose colonial languages as official languages and assimilated African languages.⁵⁸¹

⁵⁷⁸ J Blommaert (n 16 above) 10.

⁵⁷⁹ A Bamgbose (n 14 above). See also S May *Language and minority rights: Ethnicity, nationalism and the politics of language* (2012) 2nd Edition.

⁵⁸⁰ J Tully *Strange multiplicity: constitutionalism in an age of diversity* (1995) 68. See B Neuberger 'State and nation in African thought' in J Hutchinson & AD Smith (eds) *Nationalism* (1994) 231-235.

⁵⁸¹ 'Study of the problem of discrimination against Indigenous Peoples, UN Doc. E/CN.4/Sub.2/476/Add.6 says '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 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

A number of arguments have been presented concerning protection of minority languages by African states. For instance, some African states argue that linguistic diversity retards development. Yet true development can be achieved when linguistic diversity is promoted. Prah⁵⁸² argues that language is a central feature of any culture that registers people's genius in the social, economic and political lives of the people which ultimately leads to social transformation. A society cannot develop if language is the monopoly of a small and restricted minority whose orientation is directed outside, towards cultures that have had an imperial or colonial relationship with the society that is endeavoring to develop. Education for the masses must be done in the languages of the masses so that development becomes a mass phenomenon, which is part of mass culture. Only then will development translate relevantly in the lives of the broad and major sections of the population. Language is therefore one of the keys to the challenge of African development.

Post-colonial Africa saw African governments maintaining and extending the position of European languages in political, economic, educational and social systems⁵⁸³ to the exclusion of African language. The exclusion of African languages prevented minority language speakers from accessing knowledge and information and hindered them from participating in national politics, development and the decision making process.⁵⁸⁴

introduced by the colonizers; in a few cases, a national language was chosen.'

⁵⁸² KK Prah (n 560 above).

⁵⁸³ A Adegbiya *Multilingualism: a Nigerian case study* (1994) 33-4 argues as follows: 'Post-colonial policy makers in Africa have largely rubber-stamped or toed the line of language and educational policies bequeathed to them by the colonial masters. . . . Educational systems, which have widened and extended beyond what they were in colonial days, have been further used to entrench and perpetuate the feeling of the inviolable worth of colonial languages. In this environment, linguistic diversity becomes a characteristic to ignore as far as possible.'

⁵⁸⁴ A Lodhi (n 20 above) 81 argues that '[t]he dominance of the metro-languages deprives the majority of Africans of access to knowledge, and hinders them from participating in national politics and the decision-making process. It slows down national integration and development of a nation-state, with a national culture, creates insecurity and feeling of inferiority among those who have to operate in the foreign language of the ruling elite. This has led to ethnic unrest, political instability and brutal violence from time to time in several parts of Africa where the main political problems are not really ideological but rather ethno-linguistic. Peace is a pre-requisite for growth and prosperity, and in the African context, peace may be maintained only through some degree of national integration achieved by a reasonable amount of linguistic homogenisation. Language development in all forms should therefore be part and parcel of overall development.'

Another issue that has arisen with the advent of both independence and globalization is the use of minority languages on the Internet. This is important because the internet is one of the greatest sources of information in the present day and minority language speakers who are not proficient in the English, French, Portuguese, Arabic and Spanish can only access such information if it is packaged in their language. Since language is a vehicle for the expression and generation of indigenous knowledge, the use of minority languages on the Internet can also be important in the dissemination and generation of such knowledge.⁵⁸⁵ However, there is very little use of minority languages on the Internet in Africa today. On the web few official languages like Swahili, Xhosa and Hausa are used. Regarding e-mail and e-mail lists, there are web based e-mail service providers like Africast.com and Mailafrica.net that use a few official African languages.⁵⁸⁶ The bulk of the official languages are not used. The sum total of this is that the Internet has a limited use of African minority languages.⁵⁸⁷

The history chronicled above demonstrates that pre-colonial Africa had ethnic and linguistically diverse groups. Colonialism and the post-colonial nation-state nation-building model saw the imposition of colonial languages, the introduction of official languages and attempts to assimilate and integrate the ethnic and linguistic groups. This has in turn seen the marginalization of minority languages and discrimination of their speakers. This gave rise to problems associated with issues like language and culture, language and access to information, language and development, language and work and language and the Internet.

3.1.4 Post 1990 constitutional reform

The new wave of constitutional democratic change after 1990 was focused on addressing authoritarianism, unlimited government, human-rights violations and the lack of a human-rights

⁵⁸⁵ DZ Osborn 'African languages and information and communication technologies: literacy, access, and the future' Selected Proceedings of the 36th Conference on African Linguistics (2006) 86-93.

⁵⁸⁶ Other languages represented include Kiswahili, Hausa, HausaDaHausawa, Marubuta & Matasa.

⁵⁸⁷ DZ Osborn (n 576 above) gives the following reasons: *'First of all, the factors that define the digital divide also tend to minimize the potential for African language use [on the internet]. Connectivity is centred on cities and towns where official languages – the same languages that are dominant on the Internet – may be more widely spoken. In addition, only people with means and education, who are also more likely to have facility in use of the official languages, can access computers and Internet connections. The digital divide therefore is arguably more localized than bridged, being replicated on national and local levels along the lines of deeper social, economic, and linguistic divides.'*

culture, multiparty elections. It saw the introduction of limited government⁵⁸⁸ through separation of powers, checks and balances and supremacy of the constitution. Parliament and the judiciary were then empowered oversee the implementation and enforcement of the constitution.

Key to this discussion was the entrenchment of human rights and freedoms in the new constitutions and the setting up of human rights institutions charged with the responsibility of promoting the implementation and protection of the rights guaranteed. Dersso and Palermo identify three key mechanism adopted to accommodate diversity (including linguistic diversity) as constitutional guarantees of self-government of minorities; constitutional arrangements for effective representation and participation of minorities in public life; and constitutional provisions relating to language, culture and religion.⁵⁸⁹ Minority language rights fall under the third mechanism. Amongst the rights entrenched in the post 1990 constitutions were majority and minority language rights.⁵⁹⁰

Minority rights protection is seen as one of the bedrocks of a true democracy. According to Lewis,⁵⁹¹

[p]olitical institutions which give all the various groups the opportunity to participate in decision-making, since only thus can they feel that they are full members of a nation, respected by their numerous brethren, and owing equal respect to the national bond which holds them together.

There is, in other words, a need for ethno-culturally and ethno-linguistically inclusive and deliberative democracy. Seen in this light, South Africa and Zimbabwe are some of the countries that have adopted new constitutions or constitutional reforms that are deliberately designed to provide for comprehensive institutional mechanisms for accommodating linguistic diversity as will be analysed in Chapters 4 and 5.

⁵⁸⁸ According to Njunga M Mulikita, of the 37 African constitutions in force by 1994, all but four contained provisions for term limits. NM Mulikita 'A false dawn? Africa's post-1990 democratization waves' (2003) 12(4) *African Security Review* 105 107.

⁵⁸⁹ S Dersso & F Palermo 'Minority rights' in Tushnet *et al* (n 19 above) 162.

⁵⁹⁰ The constitutions of Ghana, Uganda, Benin, The Gambia, Malawi, Namibia, Sudan, Zambia, Zimbabwe and South Africa give recognition to certain aspects of minority rights related to language.

⁵⁹¹ WA Lewis (n 551 above) 66-67.

3.2 The protection of minority languages and linguistic minorities under the African human rights system

It has been established above that most African are multi-ethnic⁵⁹² and multi-linguistic without a clear majority.⁵⁹³ The issue of minorities in Africa remains controversial and problematic.⁵⁹⁴ Most African states are reluctant to recognise groups as minorities within their territories for fear that recognition may lead to secession.⁵⁹⁵ When minorities are recognised, they are mainly recognised as 'indigenous'⁵⁹⁶ or 'home-grown' minorities.⁵⁹⁷ For example, in *Sudan Human Rights Organisation and another v Sudan*, the African Commission interpreted 'peoples' to include linguistic minorities.⁵⁹⁸ In *Gunme and others v Cameroon*, the African Commission accepted that the Southern Cameroonians were a people on the basis of linguistic tradition among others.⁵⁹⁹

The 2005 Report of the Working Group of Experts on Indigenous Populations/Communities (African Working Group) identifies the following as linguistic minority concerns in Africa: a) various forms of discrimination,⁶⁰⁰ failure to recognize their language rights which entails their exclusion from education⁶⁰¹ as well as the media;⁶⁰² and c) lack of effective access to courts and

⁵⁹² Report of the African Commission's Working Group of Experts on Indigenous Populations/ Communities (2005) 101-102.

⁵⁹³ S Slimane MRG Briefing: Recognising minorities in Africa (2003) 1.

⁵⁹⁴ T Murithi, "Developments under the African Charter on Human and Peoples' Rights relevant to minorities" in K Henrard & R Dunbar (eds) *Synergies in minority protection: European and international law perspectives* (2008) 385.

⁵⁹⁵ Report on the first seminar on Multiculturalism in Africa: Peaceful and constructive group accommodation in situations involving minorities and indigenous peoples held in Arusha, Tanzania, 13-15 May 2000, E/CN.4/Sub.2/AC.5/2000/WP.3, para 28.

⁵⁹⁶ Interestingly, the African Commission defined people in a way that included minorities in *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001).

⁵⁹⁷ Henrard, The right to equality and non-discrimination and the protection of minorities in Africa in Dersso (n 7 above) 239.

⁵⁹⁸ Communication 279/03, 296/05 (joined), *Sudan Human Rights Organisation and another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (28th Activity Report).

⁵⁹⁹ Communication 266/03, *Gunme and others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) (26th Activity Report).

⁶⁰⁰ Report of the African Commission's Working Group of Experts on Indigenous Populations/ Communities (2005) 38.

⁶⁰¹ There are often issues of integration of minority languages in national educational and administrative

public administration.⁶⁰³

This section analyses the extent to which the African human rights system contributes to an adequate protection of linguistic minorities and minority language rights through the two-pillar system of minority protection. From the outset, it is crucial to highlight that there is no treaty specifically devoted to language rights in Africa. However, the protection of minority languages can often be gleaned from either express treaty provisions relating to language rights or can be implied from other rights. The section focuses mainly on minority language rights norms emanating from binding treaties from the African Union (formerly Organisation of Africa Unity). The main treaty is the African Charter on Human and Peoples' Rights (ACHPR).⁶⁰⁴ Other treaties that are referred to are the African Charter on the Rights and Welfare of the Child (ACRWC),⁶⁰⁵ the Cultural Charter for Africa,⁶⁰⁶ the African Youth Charter⁶⁰⁷ and the Charter for African Cultural Renaissance.⁶⁰⁸ The treaties will be analysed in light of the jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court). Where necessary reference is made to soft law to help explain treaty provisions.

This section has four subsections. The first subsection analyses the implied rights theory in the context of the African human rights system. Such an analysis is essential in view of the fact that minority language rights are only very indirectly and tangentially (and not expressly) provided for in the African human rights system. The exploration of the implied rights theory forms the basis

systems.

⁶⁰² Report of the African Commission's Working Group of Experts on Indigenous Populations/ Communities (2005) 42.

⁶⁰³ Report of the African Commission's Working Group of Experts on Indigenous Populations/ Communities (2005) 50-52.

⁶⁰⁴ Adopted on 27 June 1981 and entered into force on 21 October 1986. 53 out of 54 African countries have ratified it. As at 30 September 2015, only South Sudan had not ratified the ACHPR.

⁶⁰⁵ Adopted on 1 July 1990 and entered into force on 29 November 1999.

⁶⁰⁶ Adopted on 5 July 1976 and entered into force on 19 September 1990. As at 30 September 2015, it had been adopted by 34 states. Viljoen at page 213 highlights that The Cultural Charter for Africa has not had significant impact due to its framing (imposing obligations on states and making lofty commitments without providing for individual human rights to culture) and its lack of an implementation mechanism.

⁶⁰⁷ Adopted on 2 July 2006 and entered into force on 8 August 2009.

⁶⁰⁸ Adopted on 24 June 2006 and still awaits the requisite two thirds of the African Union membership for it to come into force. As at 30 September 2015, it had been adopted by 7 states.

for the analysis of most African treaty provisions. The second subsection analyses the contribution of individual human rights to the effective protection of linguistic minorities and minority languages in Africa. The approach is to analyse the individual rights themselves with reference to different treaties in which they are provided for. In the process, differences in interpretation by supervisory bodies are highlighted. The third subsection assesses the contribution of specific minority rights to an adequate system for the protection of minority languages and linguistic minorities. The focus is on the rights to identity and to use a minority language. The fourth subsection highlights that the rights in the African human rights system are not absolute and can be subject to limitations.

3.2.1 The implied rights theory under the African human rights system

It is generally accepted that human rights law is not only determined by the text of the legal provisions concerned, but also by the interpretation of that text. Since the formulation of human rights is open to a range of different interpretations, the interpretation principles, or maxims adopted are often decisive. The implied rights theory is one of the interpretative principles used to give meaning to minority language rights contained in treaties.

Chapter 2 has established that doctrine of implied or un-enumerated rights entails that explicitly guaranteed rights in a treaty by necessary implication may 'imply' the existence of the rights not explicitly guaranteed.⁶⁰⁹ According to this approach, a treaty supervisory body may read rights that are not expressly guaranteed in a treaty into the rights expressly provided for in that treaty.

It can be argued that the implied rights theory can play a crucial role in ensuring that the purpose, values, legal, social and economical goals treaties relating to minority language rights aim to achieve.⁶¹⁰ Whenever a right is not expressly mentioned but is envisaged in the overall purpose of the treaty, such a right can be implied from a right provided for in the text of that treaty. The interpretation can be stretched to as far as applying the principle of positive obligations where treaty bodies can interpret treaty provisions in a manner that imposes positive obligations on states to protect rights in treaties rather than merely the negative obligation to

⁶⁰⁹ Viljoen (n 235 above) 327.

⁶¹⁰ This ties in well with the teleological method of interpretation of treaties (derived from articles 31 to 33 of the Vienna Convention on the Law of Treaties) used by courts and treaty bodies when they interpret legislative provisions in the light of the purpose, values, legal, social and economical goals these provisions aim to achieve.

avoid violating them. This way, the holders of such right can effectively enjoy that right. Given that treaty bodies have expressed an overarching concern for the effective enjoyment of rights that they have developed the effectivity principle that stresses that treaties must be interpreted in a manner which renders its rights practical and effective, not theoretical or illusory,⁶¹¹ the implied rights theory could play a critical role in ensuring that linguistic minorities enjoy minority language rights.

The implied rights theory affirms the averment that all treaties are living documents that need to be (re)interpreted continuously in the light of changing and contemporaneous circumstances.⁶¹² In this regard the African Commission⁶¹³ argued that

[t]he uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances...

The implied rights doctrine is very crucial in the language rights discourse within the African human rights system especially in view of articles 60 and 61 of the ACHPR⁶¹⁴, which allows the African Commission to draw inspiration from international, regional, and national human rights norms to interpret African Charter provisions. It can also be contended that even the African Court on Human and Peoples' Rights can apply articles 60 and 61 of the ACHPR. This is especially so given that article 7 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights provides that

⁶¹¹ See *Airey v. Ireland*, ECHR, Series A No. 32, 2 EHRR (1979-1980), at 305.

⁶¹² This approach was adopted by the European Court of Human Rights in the cases of *Selmouni v France* (2000) 29 EHRR 403, para 101; and *Stafford v UK* (2002) 35 EHRR 32.

⁶¹³ *Serac case* (n 236 above) para 68.

⁶¹⁴ It says '[t]he Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the Field of human and peoples' rights, as well as from the provisions of various instruments adopted within the specialised agencies of the United Nations of which the parties to the present Charter are members... The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or specialised international conventions laying down rules expressly recognised by member states of the Organisation of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognised by African states, as well as legal precedents and doctrine.'

'[t]he Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned.' Articles 60 and 61 of the African Charter, the treaty to which the Protocol is a complement, provides greater clarity about precision about these 'instruments.'

The implied rights doctrine was applied by the African Human Rights Commission in the *Social and Economic Rights Action Centre (SERAC) and another v Nigeria*⁶¹⁵ where the Commission read the right to shelter as being implied by the combined effects of the rights to property, health and the protection of the family.

Viljoen argues that articles 60 and 61 of the ACHPR open a wide array of possible sources that could give interpretative guidance, including African and United Nations human rights instruments, customary international law, judicial precedents, doctrine (academic writing) and general principles of law recognised by African states.⁶¹⁶ In the context of the current discussion, the African Commission can use articles 60 and 61 to read into the ACHPR minority language rights discussed in Chapter 2. This offers a wide range of protection to minority languages.

This Chapter and Chapter 6 argue that minority language rights can be implied from the rights not to be discriminated against on the basis of language,⁶¹⁷ equality,⁶¹⁸ freedom of expression,⁶¹⁹ right to culture,⁶²⁰ right to work,⁶²¹ right to education,⁶²² right to the protection of the family,⁶²³ the right of every child to a name⁶²⁴ and the right to a fair trial.⁶²⁵

⁶¹⁵ *Serac case* (n 236 above). At para 60, the African Commission stated that *'[a]lthough the right to shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under article 16 above, the right to property and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health and family are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian government has apparently violated.'*

⁶¹⁶ Viljoen (n 235 above) 327.

⁶¹⁷ Arts 2 of the ACHPR, 3 of the ACRWC and 2 of the African Youth Charter.

⁶¹⁸ Arts 3 and 19 of the ACHPR.

⁶¹⁹ Arts 9 & 25 of the ACHPR, 7 of the ACRWC and 4 of the African Youth Charter.

⁶²⁰ Arts 17(2) and (3) and 22 of the ACHPR, 12(1) of the ACRWC and 10 and 20 of the African Youth Charter.

⁶²¹ Arts 13 and 15 of the ACHPR.

⁶²² Arts 17(1) of the ACHPR and 11 of the ACRWC.

One weakness of the implied rights theory is that implied rights do not precisely stipulate the exact scope of protection afforded to minority languages. The protection of minority languages would therefore depend on the philosophical outlook and epistemology of knowledge of the adjudicators (the members of the African Commissioners and the judges of the African Court). Progressive Commissioners and Judges may use it to protect minority languages and conservative commissioners can use it to promote language assimilation. The protection of minority languages through the application of the implied rights approach therefore depends heavily on the interpretation of the African Commission and African Court on Human and Peoples' Rights.

3.2.2 Individual human rights and their contribution to an adequate protection of linguistic minorities and minority languages in the African human rights system

The individual human rights discussed in this subsection are not specific to linguistic minorities but can be exercised by any human being within a state. However, linguistic human rights can use these individual human rights to secure their language rights. This category of rights falls under the first pillar of a system for the protection of minority languages and linguistic minorities. It includes the right to equality and non-discrimination, freedom of expression, fair trial, culture, education and participation. Although the African Commission and African Court have not yet decided on the interrelationship between these rights and minority language rights, this section argues that the African Commission and African Court could use articles 60 and 61 of the ACHPR to imply minority language rights⁶²⁶ from the right to equality and non-discrimination, freedom of expression, fair trial, culture, education and participation.

A. Equality and non-discrimination on the basis of language

The linguistic history chronicled above reveals ethno-linguistic disparities and inequalities in almost all African countries, with the consequence of creating patterns of domination and subordination, inclusion and marginalisation, and non/misrecognition of linguistic minorities and

⁶²³ Arts 18 of the ACHPR, 18(1) of the ACRWC and 8 of the African Youth Charter.

⁶²⁴ Art 6 of the ACRWC.

⁶²⁵ Art 17 of the ACRWC.

⁶²⁶ Especially the rights to use of a minority language and to identity.

minority languages. It is this context that informs the nature of equality issues that lie beneath many of the claims of the linguistic minorities in most African states.

Equality provisions are enshrined in articles 2, 3 and 19 of the African Charter. Non-discrimination on the basis of language is provided for in articles 2 of the ACHPR, 3 of the African Charter on the Rights and Welfare of the Child (ACRWC) and 2 of the African Youth Charter.

It has been established above that equality and non-discrimination mainly constitute the first pillar of an adequate system for the protection of linguistic minorities and minority languages whose aim is to ensure that linguistic minorities are placed on a substantially equal footing with other nationals of the state. In *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe*,⁶²⁷ establish that equality or lack of it affects the capacity of anyone to enjoy other rights in the Charter.⁶²⁸

It was established in Chapters 1 and 2 that equality can be formal or substantive. Formal equality means sameness of treatment in that similar people that are similarly situated in relevant ways should be treated similarly and people that are not similar should be treated dissimilarly. Substantive equality requires an examination of the actual political, economic and social disparities between language speakers to determine whether the linguistic minorities should be treated similarly or differently.

A textual reading of article 2 of the ACHPR seems to suggest formal equality and as such could be understood to require states to ensure that all individuals, including members of minorities, enjoy rights guaranteed in the charter without discrimination. Formal equality is not sufficient to address the linguistic inequalities prevalent in the colonial and post-colonial African state. Its inadequacy mainly pertains to its being difference-blind and its inattention to circumstantial inequality. Put differently, formal equality fails to recognise systematic inequality rooted in the

⁶²⁷ *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe* (2008) AHRLR 120 (ACHPR 2008) para 125.

⁶²⁸ It further established that in order for a party to establish a successful claim under article 3(2) of the Charter therefore, it must show that, the respondent state had not given the complainants the same treatment it accorded to the others or that, the respondent state had accorded favourable treatment to others in the same position as the complainants.

existence of group-based marginalisation and subordination, and in the non/misrecognition of the identity of members of some linguistic minorities in multicultural societies as constituting discrimination or second-class citizenship.⁶²⁹

The application of formal equality in the African context has two adverse effects. First, it has discriminatory results. It preserves the unequal power relations in society among members of different groups, as well as the non-recognition of linguistic minorities. It condemns vulnerable linguistic minorities to perpetual political and socio-economic marginalisation.⁶³⁰ Second, it is assimilationist in its effect. It recognises only what is the same in all and does not accommodate linguistic identity differences and the issues of equality to which these differences give rise.⁶³¹ Given the unequal position of various linguistic minorities in Africa, such assimilationist tendencies would mean an inequitable treatment of linguistic minorities and minority languages. The textual reading of article 2 of the ACHPR would not address the linguistic inequalities prevalent in African states.

A proper interpretation of article 2 of the ACHPR would not be limited to formal equality but would extend to include substantive equality. Substantive equality involves the provision of different rights, privileges and powers with regard to the relevant matters in respect of which people are different or, more accurately, unequal.⁶³² Substantive equality also entails the provision of group-specific minority rights both to offset their political and socio-economic vulnerabilities and prevent their future exclusion, and to recognise and affirm their particularity or cultural distinctness. Given the pervasive inequality among members of different linguistic minorities in many African states highlighted above, substantive equality would demand the use

⁶²⁹ See IM Young *Justice and the Politics of Difference* (1990) 164-165; MS Williams 'Memory, History and Membership: The Moral Claims of Marginalized Groups in Political Representation' in J Raikka (ed) *Do We Need Minority Rights?* (1996) 85-119, 105, 110; A Phillips *Which Equalities Matter?* (1999) 90-98.

⁶³⁰ See IM Young 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' in RE Goodin & P Pettit *Contemporary Political Philosophy: An Anthology* (1997) 256-272; MS Williams 'Memory, History and Membership: The Moral Claims of Marginalized Groups in Political Representation' in J Raikka (ed) *Do We Need Minority Rights?* (1996) 85-119, (rejecting the idea of universal equality in situations of 'group-structured inequality' saying that ignoring social difference by strict adherence to difference-blind equality will only serve to perpetuate such inequality).

⁶³¹ C Albertyn 'Equality' in E Bonthuys & C Albertyn (eds) *Gender, Law & Justice* (2007) 87 (arguing that formal equality cannot tolerate differences on grounds such as race or gender, even if they promote equality).

⁶³² B Parekh *Rethinking multiculturalism: cultural diversity and political theory* (2000) 239-242. See also I Brownlie 'The rights of peoples in modern international law' in J Crawford (ed) *The rights of peoples* (1992) 1, 7-11.

of affirmative action,⁶³³ reverse discrimination or remedial or restitutionary equality.⁶³⁴ Affirmative action acknowledges the reality of linguistic inequality and aims to level the playing field⁶³⁵ by removing the conditions for the existence of linguistic inequalities and thereby transcending them.⁶³⁶

In the light of this, linguistic minority claims for substantive equality in Africa would also demand that the state provides for institutions or guarantees that ensure that members of linguistic minorities have the capacity to enjoy their rights and are treated with equal concern and respect, not only as citizens, but also as members of linguistic minority groups.

The African human rights system's equality jurisprudence varies significantly from the International and European human rights systems jurisprudence.

First, the African human rights system does not only recognize discrimination of individuals but also recognizes discrimination of a people group. Articles 2⁶³⁷ and 3⁶³⁸ related to discrimination of individuals whilst article 19 relates to discrimination of a group. Article 19 of the African

⁶³³ See KA Acheampong 'The African Charter and the equalization of human rights' (1994) 12 *Scandinavian Human Rights Journal* 168.

⁶³⁴ LWH Ackermann 'Equality and non-Discrimination: some analytical thoughts' (2006) 22 (4) *South African Journal on Human Rights* 597-612.

⁶³⁵ C Taylor 'The Politics of Recognition' in A Guitmann (ed) *Multiculturalism: examining the politics of recognition* (1994) 40.

⁶³⁶ A Addis 'Individualism, communitarianism, and the rights of ethnic minorities' (1992) 67 *Notre Dame Law Review* 615 639.

⁶³⁷ Art 2 of the African Charter uses the term 'without distinction' instead of 'without discrimination.' The African Commission has interpreted 'without distinction' to mean 'without discrimination.' (See *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000), para 131; *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 63 & *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 54). Even though the prohibited grounds for discrimination (including language) are listed, they are not exhaustive as reflected by the term 'or other status.'

⁶³⁸ Art 3 focuses on 'equality before the law' and 'equal protection of the law.' Not much substance has been given in the interpretation of the terms 'equality before the law' and 'equal protection of the law.' *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 49 established that 'article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country' In *Union Interafricaine des Droits de l'Homme & Others v Angola* (2000) AHRLR 18 (ACHPR 1997) para 18, the African Commission talked about equality before the law when it was evaluating article 2 of the African Charter.

Charter holds that all peoples shall be equal⁶³⁹ and that nothing shall justify the domination of a people by another. This can be seen as implying a prohibition of discrimination against a people.⁶⁴⁰

Second, the African Commission has not yet adopted a three-step⁶⁴¹ assessment of whether a differentiation in treatment has a reasonable and objective justification established in International law. In *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe*,⁶⁴² the African Commission further observed that to establish discrimination⁶⁴³ it must be shown that the complainants have been treated differently in the enjoyment of any of the Charter rights by virtue of their language, among other grounds. Henrard argues that the African Commission sometimes confuses the similarities or differences between legitimate limitations to human rights generally and the reasonable justification test in relation to non-discrimination on the other.⁶⁴⁴

Third, there are principles of equality found in international law that are not clear under the African human rights system. For instance, it is not clear whether enumerated grounds for discrimination are scrutinized differently from the other grounds covered by the term 'other status'.⁶⁴⁵ There is also no clarity on whether indirect discrimination is recognized.⁶⁴⁶ It is also

⁶³⁹ Article 19 specifically recognising the importance of inter-group equality, particularly in the context of Africa, for achieving substantive equality. The inter-group equality that it guarantees covers all aspects of public life: political, social and economic.

⁶⁴⁰ See Henrard, The right to equality and non-discrimination and the protection of minorities in Africa in Dersso (n 8 above) 243. See *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) where the African Commission did not clarify the relationship between articles 2 and 19 of the African Charter.

⁶⁴¹ As shown in chapter 1, the first step establishes whether or not there is a *prima facie* case of discrimination. The second step assesses whether there is reasonable and objective justification for the discrimination. The third step involves a legitimate aim and a proportionality requirement.

⁶⁴² (2008) AHRLR 120 (ACHPR 2008) para 125.

⁶⁴³ Discrimination can be direct and indirect. Direct discrimination occurs when persons who should be treated equally are explicitly treated unequally. Indirect discrimination, also sometimes referred to as disparate impact, occurs when a neutral regulation that applies equally to all persons has a discriminatory effect and there exists no objective justification for this result.

⁶⁴⁴ See Henrard (n 8 above) 243-244. See also *Legal Resources Foundation v Zambia* para 67 & *Purohit & Anor v The Gambia* para 49.

⁶⁴⁵ Henrard (n 8 above) 245-246.

⁶⁴⁶ See *Legal Resources Foundation v Zambia* para 70 which seems to suggest though that the African Commission is concerned about discriminatory effects.

not clear whether positive action is recognized in view of the fact that the African Commission has so far not dealt with cases on positive action.⁶⁴⁷

The identified deficiencies in the equality jurisprudence of the African Commission beckons for a need to embrace indirect discrimination, introduce different levels of scrutiny for enumerated grounds for discrimination and analogous grounds, adopt a three-step assessment of whether a differentiation in treatment has a reasonable and objective justification and embrace use of positive action and measures to cure the scourge of discrimination of linguistic minorities in Africa. The African Commission can arguably use articles 60 and 61 of the African Charter⁶⁴⁸ to draw inspiration from international law to develop its equality jurisprudence.⁶⁴⁹

Given that the issue of minorities in Africa remains controversial and problematic⁶⁵⁰ and that most African states are reluctant to recognise groups as minorities within their territories for fear that recognition may lead to secession,⁶⁵¹ the equality principle could be a potentially important avenue to enhance linguistic minority protection because it is not minority specific.⁶⁵² However,

⁶⁴⁷ However, the 2005 report of the African Working Group 77 argues that articles 2 and 3 of the African Charter imply a duty on states to protect indigenous groups against discrimination by private individuals. There are still no cases that have authoritatively decided on this interpretation.

⁶⁴⁸ Articles 60 and 61 of the African Charter provide that '*[t]he Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of, human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.*'

⁶⁴⁹ Such an approach is consistent with the practice of the African Commission. For instance, in *Malawi African Association and Others v Mauritania* above, the African was inspired by the UN Declaration on the Rights of People Belonging to National or Ethnic, Religious and Linguistic Minorities to establish that the goal of the Minorities Declaration is to eliminate all forms of discrimination and to ensure equality among all human beings and this is equivalent to the state obligation to protect the separate identity of the minorities.

⁶⁵⁰ T Murithi, 'Developments under the African Charter on Human and Peoples' Rights relevant to minorities' in K Henrard & R Dunbar (n 3 above) 385.

⁶⁵¹ Report on the first seminar on Multiculturalism in Africa: Peaceful and constructive group accommodation in situations involving minorities and indigenous peoples held in Arusha, Tanzania, 13-15 May 2000, E/CN.4/Sub.2/AC.5/2000/WP.3, para 28.

⁶⁵² Clause 4 of UNHRC General Comment 23 establishes that '*[t]he entitlement, under article 2(1), to enjoy the rights under the Covenant without discrimination applies to all individuals within the territory or under the jurisdiction of the State whether or not those persons belong to a minority.*'

the scope of protection of minority language rights and linguistic minorities through the equality principle depends on the willingness of the African Commission and the African Court to interpret equality and prohibition of discrimination in a way that furthers substantive equality and the right to identity of minorities.

B. Freedom of expression

Minority language rights can be implied from the right to freedom of expression as enshrined in article 9 of the ACHPR.⁶⁵³ The right to freedom of expression refers to the right to hold opinions without any interference and to access, seek, receive and impart information through any media and without any frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.⁶⁵⁴ It includes freedom of speech and freedom of the press.

As argued in Chapter 1, language is a means through which a person expresses himself and communicates with others. For minority language speakers, this means using their minority languages. Minority language rights can therefore be inferred from the right to freedom of expression.

Implied in the right to freedom of expression is the right to receive, hold and impart information in a minority language. It has already been argued above that international law recognizes the right to linguistic expression as part of freedom of expression.⁶⁵⁵ The right also includes correspondence and broadcasting in a minority language.

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.'⁶⁵⁶

⁶⁵³ It states that '*... Every individual shall have the right to receive information... Every individual shall have the right to express and disseminate his opinions within the law.*' Freedom of expression is also protected by arts 25 of the ACHPR, 7 of the ACRWC and 4 of the African Youth Charter.

⁶⁵⁴ See Communication 379/09 *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* (ACHPR 2014) 14 March 2014.

⁶⁵⁵ de Varennes (n 86 above) 121.

⁶⁵⁶ 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.

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.

Hopefully, the African Commission and the African Court will draw inspiration from the jurisprudence of the UN and European human rights system and pronounce that the right to use one's language is implied from freedom of expression.⁶⁵⁷

C. The right to culture

Minority language rights, especially the right to use a minority language and the right to linguistic identity, can also be viewed as being implied by the right to culture enshrined in articles 17(2) and (3) and 22 of the ACHPR.⁶⁵⁸ It has been established above that language is a vehicle of cultural expression. For instance, Makoni and Trudell observe that in sub-Saharan Africa, language functions as one of the most obvious markers of culture.⁶⁵⁹ 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.'*⁶⁶⁰ Examples include the Tonga, Ndebele and Shona in ZIM and the Xhosa and Zulu in SA. In *Malawi African Association and Others v Mauritania*,⁶⁶¹ the African Commission held that

Language 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 identity.

⁶⁵⁷ In particular, *Ballantyne, Davidson & McIntyre v Canada* (n 69 above) paras 11.3 & 11.4. specifically holds that freedom of expression entails use of one's language as envisaged in article 27 of the CCPR.

⁶⁵⁸ The right to culture is also provided for in arts 12(1) of the ACRWC and 10 and 20 of the African Youth Charter.

⁶⁵⁹ Makoni & Trudell (n 205) 21.

⁶⁶⁰ Webb & Kembo-Sure (n 28 above) 5

⁶⁶¹ (2000) AHRLR 149 (ACHPR 2000) para 136.

It is therefore discernible that the right to use a minority language is impliedly protected under the right to culture.

D. The right to work

Although the African Commission and African Court have not yet made a decision, the right to use minority languages can also be implied from the right to work under equitable and satisfactory conditions in article 15 of the ACHPR and the right to access to the public service of one's country in article 13(2) of the ACHPR. Implied from these rights is that minority language speakers have a right to access civil society even if they may not be fluent in the official language.

In *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*,⁶⁶² the African Commission established that article 15 of the ACHPR places an obligation on the state to facilitate employment through the creation of an environment conducive to the full employment of individuals within society under conditions that ensure the realisation of the dignity of the individual. This arguably entails the use of a minority language at work as a means of expression and communication.⁶⁶³ It therefore follows that if a government denies a minority language speaker an opportunity to work in the civil service and or prohibits the minority language speaker to use his language at work, this could be interpreted as discrimination on the basis of language.

E. The right to education

Minority language rights can be implied from the right to education provided for in article 17(1) of the ACHPR.⁶⁶⁴ As argued in Chapter 2, education plays a crucial role in preserving and promoting linguistic identity.⁶⁶⁵ The right to education entails that education should be available,

⁶⁶² Communication 379/09, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* (ACHPR 2014) 14 March 2014 para 129.

⁶⁶³ The African Commission and African Court could draw inspiration from the European system to imply the right to work from articles 13(2) and 15 of the ACHPR.

⁶⁶⁴ Article 11 of the ACRWC.

⁶⁶⁵ Y Dinstein 'The degree of self rule for minorities in unitarian and federal states' in C Brolmann (ed) (1993) *Peoples and minorities in international law* 228.

accessible, acceptable and adaptable.⁶⁶⁶ Education is accessible if it is '*relevant, culturally appropriate and of good quality to students and, in appropriate cases, parents.*'⁶⁶⁷

Although the African Commission and the African Court have not yet decided on the right to mother-tongue education, it would appear that education can be said to be accessible to minority language speakers if it is either taught in a minority language or if the curriculum has an element of use of minority languages.⁶⁶⁸

Mother tongue education is also important for the preservation of the language and traditions of the culture conveyed through it to future generations.⁶⁶⁹ Such an interpretation is envisaged by article 17(1) of the Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) that interprets the scope of the right of education enshrined in article 17(1) of the ACHPR to include the development of curricula that address diverse social, economic and cultural settings.

The obvious restriction to the enjoyment of the right to mother tongue education is that most minority languages in Africa have not yet been developed for them to be used at different levels of education. Curriculum, course books and teachers who are able to teach should be developed if mother tongue education is to be realised. This requires time, effort and money.

Since linguistic minorities are usually in an economic and political non-dominant position, government assistance plays a crucial role in making mother tongue education a reality. Practically, the sliding scale approach could play a crucial role in determining the minority languages that should be developed and taught.⁶⁷⁰ The state would be expected to provide education in a certain minority language if the linguistic group is of a certain size and are concentrated in a certain area.⁶⁷¹

⁶⁶⁶ See General Comment 13 of the Committee on Economic, Social and Cultural Rights.

⁶⁶⁷ Para 6 of General Comment 13.

⁶⁶⁸ 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.

⁶⁶⁹ Henrard (n 13 above) 257-258.

⁶⁷⁰ K Henrard (n 13 above) 260-261.

⁶⁷¹ de Varennes (n 86 above) 189.

Just like in international law, states are neither obliged to establish educational institutions for linguistic minorities nor to financially support private linguistic minority educational institutions under the African human rights system.⁶⁷²

The preceding discussion establishes that the right to use a minority language can arguably be implied from the right to education.

F. Right to the protection of the family

It is possible to view the right to the protection of the family protected in article 18(1) and (2) of the ACHPR as implying the existence of the right to use a minority language.⁶⁷³ Family members normally communicate in their mother tongue. In some instance, their names and surnames are in the mother tongue. Family traditions and values are also transmitted through the mother tongues.

For linguistic minorities, the minority language is a key component in effectively accessing and exercising this right. It would appear that if the government proscribes the use of minority languages in the family or puts impediments to the use of a minority language in the family, such limitations could be interpreted as discrimination on the basis of language. Minority language rights are arguably implied from the right to the protection of the family.

G. The right to a name

The right to use a minority language can also be arguably implied from the right of every child to a name enshrined in article 6(1) of the ACRWC. Names and surnames constitute a means of identifying persons within their families and the community in Africa. Put differently, names are an inseparable part of the family, culture and the community. The right to a name can thus be

⁶⁷² See Henrard (n 13 above) 265. At 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 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.'*

⁶⁷³ The right is also provided for in arts 18(1) of the ACRWC and 8 of the African Youth Charter.

interpreted to include the right to a name in a language of one's choice (including a minority language).

It therefore follows that a government that prevents an individual from having a name or surname that is not in an official language but in a minority language violates the right to a name in article 6(1) of the ACRWC.

H. The right to a fair trial

The right to use of a minority language can be implied from the right to a fair trial in article 17 of the ACHPR. The most important aspect of the right to a fair trial in this regard is the right of an accused person to be informed of the alleged crime in a language he understands (which may or may not be their mother tongue) and the right to an interpreter.⁶⁷⁴

It has been argued in Chapter 2 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.⁶⁷⁵

I. Right to participation

Minority language rights can be inferred from the right to participation in article 13(1) of the ACHPR.⁶⁷⁶ The Right to participate entails participating in elections, formulation and implementation of government policies, to hold public office, etc. Minority languages may also be used in this participation.

Eide argues that the right to participation can be implemented where segments of the population obtain a degree of autonomy and several forms of territorial decentralisation like federalism, regional or local self-government.⁶⁷⁷ Territorial decentralisation plays a very pivotal role in the protection of minority languages in instances where linguistic minorities are concentrated in

⁶⁷⁴ Article 17 of the ACRWC.

⁶⁷⁵ See the *Guesdon case* (n 333 above).

⁶⁷⁶ See article 21 of the Universal Declaration.

⁶⁷⁷ A Eide 'Approaches to minority protection' in Phillips & Rosas (n 313 above) 89.

certain regions.⁶⁷⁸ The decisions of the African Commission on the right to self-determination enshrined in article 20 of the ACHPR reveal the reluctance of the African Commission to encourage secession but to encourage territorial decentralisation as a way of preserving territorial integrity and sovereignty.⁶⁷⁹

Territorial decentralisation is analysed in Chapters 4 and 5 in the context of the SA and ZIM constitutions. The application of territorial minority language rights is easy the best approach whenever territorial decentralisation obtains in a state.

Subsection summary

It is clear from the preceding sub-section that individual human rights, despite their qualification and deficiencies, contribute to a human rights framework for the effective protection of minority languages and linguistic minorities. The rights to equality, non-discrimination, freedom of expression, fair trial, culture, education, participation and fair ensure that linguistic minorities are placed on a substantially equal footing with other nationals of the state.

It should be acknowledged though that even though individual human rights provide a valuable human rights framework for the protection of minority languages and linguistic minorities, they are nevertheless inadequate. The main reason for this is that individual human rights do not regulate important aspects of public life that directly impact upon the linguistic identity of minorities. To use Kymlicka words, individual human rights standards⁶⁸⁰

[a]re simply unable to resolve some of the most important and controversial questions relating to cultural minorities: which languages should be recognised in the parliaments, bureaucracy, and courts? Should each ethnic or national group have publicly funded education in its mother

⁶⁷⁸ Henrard (n 12 above 273) argues that '[b]y granting a measure of autonomy to the various segments of a state's population while guaranteeing a degree of political participation in matters of common concern, consociational democracy arguably amounts to a technique of minority protection that qualifies as an implementation of the right to self-determination in its internal dimension for these segments/ population groups/ minorities concerns.' Self-determination is outside the scope of this study.

⁶⁷⁹ See Communication 75/92, *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) (8th Annual Activity Report); Communications 279/03, 296/05 (joined), *Sudan Human Rights Organisation and another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (28th Activity Report) and Communication 266/03, *Gunme and others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) (26th Activity Report).

⁶⁸⁰ W Kymlicka *Liberalism, Community and Culture* (1989) 4-5.

tongue? Should internal boundaries (legislative districts, provinces, states) be drawn so that cultural minorities form a majority within a local region? Should political offices be distributed in accordance with a principle of national or ethnic proportionality?

3.2.3 Specific minority rights in the African human rights system and how they contribute to the adequate protection of linguistic minorities and minority languages

It has been established above that the second pillar for the protection of linguistic minorities and minority languages is minority rights designed to protect and promote the separate identity of minority language groups.⁶⁸¹

The issue of minorities in Africa is controversial and problematic⁶⁸² and most African states are reluctant to recognise groups as minorities within their territories for fear that recognition may lead to secession.⁶⁸³ When minorities are recognised, they are mainly recognised as 'indigenous'⁶⁸⁴ or 'home-grown' minorities.⁶⁸⁵ When a discussion of minority specific rights is undertaken, reference is therefore made to peoples' rights.

This section assesses the extent to which the African human rights system adequately protects minority specific rights. Suffice to mention that the analysis below shows that the African human rights system does not have any treaty devoted to minority language rights. There are two express provisions that relate to language contained in article 3(2) of the African Youth Charter and part V of the Cultural Charter for Africa. The limitation of these treaties are that the African

⁶⁸¹ 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), '...Protection of minorities is the protection of non-dominant groups 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.'

⁶⁸² Murithi 'Developments under the African Charter on Human and Peoples' Rights relevant to minorities' in K Henrard (n 3 above) 385.

⁶⁸³ Report on the first seminar on Multiculturalism in Africa: Peaceful and constructive group accommodation in situations involving minorities and indigenous peoples held in Arusha, Tanzania, 13-15 May 2000, E/CN.4/Sub.2/AC.5/2000/WP.3, para 28.

⁶⁸⁴ Interestingly, the African Commission defined people in a way that included minorities in *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001).

⁶⁸⁵ Henrard (n 8 above) 239.

Youth Charter applies only to youths and the Cultural Charter in Africa has not had significant impact due to its framing⁶⁸⁶ and its lack of an implementation mechanism.⁶⁸⁷ The Charter for African Cultural Renaissance will replace the Cultural Charter for Africa if it is ratified by two thirds of the African Union membership.

An interesting provision is article 2(3) of the African Youth Charter⁶⁸⁸ that is formulated along the lines of article 27 of the CCPR. It says:

State Parties shall recognize the rights of young people from ethnic, religious and linguistic marginalized groups or youth of indigenous origin, to enjoy their own culture, freely practice their own religion or to use their own language in community with other members of their group.

Supervisory bodies have not yet interpreted article 2(3) of the African Youth Charter to ascertain the actual normative content of its language rights. However, a progressive interpretation would take into account how supervisory bodies have interpreted article 27 of the CCPR given the similarities between the two provisions. Such an interpretation would imply three minority specific rights namely prevention of assimilation of linguistic minorities, right to identity and the right to use minority languages in public and in private. This subsection proceeds to analyse these three minority specific rights in the African context.

A. Prevention of assimilation of linguistic minorities

Article 2(3) of the African Youth Charter arguably imposes a positive state obligation to prevent assimilation of linguistic minorities.⁶⁸⁹ Such an interpretation would enable member states to

⁶⁸⁶ It imposes obligations on states and makes lofty commitments without providing for individual human rights to culture.

⁶⁸⁷ Viljoen (n 235 above) 213.

⁶⁸⁸ This treaty was adopted on 2 July 2006 and entered into force on 8 August 2009.

⁶⁸⁹ A similar interpretation has been given to article 27 of the CCPR in Chapter 2 above. For instance, inspiration could be drawn from paragraph 6 of the UNHRC General Comment 23 states that '[a]lthough article 27 is expressed in negative terms, that article, nevertheless, does recognise the existence of a "right" and requires that it shall not be denied. Consequently, a state party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measure of protection are, therefore, required not only against acts of the state party itself... but also against acts of other persons within the state party... positive measures by states may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their... language... such positive measures must respect the provisions of Article 2(1) and 26 of the

effectively integrate linguistic minorities while allowing them to preserve their linguistic identity which is essential for the adequate protection of minority languages and linguistic minorities. The prevention of assimilation will go a long way in promoting linguistic diversity and healing the history of linguistic assimilation prevalent in the linguistic history of Africa chronicled above.

B. The right to identity

It was established in Chapter 2 that article 27 of the CCPR implies the right to identity.⁶⁹⁰ If a similar interpretation is to be adopted in interpreting article 2(3) of the African Youth Charter, the right to identity will be implied.

The point of departure though is that the African conception of identity is cultural identity.⁶⁹¹ Article 17 of the ACHPR provides for the right to cultural identity, article 20 guaranteed the cultural right of peoples to existence and article 22(1) guarantees the right to cultural development and identity.⁶⁹²

In Africa, individuals are conceived as being part of and in harmony with their community rather than independent or in conflict with it.⁶⁹³ It is within a communal context and through culture that persons become persons.⁶⁹⁴ The philosophical expressions 'I am because we are, and because

Covenant both as regards the treatment between different minorities and the treatment between persons belonging to them and the remaining population... as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under Article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.'

⁶⁹⁰ 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 Phillips & Rosas (n 110 above) 13-76 20 argues that 'article 27 is concerned with the right to identity of minorities even if this right is not named.'

⁶⁹¹ See AG Selassie 'Ethnic identity and constitutional design for Africa' (Fall 1992-93) 29 *Stanford Journal of International Law* 1; IJ Wani 'Cultural preservation and the challenges of diversity and nationhood: the dilemmas of indigenous cultures in Africa' (1990-91) 59 *University of Missouri – Kansas City Law Review* 612.

⁶⁹² See F Ouguergouz, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 217-227.

⁶⁹³ BO Okere (n 29 above) 148 (indicating that the 'African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity'). Also see R Kiwanuka 'The Meaning of "People" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80, 82.

⁶⁹⁴ See JAM Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 309-331, 320-325; MW Mutua 'The Banjul Charter and the African cultural fingerprint: an evaluation

we are therefore I am'⁶⁹⁵ and *umuntu ngumuntu ngabantu*⁶⁹⁶ aptly reflects 'communality and the inter-dependence of the members of a community'⁶⁹⁷ and that every individual is an extension of others.'⁶⁹⁸ Cultural identity therefore defines the right to identity in Africa.

It has been established above that central to culture is the language component.⁶⁹⁹ Intrinsic in the protection of cultural identity is the prevention of the erosion of minority languages. Protection of cultural identity (and by extension linguistic identity) is therefore a necessary aspect of effective protection of minority languages and linguistic minorities.⁷⁰⁰

C. The right to use a minority language

Article 2(3) of the African Youth Charter obliges member states to recognise the right of youths belonging to linguistic minority groups to use their language. Private use of language is not a contested issue. However, the use of language with public in communication with public authorities, in public media and in education is one of the linguistic minorities' chief concerns. The use of languages in the public domain is usually determined by the extent of development of the language as well as the actual language situation in each country. Interestingly, article 17 of the Cultural Charter for Africa obliges states to develop indigenous (minority) languages with a view of ensuring cultural advancement and accelerating economic and social development.

As regards use of minority languages in the public service, states do not have an obligation to

of the language of duties' (1995) 35 *Virginia Journal of International Law* 339, 346-359

⁶⁹⁵ Mbiti (n 31 above) 141.

⁶⁹⁶ Literally translated as 'a person is a person through other people.'

⁶⁹⁷ *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 163.

⁶⁹⁸ *MEC for Education, KwaZulu-Natal & Others v. Pillay* 2008 (1) SA 474 (CC) para. 53.

⁶⁹⁹ R Dworkin 'Liberal community' (1989) 77 *California Law Review* 479-504 argues that Says '[t]hey [people] need a common culture and particularly a common language even to have personalities, and culture and language are social phenomena. We can have only the thought, and ambitions, and convictions that are possible within the vocabulary that language and culture provide, so we are all, in a patent and deep way, the creatures of the community as a whole.'

⁷⁰⁰ See M Koenig & P de Guchteneir 'Political governance of cultural diversity' in M Koenig & P de Guchteneir (eds) *Democracy and Human Rights in Multicultural Societies* (2007) 3, 7 who indicate the effect of these developments in delegitimising the nation-state model and requiring new public policies of governing diversity.

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. African states could use the ‘sliding-scale approach’⁷⁰¹ 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.⁷⁰² Such an approach is practical in Africa where linguistic minorities are usually territorially concentrated and most social and economic affairs are conducted at local levels in the regional or local vernacular. States can accord official language status at regional or municipal levels to languages spoken regionally or locally and national official language status to widely spoken language/s in a nation. This approach balances the interest of having a common national language with the need to recognise regional and local minority languages to empower their hitherto neglected speakers.

Regarding language use in education, minority specific issues revolve around mother tongue education, curricular content and establishment of private minority educational institutions. Regarding 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 concentrated⁷⁰³ taking into account the number of minority students seeking education in their language and the extent of the burden this puts on public resources.⁷⁰⁴

Concerning the content of education, states are enjoined to adopt a multicultural approach⁷⁰⁵ where the education curricula should objectively reflect, among others the culture and language

⁷⁰¹ de Varennes (n 86 above) 177.

⁷⁰² de Varennes (n 86 above) 177-178.

⁷⁰³ Henrard (n 13 above) 260-261.

⁷⁰⁴ de Varennes (n 86 above) 33.

⁷⁰⁵ See Article 4 of the 1992 UN Declaration on the Rights of Minorities and Article 12 of the Framework Convention.

of historically disadvantages linguistic minority groups.⁷⁰⁶ Ideally, the text materials to be used should also be representative of the perspectives of members of different sections of society.⁷⁰⁷

Mother tongue education could easily be effected where minorities are able to establish their own educational institutions at their cost subject to national standards of quality education. Even though the state does not generally have the obligation to fund such institution, 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.⁷⁰⁸

The use of language in media has two aspects. The first relates to right of linguistic minorities to establish print or electronic media in minority languages.⁷⁰⁹ The state does not generally have an obligation to support linguistic minority media institutions. The second relates access to media. This can be realized if states allocate linguistic minorities frequencies.⁷¹⁰ Language is the vehicle through which these aims are achieved. The 'sliding-scale approach' is useful in determining the extent of state obligations in this area. Accordingly, the size and geographical concentration of the minority population, the capacity of the state concerned, and the needs and interests of minorities should be taken into account.

Subsection summary

The preceding discussion establishes that the second pillar for minority language protection is not adequately protected under the African human rights system. Some weaknesses include the fact that there is no treaty devoted to specific minority language rights. The concept of minority itself is a contestable issue. The express provisions that somewhat provides for some minority

⁷⁰⁶ Henrard (n 13 above) 262-265.

⁷⁰⁷ It is interesting to note that arts 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.*'⁷⁰⁷ 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.

⁷⁰⁸ See art 5(1)(c) of the UNESCO Convention on the Elimination of Discrimination in Education.

⁷⁰⁹ See de Varennes (n 86 above) 217-225.

⁷¹⁰ de Varennes (n 86 above) 223.

language rights are weak in formulation and have not yet been interpreted by supervisory bodies to give content to the minority language rights. This normative deficiency beckons for a need to clarify the content of specific minority language rights in Africa which is addressed in Chapter 6. It would be fair to contend that the African human rights system has an evolving human rights framework for the protection of minority languages and linguistic minorities.

3.2.4 Limitation of minority language rights under the African human rights system

Before concluding the discussion on the extent to which the African human rights system reflects the two pillar system for the adequate protection of minority languages and linguistic minorities, it is important to highlight that minority language rights under the African human rights system discussed in this section do not apply absolutely but may be legitimately limited by states in three ways under the ACHPR.⁷¹¹

First, rights can be limited by 'claw back' clauses such as 'for reasons... previously laid down by law',⁷¹² 'within the law',⁷¹³ 'subject to law and order'⁷¹⁴ and 'provided he abides by the law'.⁷¹⁵ The obvious concerns are that state parties could use 'claw back' clauses to unduly restrict the rights provided for in the ACHPR.⁷¹⁶ However, the African Commission has interpreted the term 'law' as international law or international human rights standards,⁷¹⁷ thus minimising the negative effects of these clauses.

Second, minority language rights in the ACHPR can be limited using right-specific-norm-based limitations⁷¹⁸ that requires the limiting law to serve some stipulated objective like national

⁷¹¹ This section has heavily relied on Viljoen (n 235 above) 329-333.

⁷¹² Art 6 of the ACHPR.

⁷¹³ Art 9 of the ACHPR.

⁷¹⁴ Art 8 of the ACHPR.

⁷¹⁵ Art 10(1) and 12(1) of the ACHPR.

⁷¹⁶ See E Bondzie-Simpson, 'A critique of the African Charter on Human and Peoples' Rights' (1988) 31 *Howard Law Journal* 643, 661.

⁷¹⁷ See Communications 105/93, 128/94, 152/96 (joined), *Media Rights Agenda and others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) (12th Annual Activity Report); Communication 101/93, *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995) (8th Annual Activity Report) para 15 and Communications 27/89, 46/90, 49/90, 99/93 (joined), *Organisation Mondiale Contre la Torture and others v Rwanda* (2000) AHRLR 282 (ACHPR 1996) (10th Annual Activity Report).

⁷¹⁸ Viljoen (n 235 above) 329.

security, law and order, public health or morality,⁷¹⁹ health, ethics and rights and freedoms of others.⁷²⁰ Interestingly, in *Amnesty International v Zambia*, the African Commission treated right-specific-norm-based limitations as ‘claw back’ clauses that can only be limited by international law or international human rights standards.⁷²¹

Third, minority language rights in the ACHPR can be limited using the general limitation clause in article 27(2) of the ACHPR which says ‘[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.’⁷²² In practice, the African Commission applies the proportionality test to establish whether a limitation is legitimate and justifiable.⁷²³

The limitation should be by law of general application. The impact, nature and extent of the limitation is weighed against the legitimate state interest serving a particular goal. The limitation should not have the effect of obliterating and rendering the right concerned illusory.⁷²⁴ Whenever there is more than one way of achieving an objective, the less invasive route should be followed.⁷²⁵

It is interesting to note that in *Legal Resources Foundation v Zambia*,⁷²⁶ the African Commission established that the limitation of rights cannot be solely based on popular will but the proportionality principle in article 27(2) of the ACHPR. This is crucial for linguistic minorities because one of the obstacles of minority language rights protection is the idea that majority

⁷¹⁹ Art 12(2) of the ACHPR.

⁷²⁰ Arts 8 and 11 of the ACHPR.

⁷²¹ Communication 212/98, *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) (12th Annual Activity Report) para 50.

⁷²² Communications 105/93, 128/94, 152/96 (joined), *Media Rights Agenda and others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) (12th Annual Activity Report) paras 68 and 77 established that the only legitimate limitation to rights in the ACHPR is article 27(2) of the ACHPR.

⁷²³ See Viljoen (n 235) 331.

⁷²⁴ Communications 105/93, 128/94, 152/96 (joined), *Media Rights Agenda and others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) (12th Annual Activity Report) para 65.

⁷²⁵ Communication 242/2001, *Interights and others v Mauritania* (2004) AHRLR 87 (ACHPR 2004) (17th Annual Activity Report) para 82.

⁷²⁶ Communication 211/98, *Legal Resources v Zambia* (2001) AHRLR 84 (ACHPR 2001) (14th Annual Activity Report) para 69.

languages dominate and majority language speakers are numerically superior, thus if the majority principle applies, minority languages would become the easy casualty.

The question that remains to be answered is whether and to what extent the European principle of margin of appreciation discussed in Chapter 2 applies in the African human rights system. In *Prince v South Africa*, the African Commission acknowledged that the principle of subsidiarity and the doctrine of margin of appreciation apply to the ACHPR since states are primarily responsible for protecting rights in the ACHPR.⁷²⁷ However, the African Commission did not allow a restrictive reading of the doctrines of deference and margin of appreciation which advocates for the hands-off approach by the African Commission on the mere assertion that its domestic procedures meet more than the minimum requirements of the African Charter. This would oust the African Commission's mandate to monitor and oversee the implementation of the African Charter. Put differently, the doctrine of margin of appreciation does not preclude an assessment by the African Commission of the reasonableness of the limitation of rights in terms of section 27(2) of the ACHPR.⁷²⁸ This approach is similar to the European Court's approach that also indicates that the margin of appreciation goes hand in hand with European supervision (though the latter is inversely related to the width of the margin).

Section summary

A number of conclusions can be made from this section. First, the concept of minority itself is a contestable issue in Africa. Second, unlike the European human rights system, the African human rights system does not have a specific treaty devoted to minority language rights. Third, the two-pillar system for the protection of minority languages and linguistic minorities in Africa is rather weak in that the qualified rights are not minority specific and do not regulate important aspects of public life that directly impact upon the linguistic identity of minorities. In any event, supervisory bodies have not yet interpreted both the individual and minority specific rights to give content to the minority language rights. This normative deficiency beckons a need for

⁷²⁷ Communication 255/02, *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) para 51 establishes that 'Similarly, the margin of appreciation doctrine informs the African Charter in that it recognises the respondent state in being better disposed in adopting national rules, policies and guidelines in promoting and protecting human and peoples' rights as it indeed has direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that needs to be struck between the competing and sometimes confliction forces that shape its society.'

⁷²⁸ Viljoen (n 235 above) 333.

clarity of minority language rights norms in Africa.⁷²⁹ Finally, despite these deficiencies, the African human rights system has an evolving human rights framework that contributes to the adequate protection of minority languages and linguistic minorities.

3.3 Language policy and practice in Africa

This section⁷³⁰ analyses the language policies and practices of Africa to assess the extent to which African states are implementing human rights provisions that relate to protection of minority languages and linguistic minorities in Africa. According to Dersso and Palermo *'[l]anguage policies determine the level of inclusion and protection of minorities having their own languages.'*⁷³¹

In 1997, there was an inter-governmental conference of ministers on language policies in Africa which culminated in the 1997 Harare Declaration. The Declaration encourages multilingualism as part of democratic governance and respects linguistic rights as human rights. It enjoins African states to promulgate language policies that ensure multilingualism, development of minority languages, training of language practitioners, progressive use of languages in education, media, courts, business and public administration. It further enjoins African countries to co-operate in developing regional and sub-regional languages. They also came up with a Plan of Action that was aimed at implementing what had been agreed. Key to the plan was the development of educational materials, production of a language atlas of Africa, language planning, and promotion of literacy. This was a good development in as far as development of language policies is concerned. On the practical front however, very few African countries have implemented the contents of the Harare Declaration.

There is no agreement on how many languages are spoken in Africa. Ethnologue claims that more than 2011 languages are spoken in Africa⁷³² and Abdulaziz Lodhi states that 2583

⁷²⁹ However, there is a possibility that the African Commission and African Court could use articles 60 and 61 to draw inspiration from the International and European human rights systems to give normative clarity to minority language rights in Africa.

⁷³⁰ I have relied to some degree on a UNESCO commissioned report; KE Gardelii (2004) 'Annotated statistics on linguistic policies and practices in Africa.'

⁷³¹ S Dersso & F Palermo 'Minority rights' in Tushnet *et al* (n 19 above) 167.

⁷³² BF Grimes (ed) *Ethnologue. languages of the world* (1996).

languages and 1382 dialects are spoken in Africa.⁷³³ A conservative number of languages spoken in Africa is at least 2000 languages and this thesis will proceed on that basis.

At the African Union (AU) level, section 25 of the Constitutive Act of the AU states that '*[t]he working languages of the Union and all its institutions shall be, if possible, African languages, Arabic, English, French and Portuguese.*' Rule 34 of the Rules of Procedure of the ACHPR affirms this provision by stating that '*[t]he working languages of the Commission and of all its institutions shall be those of the Organisation of African Unity.*' These provisions empower the AU and its organs to use minority languages in principle. However, in practice the African Union uses English, French, Portuguese, Arabic and Kiswahili. The discriminatory effect of these provisions is that African languages (excluding Kiswahili) are not used at the African Union level.

The main approach that African states have used in guaranteeing language rights is to grant African languages official language status.⁷³⁴ There are two major trends that have emerged in Africa concerning the use of minority languages. The first trend is that 26 African countries do not recognise (African) minority languages as official languages despite there being African languages spoken in the country. For example, Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Congo-Brazzaville, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea-Conakry, Cote d'Ivoire, Liberia, Mali, Mauritius, Mozambique, Namibia, Niger, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Togo, Uganda and Zambia do not even recognize any African language as an official language.⁷³⁵ Only European languages like English, French, Portuguese and Spanish are recognised as official languages and used in government, courts, education, media, business and other public domains. Minority languages are therefore not used and have no functional load in government business in these countries despite the number of people using them in private. This essentially means that speakers of non-official minority languages are discriminated against on the basis of language in these countries. Such language policies are not friendly to the protection of minority languages and linguistic minorities and perpetuate the discrimination perpetrated on linguistic minorities during the colonial era.

⁷³³ A Lodhi (n 20 above) 81.

⁷³⁴ Chapter 1 established that international law requires the use of a language that has been afforded official language status.

⁷³⁵ Official and spoken languages of African countries
http://www.nationsonline.org/oneworld/african_languages.htm (accessed on 4 May 2014).

The second trend is that some minority languages have been given official language status. Chapter 1 established that international law requires the use of a language that has been afforded official language status. Amongst those afforded official language status, some have been used to a greater extent in the public domain, some have been used to a small extent in the public domain and some have not been used at all in the public domain. The last category clearly indicates that the granting of official language status is merely symbolic and does not at all protect the right of minority languages speakers to use their language in public. The languages in the last category, though having symbolic official language status, remain minority languages whose speakers are discriminated against because they have no functional load in government business.

Generally, 35 out of the 2000 African languages are official languages in 18 countries. The official languages are Setswana in Botswana, Kirundi in Burundi,⁷³⁶ Sango in the Central African Republic,⁷³⁷ Comorien in Comoros,⁷³⁸ Kikongo, Lingala, and Tshiluba in the Democratic Republic of Congo (DRC),⁷³⁹ Amharic in Ethiopia, Kiswahili in Kenya,⁷⁴⁰ DRC and Tanzania, Sesotho in Lesotho, Malgache in Madagascar,⁷⁴¹ Chichewa in Malawi, Kinyarwanda in Rwanda,⁷⁴² Hausa, Ibo and Yoruba in Nigeria,⁷⁴³ Seselwa (Creole and kreol) in Seychelles, Somali in Somalia,⁷⁴⁴ Sepedi, Sesotho, Setswana, Siswati, Tshivenda, Xitsonga, Afrikaans, Isindebele, Isixhosa and Isizulu in South Africa,⁷⁴⁵ Siswati in Swaziland and Shona, Ndebele, Chibarwe, Kalanga, Koisan, Nambya, Ndau and Shangani in Zimbabwe. In other African states, minority languages are not afforded official status. This shows that at most 0.15% of languages in Africa are protected via the official language status route. Further, only South Africa and Zimbabwe protect sign language as a language.⁷⁴⁶ The extent to which these official languages

⁷³⁶ Art 8 of the Burundi Constitution.

⁷³⁷ Art 17 of the Central African Republic Constitution.

⁷³⁸ Art 2 of the Comoros Constitution.

⁷³⁹ Art 6 of the DRC Constitution.

⁷⁴⁰ Art 53 of the Constitution of Kenya.

⁷⁴¹ Art 4(5) of the Constitution of Madagascar.

⁷⁴² Art 4 of the Constitution of Rwanda.

⁷⁴³ Art 53 of the Constitution of Nigeria.

⁷⁴⁴ Art 3 of the Constitution of Somalia.

⁷⁴⁵ Sec 6 of the Constitution of South Africa.

⁷⁴⁶ Sec 6(5) of the South African Constitution.

are used in the public sphere are analysed below. From this general survey alone, it is clear that speakers of African minority languages are discriminated against on the basis of language.

As regards language use in legislation, most African countries use official languages as a medium of law making.⁷⁴⁷ Official languages that have not been used in legislation are Ndebele, Chibarwe, Kalanga, Koisan, Nambya, Ndau and Shangani in Zimbabwe. These languages are merely symbolic when it comes to use in legislation. It is also interesting to note that there are very few countries that have used minority languages in legislation. For instance, Cape Verde and Guinea-Bissau have used Crioulo and Chad has restrictively used Sara in legislation. Angola has translated its constitution into Kikongo, Cokwe, Oshiwambo, Kimbundu and Umbundu. Mauritius has used Creole. Senegal has used Wolof and Namibia has used Oshiwambo, Otjiherero, Rukwangali, Afrikaans and Silozi in legislation.⁷⁴⁸ Kinyarwanda and Shona are used in Parliamentary debates and recoded in the hansard in Rwanda and Zimbabwe respectively. This is a progressive way of enhancing minority language use in legislation. Otherwise, by and large, most minority languages are not used in legislation.

European official languages (English, French, Spanish, Portugues, etc) are ordinarily used as authorised languages in court proceedings and in the writing of judgments. Some African official languages used in the judicial system are Afrikaans in South Africa, Kinyarwanda in Rwanda and Swahili in Tanzania, Uganda and Kenya.⁷⁴⁹ Some official languages are basically used either when a person is being charged or when a person requests the services of an interpreter during criminal proceedings. This has been the case in Benin,⁷⁵⁰ Botswana,⁷⁵¹ Eritrea,⁷⁵² Ethiopia,⁷⁵³ Ghana,⁷⁵⁴ Kenya,⁷⁵⁵ Malawi,⁷⁵⁶ Mauritius,⁷⁵⁷ Namibia,⁷⁵⁸ Nigeria,⁷⁵⁹ Seychelles,⁷⁶⁰

⁷⁴⁷ That is language used in parliamentary debate, drafting and promulgating laws.

⁷⁴⁸ KE Gardelii (n 719 above) 14.

⁷⁴⁹ 'Languages used in government, administration and education in Africa' on the website of Dictionary of African Christian biography <http://www.dacb.org/languages.html> (accessed on 1 March 2014).

⁷⁵⁰ Art 40 of the Benin Constitution.

⁷⁵¹ Art 10 of the Botswana Constitution.

⁷⁵² Art 17 of the Eritrean Constitution.

⁷⁵³ Art 19 and 20 of the Ethiopian Constitution.

⁷⁵⁴ Art 17(2) of the Constitution of Ghana.

⁷⁵⁵ Art 72 and 82 of the Kenyan Constitution.

⁷⁵⁶ Art 42 of the Malawi Constitution.

⁷⁵⁷ Art 5 and 10 of the Mauritius Constitution.

⁷⁵⁸ Arts 11 and 19 of the Namibian Constitution.

South Africa,⁷⁶¹ Uganda,⁷⁶² Zambia⁷⁶³ and Zimbabwe.⁷⁶⁴ This makes the bulk of official languages symbolic in the judicial system.

It is imperative to note that some minority languages have indeed been used in the judicial system. For instance, Adja, Baatonum, Dendi, Fongbe, Yoruba and Waama have been used in Benin. Moore, Jula and Fulfulde have been used in Burkina Faso, Crioulo in Cape Verde, Sara, Kanembou, Maba, Gorane and Toupouri in Chad, Lingala and Munukutuba in Congo-Brazzaville, Afar and Somali in Djibouti, Fang in Equatorial Guinea and Wolof, Pulaar. Serrer, Joola, Mandinka and Soninke in Senegal.⁷⁶⁵ This has gone a long way in promoting the right to use a minority language in the judicial system.

The major official languages that have been used are European official languages (like English, French, Portuguese, Spanish, etc). The other official minority languages that have been used in administration include Swahili in Kenya, Kirundi in Burundi, Kinyarwanda in Rwanda, Shona and Ndebele in Zimbabwe. Other official languages like Chibarwe, Kalanga, Koisan, Nambya, Ndaue and Shangani in Zimbabwe are not used in administration. They are therefore symbolic to the extent of their non-use in administration. Interestingly, minority languages have been used in Cameroon, Botswana, Burkina Faso, Benin, Cape Verde, Chad, Congo-Brazzaville, Djibouti, Democratic Republic of Congo, Gabon, Ghana, Guinea-Bissau, Guinea-Conakry, Kenya, Malawi, Mauritius, Namibia, Nigeria, Niger, Senegal, Sierra Leone, Somalia, Togo and Zimbabwe.⁷⁶⁶ Given that about two thousand languages are spoken in Africa and at most 30 are used in administration, it can be argued that minority languages are used to a very small extent in administration. This speaks volumes on the extent of discrimination perpetrated on minority language speakers in Africa.

Almost all official languages have been used in either primary, secondary or tertiary education. Exceptions are Chibarwe, Kalanga, Koisan, Nambya and Ndaue in Zimbabwe. The extent of use

⁷⁵⁹ Arts 5 and 6 of the Nigerian Constitution.

⁷⁶⁰ Art 18 of the Constitution of Seychelles.

⁷⁶¹ Sec 35 of the Constitution of South Africa.

⁷⁶² Art 23 and 28 of the Ugandan Constitution.

⁷⁶³ Art 13, 18 and 26 of the Zambian Constitution.

⁷⁶⁴ Sec 69 and 70 of the Zimbabwean Constitution.

⁷⁶⁵ KE Gardelii (n 719 above) 16.

⁷⁶⁶ KE Gardelii (n 719 above)18.

varies from country to country. Non-European official languages are usually used up to secondary school level. Only in a few countries are non-European official languages taught and used in tertiary education. For example, Afrikaans is used in some tertiary institutions in South Africa and Shona is taught in some tertiary institutions in Zimbabwe

A number of non-official minority languages have been used in education.⁷⁶⁷ For example, non-official minority languages are used as languages of instruction in adult literacy programs in Angola, Botswana, Burkina Faso, Chad, Congo-Brazzaville, Democratic Republic of Congo, Eritrea, Ethiopia, Gabon, Ghana, Guinea-Bissau, Guinea-Conakry, Kenya, Cote d'Ivoire, Malawi, Mali, Mauritius, Namibia, Nigeria, Senegal, Sierra Leone, Togo, Uganda and Zimbabwe.⁷⁶⁸ In preschool or kindergarten, some non-official minority languages are used in Benin, Botswana, Central Africa Republic, Democratic Republic of Congo, Eritrea, Ethiopia, Ghana, Kenya, Namibia, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Togo, Uganda and Zimbabwe.⁷⁶⁹ In primary schools, some non-official minority languages are used in Zimbabwe, Uganda, South Africa, Sierra Leone, Nigeria, Niger, Namibia, Mali, Kenya, Ghana, Ethiopia, Eritrea, Democratic Republic of Congo and Central Africa Republic.⁷⁷⁰ In secondary schools, some non-official minority languages are used as languages of instruction in Central Africa Republic and Ghana.⁷⁷¹ In tertiary institutions non-official minority languages are not used as a medium of instruction in any African country.

The trend that emerges is that minority languages⁷⁷² are usually used in the earlier stages of education and adult literacy programs but never used at tertiary institutions. African countries prefer using foreign languages in their tertiary education. The root cause lies in the language history of Africa discussed above. One of the other reasons is that the education material for most minority languages have not yet been developed for them to be used in primary,

⁷⁶⁷ Sec 29(2) of the South African Constitution elaborately states that 'Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable.' See also article 6(2) of the Ugandan Constitution and section 40 of the Zimbabwean Education Act.

⁷⁶⁸ KE Gardelii (n 719 above) 19 to 28

⁷⁶⁹ KE Gardelii (n 719 above).

⁷⁷⁰ KE Gardelii (n 719 above).

⁷⁷¹ KE Gardelii (n 719 above).

⁷⁷² Except a few like Afrikaans, Shona, etc.

secondary and more specifically tertiary institutions. More minority languages need to be developed in order for them to be used in primary, secondary and tertiary spheres of education.

All European official languages are used in business. Again the bulk of non-European official languages are used in business especially at a private level. A few non-official minority languages are used in Benin, Burkina Faso, Congo-Brazzaville, Democratic Republic of Congo, Eritrea, Ethiopia, Ghana, Guinea-Conakry, Namibia, Nigeria and Togo.⁷⁷³ This clearly shows discrimination of minority language speakers in the public sphere of business.

All European official languages are used in state media. A greater part of non-European official languages are used in state media. For example, Shona, Ndebele, Tonga and Kalanga are used in Zimbabwean state media. Interesting to note is the fact that some non-official minority languages are used on state radio in Angola, Burkina Faso, Chad, Congo-Brazzaville, Cote d'Ivoire, DRC, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Ghana, Kenya, Mali, Mozambique, Namibia, Niger, Nigeria, Senegal, Sierra Leone, Togo, Uganda and Zimbabwe.⁷⁷⁴ On state television, minority languages are used in Uganda, Togo, Sierra Leone, Senegal, Nigeria, Niger, Namibia, Mauritius, Mali, Cote d'Ivoire, Guinea-Conakry, Ghana, Ethiopia, Eritrea, DRC, Burkina Faso and Benin.⁷⁷⁵ The bulk of the use of both official and non-official minority languages is done in the private sphere (private media). More still need to be done to increase the number of minority languages used in state or public media.

The preceding discussion highlights that there are some African countries like Benin, Angola, Burkina Faso, etc that have afforded official language status to colonial European languages only. The European official languages are the ones used in the public sphere in these countries. These language policies are not friendly to the protection of minority language rights at all. Second, there are some countries that have afforded African languages official language status. The extent to which these non-European official languages are used in the public sphere varies from country to country, with some being used to a greater extent, some to a lesser extent and others not used at all. The according of the official language status to latter group is merely symbolic. Finally, there are at most 100 official and non-official minority languages out of at least 2 000 spoken in Africa that are used in the public sphere. This essentially means that most

⁷⁷³ KE Gardelii (n 719 above) 31 & 32.

⁷⁷⁴ KE Gardelii (n 719 above) 33 to 37.

⁷⁷⁵ KE Gardelii (n 719 above).

minority languages in Africa are not being used in public. A lot still needs to be done to improve the use of minority languages in the public sphere.

3.4 Chapter summary

A few conclusions can be drawn from this Chapter. On the linguistic history of Africa, it has been established that pre-colonial Africa had ethnic and linguistically diverse groups. Colonialism and the post-colonial nation-state nation-building model saw the imposition of colonial languages, the introduction of official languages and attempts to assimilate and integrate the ethnic and linguistic groups. This has in turn seen the marginalization of minority languages and discrimination of its speakers. This gave rise to problems associated with issues like language and culture, language and access to information, language and development, language and work and language and the Internet. Put differently, the genesis of the problems of linguistic minorities lies in the creation and administration of the colonial state. The adoption by independent African states of the nation state model of nation building compounded the language problem. However, the post 1990 constitutional dispensation has seen some accommodation of minority language rights. Chapters 4 and 5 will case study South Africa and Zimbabwe respectively to assess the extent of the said accommodation.

On the regional framework for the protection of minority language rights, a number of conclusions can be made from this section. First, the concept of minority itself is a contestable issue in Africa. Second, unlike the European human rights system, the African human rights system does not have a specific treaty devoted to minority language rights. Third, the two-pillar system for the protection of minority languages and linguistic minorities in Africa is rather weak in that the qualified rights are not minority specific and do not regulate important aspects of public life that directly impact upon the linguistic identity of minorities. In any event, supervisory bodies have not yet interpreted both the individual and minority specific rights to give content to the minority language rights. This normative deficiency beckons a need for clarity of minority language rights norms in Africa.⁷⁷⁶ Finally, despite these deficiencies, the African human rights system has an evolving human rights framework that contributes to the adequate protection of minority languages and linguistic minorities.

⁷⁷⁶ However, there is a possibility that the African Commission and African Court could use articles 60 and 61 to draw inspiration from the International and European human rights systems to give normative clarity to minority language rights in Africa.

Finally on state practice, two trends emerged in Africa. The first trend is insensitive to minority language rights. It is typified by some African countries like Benin, Angola, Burkina Faso, etc that have afforded official language status to colonial European languages only. The European official languages are the ones used in the public sphere in these countries. These language policies are not friendly to the protection of minority language rights at all. The second trend is friendly to minority language rights. It is a trend of some countries that have accorded official language status to minority languages. The extent to which these non-European official languages are used in the public sphere varies from country to country, with some being used to a greater extent, some to a lesser extent and others not used at all. The according of the official language status to latter group is merely symbolic. Finally, there are at most 100 official and non-official minority languages out of at least 2 000 spoken in Africa that are used in the public sphere. This clearly shows that there is limited use of minority languages in legislation, administration, education, the judicial system, media and business. More can be done to improve the use of minority languages in the public sphere.

Chapter 4

Constitutional framework for the protection of minority languages in South Africa

4.1 Introduction

SA has numerous linguistic population groups all of which (except the English speaking group) can be considered minority.⁷⁷⁷ Post apartheid SA adopted a constitutional framework for the protection of minority languages and linguistic minorities. This chapter examines the form and nature of the South African constitutional design for the accommodation of its diverse languages. It contends that the constitutional application of the minority rights framework in African countries, as defended in this study, is necessary to address the issue of minority language rights. Although South Africa has had a relatively short experience with its new constitution⁷⁷⁸ and hence it is not possible to assess its successes or failures conclusively, the SA experience can help to exemplify how the human rights framework towards the protection of minority languages and linguistic minorities defended in this study is and should be translated into a constitutional design for the accommodation of diversity.

This chapter is divided into two sections. The first section traces the language history of South Africa (SA) to identify how political power relations influenced SA language policies that has seen linguistic minorities suffered discrimination on the basis of language. The second section analyses the extent to which minority languages and linguistic minorities are protected through the SA constitutional design that is supposedly aimed at accommodating linguistic diversity. The analysis is done in the light of the two-pillar system for the effective protection of minority languages and linguistic minorities identified in Chapter 1.

⁷⁷⁷ K Henrard 'Language rights and minorities in South Africa,' (2001) *International Journal on Multicultural Societies* 3(2) 78-98 78. It is interesting to note that none of the SA language groups have a population above 50%. The language group with a larger percentage of people is Zulu with 23%. This coupled with the fact that English dominates as SA's *lingua franca* can lead to a reasonable conclusion that all SA languages (except English) can be regarded as minority languages.

⁷⁷⁸ South African Constitution came into force on 4 February 1997.

4.2 Language history of South Africa

SA is a multicultural country inhabited by people of different racial, ethno-linguistic and religious groups. This diversity has its roots in SA history that this section briefly explores. This section is not intended to deal exhaustively with this history. Rather, it briefly focuses only on key aspects of SA history that reveal different language patterns. The main phases covered are pre-colonial, colonial, apartheid SA and the post 1994 Constitutional dispensation.

4.2.1 Pre-colonial South Africa

Just like most African states, the inhabitants of what is present day SA had diverse ethnic groups bound by kinship ties, language and culture before colonization. A major feature of the pre-colonial period is that people freely spoke their languages. Individuals were not discriminated against based on language choice.⁷⁷⁹ There was no central administration and no nation state to regulate languages.

The first phase of the pre-colonial history⁷⁸⁰ saw the arrival of African groupings into what is now known as SA. The first groups to arrive were the San and Khoi people.⁷⁸¹ In terms of the current language discourse, it would appear that the first known languages to be spoken in SA were the Khoi, San and Nama languages including Khoekhoegowala, Xun, Khwedam, Nluu, Gora and Xiri.

The second group to arrive during this first phase were the Bantu language groups, which migrated south from central Africa, settling in the Transvaal region sometime before AD 100. Particularly noteworthy were the Nguni, ancestors of the Zulu and Xhosa, who occupied most of the eastern coast by 1500.⁷⁸² The languages spoken by the Bantu groups include Zulu, Xhosa, Swati, Ndebele, Southern Sotho, Northern Sotho, Tsonga, Tswana and Venda. As mentioned earlier, people freely spoke their languages and there was no discrimination against individuals

⁷⁷⁹ AA Abdi 'Apartheid and education in South Africa: select historical analyses' (2003) 27 (2) *The Western Journal of Black Studies*.

⁷⁸⁰ D Kriek 'The new South African Constitution – Background and historical processes: More unitary or more federal characteristics?' in Konrad Adenauer Stiftung (ed) *Aspects of the debate on the draft of the new South African Constitution dated 22 April 1996* (1996) identifies this phase as characterized by tribal regimes.

⁷⁸¹ See Untitled <http://www.salanguages.com> (accessed 5 June 2012).

⁷⁸² See n 770 above.

based on language.

The second phase saw the arrival of non-African groups in search of trade and mining opportunities. The first group to come around 696 BC was Arabic traders. The Portuguese explorers also came to explore the Cape of Good Hope in 1488.⁷⁸³ In 1580, English explorer sir Francis Drake rounded the Cape. It is sufficient to mention that there were no permanent settlements but explorations. There was no interference with Khoisan and Bantu languages then.⁷⁸⁴ In Heugh's words, '*the pre-colonial ecology was characterised by a network of diverse multilingual practices.*'⁷⁸⁵

Language diversity existed in pre-colonial SA and language rights of all groups were entertained. In terms of education, African societies in SA had informal programmes of education where indigenous languages were used. The process of education began by learning of the young from family members. Later, the young were trained in manners, roles, responsibilities, and history as well as the importance of military and fighting skills.⁷⁸⁶

4.2.2 Colonial South Africa

Colonialism had a huge impact on language diversity and the language rights of native SA communities. It introduced the concept of official language status, saw the imposition of English and introduced the tension between the English and Afrikaans speaking groups, on the one hand, and the European and African language speakers on the other.⁷⁸⁷

The first phase of colonialism began in the 17th Century, and saw the permanent settlement of

⁷⁸³ In 1497, explorer Vasco Da Gama passes Cape of Good Hope and names the region Currently known as the KwaZulu-Natal Province as they passed it during Christmas. See n 770 above.

⁷⁸⁴ J Carter 'An overview of pre-colonial cultures in South Africa' accessed on 30 June 2014 at <http://www.humanities360.com/index.php/an-overview-of-pre-colonial-cultures-in-south-africa-19273/>

⁷⁸⁵ K Heugh 'The South African experience in language policy and planning' in PW Akumbu & BA Chiatoh (eds) (2013) *Language policy in Africa: perspectives for Cameroon* 108-138 108.

⁷⁸⁶ n 770 above.

⁷⁸⁷ L Marjorie 'Language policy and oppression in South Africa' <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/south-africa/language-policy-and-oppression-south-africa> (accessed on 20 June 2014).

the Dutch at the Cape in 1652⁷⁸⁸ when the Dutch East India Company established a provisioning station on the Cape. It spans into the 18th Century, when the French Huguenot refugees, the Dutch, and Germans began to settle in the Cape. Collectively, they form the Afrikaans speaking group in today's South African population. The establishment of these settlements had far-reaching social and political effects on the groups already settled in the area, leading to upheaval in these societies and the subjugation of their people. By 1779, European settlements extended throughout the southern part of the Cape and eastwards toward the Great Fish River. It was here that Dutch authorities and the Xhosa fought the first frontier war.⁷⁸⁹

In terms of language, this phase did not see interference with the Khoisan and Bantu languages in the private domains. The San, Khoi and Bantu groups continued to speak and use their languages wherever they resided. Even at the Cape and other areas where the Dutch had settled, the Khoisan and Bantu languages continued to be used in private.

The second phase of colonialism began with the first British Occupation of the Cape between 1795 and 1803, spreading through the second occupation in 1806, the 1814 ceding of the Cape Colony to Britain and continued through the 19th Century. There were a number of major features of this phase. First, there was the British settlement at the Cape in 1814. It came with the further entrenchment of English as a dominant language in schools, churches, government and changing of local names into English.

The dominance of English partly led to the second feature namely a long conflict between the Dutch and the British that led to the northern migration of the Boers known as the Great Trek in 1836. This movement saw the defeat of the Zulus in 1838⁷⁹⁰ and the creation of Independent Boer Republics of Transvaal and Orange Free State in 1852 and 1854 respectively. There were essentially two colonies – one occupied by the Boers in the Republics of Transvaal and Orange Free State and the other occupied by the British in the Cape of Good Hope and surrounding areas.

Three language trends emerged. The first trend relates to areas within the now SA that were not

⁷⁸⁸ See n 770 above.

⁷⁸⁹ See n 770 above.

⁷⁹⁰ They were finally conquered in 1879.

occupied by either the Boers or the British. In these areas, Khoisan and Bantu languages were not interfered with in the private sphere. The second trend relates to the Independent Republics of Transvaal and Orange Free State. Here Dutch was the official language in the public domain and African languages still continued to exist largely unaffected in the private sphere due to the weak administration of the Boer Republics.

The third trend relates to the British Colony of Cape and surrounding areas. There, English was predominantly imposed as the language of business. African languages continued to be used in the private sphere uninterrupted. However, there was the introduction of education in the mother tongue. For instance, in 1803, Commissioner-General De Mist introduced the principle of mother-tongue education in Dutch. Shortly thereafter, Lord Charles Somerset stipulated that only English and Latin could be taught in government schools, and Dutch, the mother tongue, was relegated to the background.⁷⁹¹

The final phase of colonialism began with the establishment of the Union of SA by the British in 1910 following the defeat of the Boers in the Anglo-Boer war between 1899 and 1902. British forces prevailed in this conflict, and the Republics of Transvaal and Orange Free State were incorporated into the British Empire.⁷⁹² The administrator – Lord Alfred Milner – declared an English-only policy for the education of Boer children. Africans were allowed to use mother-tongue education in missionary schools for four and six years and thereafter they would switch to English medium. Heugh argues that:⁷⁹³

Amongst African communities, the switch to English for the upper primary and secondary education created a hierarchical impression of English as the language of the educated person... and also the language which represented liberation and access to the world and all its symbolic and material capital.

In May 1910, the two Republics and the British colonies of the Cape and Natal formed the Union of SA, a self-governing dominion of the British Empire⁷⁹⁴ through the South Africa Act.⁷⁹⁵

⁷⁹¹ I Bekker 'The story of South African english: A brief linguistic overview' (2012) 1 (1) *International Journal of Language, Translation and Intercultural Communication* 139-150.

⁷⁹² Bekker (n 780 above) 139-150.

⁷⁹³ Heugh (n 774 above) 109, 110.

⁷⁹⁴ n 771 above. See also G Carpenter *Introduction to South African constitutional law* (2002) 198-199.

⁷⁹⁵ H Klug *The Constitution of South Africa* (2010) 8.

Language rights were entrenched in the constitution for the first time. For instance, section 137 of the South Africa Act of 1909 recognised English and Dutch as official languages.⁷⁹⁶ Section 137 provided:

Both English and the Dutch languages shall be official languages of the Union and shall be treated on a footing of equality, and possess and enjoy equal freedom rights and privileges; all records, journals and proceedings of Parliament shall be kept in both languages, and all Bills, Acts and notices of general public importance or interest issued by the Government of the Union shall be in both languages.

Malan convincingly argues that this provision established a dispensation of actual equality between the two official languages as one of the cornerstones of the Union of South Africa.⁷⁹⁷ What made this provision significant is that it was constitutionally entrenched and could only be amended with the support of at least two thirds of the total number of the two houses of parliament (House of Assembly and Senate) sitting together.⁷⁹⁸ English and Afrikaans were elevated above the African Bantu languages.

This trend continued with Afrikaans being afforded official language status through Act no. 8 of 1925.⁷⁹⁹ English was predominantly used in the government spheres. Afrikaans was used to some degree in education even though the Constitution provided for equal treatment. The African languages did not enjoy official language status. They were usually used in the private domains like homes and workplaces. Clearly there was discrimination based on minority African languages during this period in South Africa.

Heugh summarises the impact of colonialism on languages in SA as follows:⁸⁰⁰

[A]t least one European language was introduced and layered over an existing linguistic ecology... This layering over existing language practices has resulted in disruptive changes to the

⁷⁹⁶ n 770 above.

⁷⁹⁷ K Malan 'The discretionary nature of the official language clause of the Constitution' (2011) 26 *South African Public Law* 381 383.

⁷⁹⁸ See section 152 of the South African Act. See also Malan (n 321 above) 383.

⁷⁹⁹ The entrenched protection of English and Afrikaans was retained by the Constitution of 1961 and that of 1983.

⁸⁰⁰ Heugh (n 774 above) 108.

balance of power amongst language communities. Change resulted in an unequal arrangement between the exogenous language used for vertical political and administrative control and the distribution and co-existence of many endogenous languages and their speakers.

4.2.3 Apartheid South Africa

The following history reveals how the apartheid era⁸⁰¹ saw the elevation of Afrikaans – and to some degree English – above other African Bantu languages in SA. This policy essentially discriminated against speakers of African Bantu languages based on language.

In 1948, the National Party won the all-white elections and began passing legislation codifying and enforcing an even stricter policy of white domination and racial separation known as "apartheid" (separateness). The apartheid era was based quite fundamentally on the spatial division of the country into racial and ethnic blocs. Racially the population was divided into four groups: Africans,⁸⁰² whites,⁸⁰³ coloured,⁸⁰⁴ and people of Indian and Asian⁸⁰⁵ origin.⁸⁰⁶ In terms of education, separate education departments for each linguistic group, were established in different geographical regions of the country. This racial approach entrenched discrimination of African people based on language and race. This situation was further worsened by the uneven distribution of resources towards the different education departments. According to Heugh,⁸⁰⁷

[m]aterial resources were unevenly allocated: most to the system providing for 'White' English and Afrikaans speakers, less to those providing for 'Coloured' and Indian schools, and least to those providing for African language speaker.

Afrikaans and English were regarded as official languages with a status superior to and elevated above African Bantu languages.⁸⁰⁸ This clearly shows discrimination of individual

⁸⁰¹ Also referred to as the race regime.

⁸⁰² They constitute 79.7% of the population of South Africa according to 'Statistics South Africa, Mid-year estimates for South Africa by population group and sex, 2007' <http://www.statssa.gov.za/PublicationsHTML/P03022007/html/P03022007.html> (accessed 23 December 2013).

⁸⁰³ Constituting 9.1 % of the South African population according to n 327 above.

⁸⁰⁴ Constituting 8.8 % of the population according to n 409 above.

⁸⁰⁵ Constituting 2.4 % of the population according to n 409 above.

⁸⁰⁶ See n 791 above.

⁸⁰⁷ Heugh (n 774 above) 112.

⁸⁰⁸ Heugh (n 774 above) 112.

Africans based on race and language. However, the apartheid regime introduced a policy of 'separate development' in the 1950s that saw the creation of four 'independent' Bantustans with a view of engineering a permanent Balkanisation of the country. In May 1961, South Africa abandoned its British dominion status and declared itself a republic.

The 1961 Constitution particularly continued with the notion of equal treatment of official languages. Section 108(1) of the Constitution⁸⁰⁹ provided that:

English and Afrikaans shall be the official languages of the Republic, and shall be treated on a footing of equality, and possess and enjoy freedom, rights and privileges.

Again the notion of equal treatment of official languages continued through the 1961 Constitution. The converse was that English and Afrikaans were more superior than African bantu languages.

One interesting feature that emerged in this period was territorial language rights approach where constitutions granted official language status to African languages in four so-called black homelands namely the Transkei, Bophuthatswana, Venda and Ciskei (the so-called TBVC states). For instance, the Transkei constitution provided that Xhosa was the official language and allowed Sesotho, English and Afrikaans also to be used for legislative, executive and administrative purposes.⁸¹⁰ Section 8 of the 1981 Ciskei constitution provided for English and Xhosa as the official languages that had to enjoy equal recognition. Section 5 of the 1977 Bophuthatswana constitution provided for Tswana, English and Afrikaans as official languages. Section 5 of the 1979 Venda constitution provided for Luvenda, English and Afrikaans as official languages. After 1961, up to and including the coming into effect of each TBVC states' own constitution, Afrikaans and English, plus an African language for each black area, were SA's official languages⁸¹¹ as shown above. The other non-official African Bantu languages remained inferior and their speakers suffered discrimination based on language.

⁸⁰⁹ This section replaced section 137 of the South African Act

⁸¹⁰ See Malan (n 786 above) 384. Section 41 of the Transkei Constitution Act 15 of 1976 provided that 'A bill shall become law on being assented to by the President and the secretary of the Assembly shall cause a copy of the Act in the Xhosa language (together with copies thereof in English and Sesotho) to be enrolled in the record of the office of the registrar of the Supreme Court of Transkei and shall be conclusive evidence of the provisions of such law.'

⁸¹¹ H Klug (n 784 above) 99.

This period saw the separate development of the following languages: Zulu, Xhosa, Swati, Ndebele, Southern Sotho, Northern Sotho, Tsonga, Tswana and Venda. Mother-tongue education was compulsory in the lower primary grades in schools thereafter a transition was made in schools for Afrikaans or English media of instruction.⁸¹² This approach shows that there was no mother tongue education beyond lower primary school grades. Afrikaans and English remained dominant beyond lower primary school grades.

Another key component of the language history of South Africa in the 1970s was the decree issued by the Bantu Education Department on 17 October 1974 that imposed Afrikaans and English as the medium of instruction in the bulk of the subjects in higher primary ('middle school') and secondary school ('high school'). Even though the Afrikaans and English speakers were numerically inferior, they wielded political power that gave their languages dominances over African Bantu languages speakers who were numerically majority but had no political power. The African Bantu languages were therefore minority languages and their speakers were discriminated against on the basis of language.

Part of the 1974 Afrikaans Medium Decree reads as follows:

... With Std V classes and Secondary Schools Medium of Instruction Std V – Form V

1. It has been decided that for the sake of uniformity English and Afrikaans will be used as media of instruction in our schools on a 50-50 basis as follows:
2. Std V, Form I and II
 - 2.1. English medium: General Science, Practical Subjects (Homecraft-Needlework-Wood- and Metalwork-Art-Agricultural Science)
 - 2.2 Afrikaans medium: Mathematics, Arithmetic, Social Studies
 - 2.3 Mother Tongue: Religion Instruction, Music, Physical Culture The prescribed medium for these subject must be used as from January 1975. In 1976 the secondary schools will continue using the same medium for these subjects.
3. Forms III, IV and V All schools which have not as yet done so should introduce the 50-50 basis as from the beginning of 1975. The same medium must be used for the subjects related to those mentioned in paragraph 2 and for their alternatives. ...

This decree led to the 16 June 1976 Soweto uprising where students rose up against the 1974

⁸¹² n 770 above.

Decree. This uprising conveyed a clear linguistic diversity message that minority languages needed to be protected and used in education.⁸¹³ It reveals how the lack of recognition or accommodation of language diversity can be a source of conflict if one language is imposed over others in a multilingual society. It also pitted English and Afrikaans speakers on one hand and the African Bantu language speakers on the other hand.

No, I have not consulted the African people on the language issue and I'm not going to. An African might find that 'the big boss' only spoke Afrikaans or only spoke English. It would be to his advantage to know both languages.

This decree led to the June 16, 1976 Soweto uprising where students rose up against the 1974 Decree. This uprising conveyed a clear linguistic diversity message that minority languages needed to be protected and used in education.⁸¹⁴ It reveals how language diversity can be a source of conflict if one language is imposed over others in a multilingual society. It also pitted English and Afrikaans speakers on one hand and the African Bantu language speakers on the other hand.

The late 1970s saw the apartheid regime facing immense pressure through increasing internal resistance and international isolation. This led to the Apartheid regime led by Prime Minister P. W. Botha to implement a new constitutional arrangement that embraced the concept of multiracial government but at the same time perpetuating racial separation.⁸¹⁵ The new 1983 constitution established racially segregated houses of parliament (for whites, Asians and coloured but excluded blacks from full citizenship). The apartheid government thought that this would bolster National Party support amongst the coloureds and Asians and give the party the numerical strength to counter growing black dissent.⁸¹⁶

However, two mechanisms ensured that power remained safely in the hands of the dominant white party (the National Party). First, government was effectively centralised under an executive state president with extraordinary powers. Second, all significant decisions within the legislature - such as the election of president - could be resolved by the 4:2:1 ratio of

⁸¹³ See also SM Ndlovu *The Soweto Uprising: counter-memories of June 1976* (1998); P Bonner & L Segal *Soweto: A History* (1998).

⁸¹⁴ See Ndlovu (n 802 above).

⁸¹⁵ See Untitled <http://www.nationsonline.org> (accessed 20 December 2013).

⁸¹⁶ Ndlovu (n 802 above).

representatives, which ensured that even if the 'non-white' houses of parliament voted in unison, the will of the 'white' house would prevail.

The exclusion of the black majority in the new system of government received condemnation internally and externally. It led to the escalation of resistance and rebellion, which began in late 1984 and led to the imposition of repeated states of emergency from mid-1985. Prime Minister Botha resigned in 1989 and was replaced by F. W. de Klerk who quickly moved in to reform apartheid.⁸¹⁷ This then led to the beginning of negotiations between the then government and other political organisations to come up with ways of ending apartheid and introducing some form of democracy. The stakeholders called their negotiation forum the Convention for a Democratic South Africa (CODESA). This began the process of what this thesis calls the constitutional or post 1994 dispensation.

It is clear from this history that apartheid SA saw the elevation of Afrikaans (and English) in the public sphere. There were minimal attempts to confer official language status to African languages in the Black homelands. But African Bantu languages remained inferior. The Soweto uprisings had two facets. First was resistance to the imposition of Afrikaans in education. Second was a call for equitable treatment of African Bantu languages alongside Afrikaans and English. This background informed negotiations in the constitutional dispensation phase of SA history.

4.2.4 Constitutional or post 1994 dispensation

The CODESA negotiations led to a two-staged constitution making process. The first phase involved the making of the Interim Constitution that established the Government of National Unity. The Interim constitution, adopted in 1993 and entered into force on 27 April 1994, had a number of interesting language rights clauses.

Section 3 of the Interim constitution saw a shift in the perception of official languages. It introduced a new language dispensation that saw 11 languages (Sepedi,⁸¹⁸ Sesotho, Setswana,

⁸¹⁷ For instance, he released Nelson Mandela from prison in February 1990 and rescinded the banning of the African National Congress (ANC) and other groups fighting apartheid. He repealed the Native Land Act that made it illegal for Africans to own land in the urban areas, among other pieces of legislation.

⁸¹⁸ The interim constitution referred to as Sesotho sa Leboa.

siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu) being granted official language status. Section 3(1) provided for what Malan calls ‘aspirational equality’⁸¹⁹ when it established that ‘... *conditions shall be created for their development and for the promotion of their equal use and development.*’ It is clear from this clause that there was an acknowledgment that all official languages were not equal but aspired to have these languages equally used and developed.

Section 3(2) and (5) of the interim constitution enshrined non-diminishing clauses that also impacted the position of official languages. Section 3(2) provides that:

Rights relating to language and the status of languages existing at the commencement of this Constitution shall not be diminished, and provision shall be made by an Act of Parliament for rights relating to language and the status of languages existing only at regional level, to be extended nationally in accordance with the principles set out in subsection (9).

The first part of this subsection retained the equal treatment of English and Afrikaans that existed in terms of the 1983 constitution. It can therefore be argued that the interim constitution dovetailed equal treatment of English and Afrikaans with the aspirational equality of other official languages. The second part saw the extension of languages spoken in the TBVCs to be official languages.

Section 3(5) of the Interim constitution provides that:

A provincial legislature may, by a resolution adopted by a majority of at least two thirds of all its members, declare any language referred to in subsection (1) to be an official language for the whole or any part of the province and for any or all powers and functions within the competence of that legislature, *save that neither the rights relating to language nor the status of an official language as existing in any area or on relation to any function at the time of the commencement of this Constitution, shall be diminished.*

The non-diminishing clause in the proviso of section 3(5) related to the African official languages in former black homelands. Their rights had to be preserved and retained by provincial governments. This effectively meant that there was still equal treatment of languages spoken in

⁸¹⁹ K Malan (n 786 above) 385.

provinces.

Section 3(3) of the Interim constitution also conferred qualified rights on speakers of the 11 official languages to use and to be addressed in the official language of their choice when dealing with any public administration. It stated that:

Whenever practicable, a person shall have the right to use and to be addressed in his or her dealings with any public administration at the national level of government in any South African official language of his or her choice.

The second phase involved the drafting and adoption of the final Constitution of 1996. For the purpose of this thesis, one of the most controversial issues was the question of how to accommodate various dimensions of South Africa's population diversity that had been caused by divisions and inequalities that apartheid had entrenched in society. Various views were presented. For instance, the African National Congress (ANC) took the position that:⁸²⁰

Ethnic divisions were real, but they were essentially the creations of apartheid and once that was abolished then a democracy based on neither race nor ethnicity would be able to emerge.

ANC essentially advocated for a unitary state structure and a Westminster-style majoritarian democracy that could ensure social transformation, economic empowerment and nation building.⁸²¹ The National Party emphasised advocated for power-sharing structures and a federal form of state structure that accommodates the identities and interests of the various constituent groups.⁸²² The final constitutional settlement, as set out in the 1996 Constitution,⁸²³ reflects a compromise between these positions. Even though a fully-fledged multicultural federalism was not adopted, the 1996 Constitution establishes a federal-like state structure with

⁸²⁰ C Murray & R Simeon 'Recognition without empowerment: minorities in a democratic South Africa' (2007) 5 (4) *International Journal of constitutional Law* 699-729 711.

⁸²¹ See H Klug (n 784 above).

⁸²² See H Ebrahim *The Soul of a nation: constitution-making in South Africa* (1998); Murray & Simeon (n 332 above) 708-713; Klug (n 784 above) 104-107.

⁸²³ Section 71 of the Interim Constitution stipulated that a new constitution or any part of a new constitution shall become operational only once the Constitutional Court has ratified that it complies with the constitutional principles. See for more B de Villiers 'The Constitutional Principles: Content and Significance' in B de Villiers *Birth of a Constitution* (1994) 41-42. The Certification judgment will be discussed below. On 8 May 1996, the Final Constitution (Act no. 108 of 1996) was approved by the Constitutional Assembly.

a system of provincial government.⁸²⁴ It also accommodates the various languages,⁸²⁵ cultures and religions⁸²⁶ that give meaning and purpose to the life of many South Africans. The 1996 Constitution provides a reasonably sophisticated design for the accommodation of linguistic diversity specific to the SA historical and socio-political context, and that this design largely reflects the framework developed and defended in this study.

4.3 SA constitutional framework for the protection of minority languages

There are a number of provisions that provide for the protection of minority language rights in the SA Constitution. A general comment is that the SA constitutional framework embodies the two-pillar system of protection of minority languages and linguistic minorities identified in Chapter 1. The first pillar consists of individual human rights of special relevance to linguistic that ensure that linguistic minorities are placed on a substantially equal footing with other nationals of the state. Such rights include equality, non-discrimination, freedom of expression, fair trial, culture, education and participation. The second pillar consists of specific minority rights and measures designed to protect and promote the separate identity of minority language groups. These include the right to identity, the right to use a minority language in the public and private spheres. This section analyses the extent to which the SA constitutional framework contributes to an adequate protection of linguistic minorities and minority language rights through the two-pillar system of minority protection reflected throughout the thesis.

4.3.1 Pillar 1 – Equality, non-discrimination and other individual rights applicable to minority language rights

It has been established above that the first pillar consists of individual human rights of special relevance to linguistic that ensure that linguistic minorities are placed on a substantially equal footing with other nationals of the state. They include the rights to equality, non-discrimination

⁸²⁴ Sections 46(1)(d) and 105(1)(d) of the Constitution also provides for proportional representation. This goes a long way in ensuring that the minorities participate in government. See *Ex Parte Speaker of the Western Cape Provincial Legislature: In Re First Certification of the Constitution of the Province of the Western Cape* (1997) 4 SA 795 (CC), 1997 9 BCLR 1167 (CC) para 45.

⁸²⁵ For example, section 146 empowers Provinces to designate as official languages at least two languages spoken within their respective jurisdictions.

⁸²⁶ A Addis 'On human diversity and the limits of toleration' in I Shapiro & W Kymlicka (eds) *Ethnicity and group rights: Nomos XXXIX* (1997) 112 128.

based on language, freedom of expression, right to education and right to language and culture. The extent to which individual human rights protect minority language rights in SA is analysed below.

4.3.1.1 Section 9 of the Constitution – the right to equality and non-discrimination on the basis of language

Section 9 of the Constitution provide that

Everyone is equal before the law and has the right to equal protection of the law... Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken... The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth... No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination... Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

A. Equality

Section 9 of the Constitution guarantees the right to equality⁸²⁷ in two ways. On one hand, it guarantees that the law will protect and benefit people equally by ensuring that they fully and equally enjoy their rights and freedoms. This protection arguably allows linguistic minorities to enjoy full and equal language rights with the rest of the population. On the other hand, the Constitution prohibits unfair discrimination⁸²⁸ and enjoins the state to take special measures to protect or advance persons that were historically disadvantaged by unfair discrimination. The

⁸²⁷ The right to equality is one of the values enshrined in section 1 of the South African Constitution. Equality is one of the foundations of a democratic society. Section 37(5) of the Constitution identifies the Right to equality as one of the non-derogable rights even in a state of emergency.

⁸²⁸ Section 9(3) precludes discrimination by the state and section 9(4) precludes discrimination by other parties. It is also important to highlight that the prohibition against discrimination is part of the non-derogable rights set out in the table of non-derogable rights in section 37(5)(c) of the Constitution.

affirmative action is designed to address the historical inequality and discrimination perpetrated during the apartheid era.⁸²⁹ Considering the history of discrimination of linguistic minorities cited above, section 9 could play a very crucial role in preventing further discrimination and eliminating the effects of past discrimination on linguistic minorities.

This two-fold guarantee of equality awakens us to concepts of formal and substantive equality. Formal equality means sameness of treatment in that similar people that are similarly situated in relevant ways should be treated similarly and people that are not similar should be treated dissimilarly.⁸³⁰ The Constitution however leaves open to interpretation the issues of what counts as relevant when determining the similarity of people's situations and what constitutes similar treatment of people who are similarly situated. Formal equality simply requires that all persons are equal bearers of rights and does not take into account the actual social and economic disparities between individuals and groups. In the context of this thesis, formal equality would require that all language speakers (majority and minority) be equal bearers of language rights despite their social and economic disparities.

The downside to such an approach is that it is blind to the existing inequalities between language groups. For instance, a law that affords every language speaker a right to be taught in mother tongue in secondary and tertiary education may be disadvantageous to speakers of a minority language that has not been developed enough to be taught at secondary and tertiary levels. The fulfilment of such right would require government support for development of minority languages that have not been developed enough to be taught in secondary and tertiary institutions because of political power relations in pre-1994 SA. What would then be required is a substantive equality approach that takes into account the disparities and inequalities prevalent among language groups to justify government support to undeveloped minority languages.

Currie and de Waal⁸³¹ argue that substantive equality requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment (in the form of affirmative action) to achieve this goal. This approach requires an examination of the actual social and economic disparities between language speakers to determine whether the Constitution's commitment to

⁸²⁹ This history has already been chronicled above. In *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) [40], the Constitutional Court acknowledged this fact.

⁸³⁰ Currie & de Waal (n 58 above) 210.

⁸³¹ Currie & de Waal (n 58 above) 213.

equality is being upheld. This approach focuses on the results or effects of a particular rule rather than its mere form. In the words of the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.⁸³²

[E]quality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not pre-suppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.

Clearly, the jurisprudential interpretation of section 9 of the Constitution envisages substantive equality instead of formal equality. The very concept of affirmative action enshrined in section 9(2) suggests substantive equality. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,⁸³³ the Constitutional Court established as follows:

Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied... One could refer to such equality as remedial or restitutionary equality.

In *President of the Republic of South Africa v Hugo*⁸³⁴ the Constitutional Court held as follows:

We need... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine

⁸³² *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 132.

⁸³³ 1999 (1) SA 6 (CC) [60] to [61].

⁸³⁴ 1997 4 SA 1 (CC) [41].

whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

Clearly, section 9(1) and (2) of the Constitution envisages substantive equality as opposed to formal equality. Fredman⁸³⁵ convincingly argues that substantive equality has four aims. First, substantive equality should aim to break the cycle of disadvantage associated with out-groups. Second, it should promote respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation and violence because of membership of an out-group. Third, it should entail positive affirmation and celebration of identity within community. Finally, it should facilitate full participation in society. Section 9(1) and (2) can arguably be used to address the past history of discrimination of linguistic minorities on the basis of language and place them on a substantively equal footing with the rest of the population.

B. Non-discrimination

It is important to note that in determining a violation of the right to equality, section 9 of the SA Constitution identifies three ways in which a law or conduct may differentiate between people or a group of people namely mere differentiation, unfair discrimination and affirmative action.

i. Mere differentiation

This refers to laws and conduct that treat persons or groups of people differently to others for a variety of legitimate reasons.⁸³⁶ In order for mere differentiation to be established, three things are key. First, the grounds permissible under mere differentiation should not be contained in section 9(3) of the Constitution. Second, there should be a legitimate purpose for the differentiation. Third, there should be a rational connection between the differentiation and the purpose which is proffered to substantiate or validate it.⁸³⁷

The rationality requirement was ably captured in *Pharmaceutical Manufacturers Association of*

⁸³⁵ S Fredman 'Providing Equality. Substantive Equality and the Positive Duty to Provide' 2005 *SAJHR* 167.

⁸³⁶ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) [22].

⁸³⁷ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) [25] & *Weare v Ndebele* NO 2009 (1) SA 600 (CC). Z Motala & C Ramaphosa *Constitutional law: Analysis and cases* (2002) 262 contend that '[t]he rationality test requires that the regulation must not be arbitrary so as to serve no legitimate governmental purpose – the test requires a rational reason for the regulation, and a connection between the regulation and the ends pursued.'

SA: *In re: ex parte President of the Republic of South Africa*⁸³⁸ where the court established the following:

[i]t is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

Suffice to mention that mere differentiation does not amount to discrimination proscribed by section 9(3) of the Constitution. Mere differentiation acknowledges the existence of fair discrimination where such differentiation is warranted. Interestingly, section 9 of the South African Constitution does not prohibit discrimination but prohibits unfair discrimination that is based on grounds set out in section 9(3) of the South African Constitution.⁸³⁹

ii. Unfair discrimination

Unfair discrimination occurs when a person or a group of people is treated differently to other people on illegitimate grounds. There are three sets of acceptable illegitimate grounds. The first set of illegitimate grounds relate to grounds listed in section 9(3) of the Constitution which include language. Section 9(5) makes it clear that any differentiation on the basis of any of the listed grounds (including language) is presumed to be unfair discrimination. In *Harksen v Lane*⁸⁴⁰ the Constitutional Court held that the common denominators for these grounds is that they have been misused in the past to categorise, marginalise, discriminate against and often oppress persons who have been associated with these attributes or characteristics. These grounds '*have the potential, when manipulated, to demean persons in their inherent humanity and dignity.*'

⁸³⁸ 2000 (2) SA 674 (CC) [85].

⁸³⁹ See C Albertyn 'Equality' in H Cheadle et al (eds) *South African Constitutional Law: The Bill of Rights* (2002) 105.

⁸⁴⁰ *Harksen v Lane* 1998 1 SA 300 (CC) para 50.

The second set of illegitimate grounds relate to grounds analogous to those listed in section 9(3) of the Constitution. In *Harksen v Lane NO*,⁸⁴¹ the Constitutional Court interpreted the illegitimate grounds listed in section 9(3) to include grounds that are analogous to those listed in section 9(3) of the Constitution. An analogous ground was defined as one that is '*based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner.*'⁸⁴² It follows therefore that differentiation on the ground of language (including minority language) or any other ground analogous to language is presumed unfair discrimination.

The third set of illegitimate grounds is discrimination that results in the impairment of human dignity.⁸⁴³ The Constitutional Court has accepted that discrimination that results in the impairment of human dignity violates the equality provisions.⁸⁴⁴ In fact, *Prinsloo v Van der Linde*,⁸⁴⁵ held that unfair discrimination '*principally means treating people differently in a way that impairs their fundamental dignity as human beings, who are inherently equal in dignity.*' According to Currie and de Waal:

The concept of dignity is thus of central importance to understanding unfair discrimination. Unfair discrimination is differential treatment that is hurtful or demeaning. It occurs when law or conduct, for no good reason, treats some people as inferior or incapable or less deserving of respect than others. It also occurs when law and conduct perpetuates or does nothing to remedy existing disadvantage and marginalisation.

What makes the discrimination unfair is its impact on its victims. *Harksen v Lane NO*⁸⁴⁶ establishes that a number of factors need to be objectively and cumulatively taken into account

⁸⁴¹ 1998 (1) SA 300 (CC) [53].

⁸⁴² *Harksen v Lane NO* 1998 (1) SA 300 (CC) [46].

⁸⁴³ 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 has been already argued in Chapter 1 that it is inhuman for a human being to be discriminated on the basis of language.

⁸⁴⁴ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) [33] and *Harksen v Lane NO* 1998 (1) SA 300 (CC) [46].

⁸⁴⁵ 1997 (3) SA 1012 (CC) [31].

⁸⁴⁶ 1998 (1) SA 300 (CC) [52]. Paragraph 53 of the same case also establishes that the test for discrimination is threefold. First, does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? Second, does the differentiation amount to unfair

to determine whether discrimination has an unfair impact. These include but are not limited to a) the position of the complainants in society and whether they have been victims of past patterns of discrimination;⁸⁴⁷ b) whether the primary purpose of a discriminating law or action is to achieve a worthy and important societal goal and c) the extent to which the complainant's rights and fundamental have been impaired. Given the established past history of discrimination suffered by linguistic minorities, it would follow that differentiation on the basis of language may legitimately be deemed unfair discrimination.

It is interesting to note that section 9(4) of the Constitution prohibits both direct and indirect unfair discrimination. The prohibition of indirect unfair discrimination is based on the realization that although the basis of the differentiation is *prima facie* innocent, the impact or effect of the differentiation may be discriminatory.⁸⁴⁸ This is especially crucial given the political, economic and social disparities that linguistic minorities find themselves in. What may appear neutral or innocent on the face of it may turn up discriminatory if the actual vulnerable situation of linguistic minorities is taken into account.

In South Africa, there is no need for a complainant to show that law or conduct that has an indirect discriminatory effect was intended to discriminate.⁸⁴⁹ Intention is usually subjective and may sometimes be difficult for linguistic minorities to prove especially when it relates to the intention of the legislature. Section 9(4) further creates a state obligation to prevent and prohibit discriminatory practices by means of legislation. This was the embryo provision for the Promotion of Equality and the Prevention of Unfair Discrimination Act (Equality Act).⁸⁵⁰

discrimination? Third, if the differentiation is deemed unfair, can it be justified under the limitation clause? With this approach, it is not quite clear if the two-staged process of limiting rights in section 36 has any meaningful application to section 9 of the Constitution. It is particularly difficult to see how any discrimination that has already been deemed unfair can be acceptable in an open and democratic society based on human dignity, equality and freedom. See *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 1999 3 SA 173 (C) & *Lotus River, Ottery, Grassy Park Residence Association v South Peninsula Municipality* 1999 2 SA 817 (C).

⁸⁴⁷ Differential treatment that burdens people in a disadvantaged position is likely to be deemed unfair unlike those that are well off.

⁸⁴⁸ See *Griggs v Duke Power Co* 401 US 424 (1971) & *City Council of Pretoria v Walker* 1988 2 SA 363 (CC).

⁸⁴⁹ *City of Pretoria v Walker* 1988 2 SA 363 (CC). However, *Democratic Party v Minister of Home Affairs* 1999 3 SA 254 (CC) held that the complainant must establish a causal connection between the law and indirect discrimination suffered.

⁸⁵⁰ Act 4 of 2000 as amended by Act 52 of 2003, which came into effect on 15 January 2003. Section 32 of the Equality Act does not include unfair language discrimination practices as to the Illustrative list of Unfair Practices in

iii. Affirmative action

Section 9(2) of the Constitution that allows legislative and other special measures to be taken to protect and advance persons or group of people previously (historically) disadvantaged by unfair discrimination introduces the concept of affirmative action. It is interesting that in *Brink v Kitshoff*⁸⁵¹ the Constitutional Court has gone further to state that the equality clause should be interpreted in the context of South Africa's history of systematic racial discrimination and other modes of systematic discrimination (including discrimination based on language) inscribed on the country's social fabric.

Affirmative action refers to a wide range of governmental policies designed to give preferential treatment for historically disadvantaged victims of discrimination like linguistic minorities. It recognises that strict adherence to formal equality allows entrenched patterns of social, economic, legal and political inequalities to continue without taking into account either the historic disadvantage or the very real persistence of discrimination against traditionally disfavoured groups like linguistic minorities.⁸⁵²

Affirmative action does not amount to unfair discrimination. Section 14(1) of the Equality Act regards affirmative action as discrimination that is not unfair.⁸⁵³ Affirmative action is not derogation from the right to equality but a substantive and composite part of the right to equality.⁸⁵⁴ Put differently, affirmative action moves the discrimination discourse away from a formal concept to a substantive concept of equality. Under this substantive concept, the law must be adjusted and formulated in a way that allows the historically disadvantaged (and are still disadvantaged) to also benefit from the protection of the law. In this sense, the law is adjusted to equalise the disadvantages by treating the less privileged favourably. Affirmative action therefore becomes a corrective measure to counteract the legacy of unfair discrimination

certain sectors in terms of subsection 29(5) of the Equality Act.

⁸⁵¹ 1996 (4) SA 197 (CC) para 40 and 41.

⁸⁵² See RJ Cottrol & M Davis 'Affirmative action' in M Tushnet, T Fleiner & C Saunders (Eds) (2013) *Routledge handbook of constitutional law* 325-326.

⁸⁵³ Section 14(2) of the Equality Act lists the criteria to be used to determine whether discrimination is fair. The criteria boils down to whether or not the discrimination amounts to reasonable and justifiable differentiation.

⁸⁵⁴ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) [32] & *Motala v University of Natal* 1995 (3) BCLR 374 (D).

based on language or the promotion of equality to compensate for accumulated inequalities as a result of a legacy of past discrimination.⁸⁵⁵

Section 28 of the Equality Act⁸⁵⁶ provides for special measures to promote equality with regard to race, gender and disability. These measures do not extend to language. However, it may be permissible for the state to use affirmative action to protect and advance the rights of linguistic minorities given their history of disadvantage due to unfair discrimination.⁸⁵⁷

It is therefore clear that since language is one of the stated illegitimate grounds for discrimination and linguistic minorities have been historically discriminated against, affirmative action is one of the measures that can be used to counteract the legacy of unfair discrimination and promote substantive equality. Devenish rightly cautions though that the affirmative action programs will have to be pursued in a way that is cost effective and does not result in a wholesale squandering of valuable human and institutional resources that significantly undermine economic growth or destroys or emasculates national resources.⁸⁵⁸ This approach requires a judicious balance between social justice and economic growth.

C. Summation of the equality jurisprudence

Section 9 of the SA Constitution rejects a formal conception of equality in favour of substantive equality⁸⁵⁹ because of both the country's history⁸⁶⁰ of discrimination against linguistic minorities

⁸⁵⁵ VC Jackson & MV Tushnet *Comparative constitutional law* (1999) 1079.

⁸⁵⁶ Other statutes that relate to affirmative action are the Employment Equity Act 55 of 1998 and the Preferential Procurement Policy Framework Act 5 of 2000.

⁸⁵⁷ See the American case of *Regents of the University of California v Bakke* 438 US 265 (1978) and the South African cases of *Motala v University of Natal* 1995 (3) BCLR 374 (D) & *Van Heerden v Minister of Finance* 2004 (6) SA 121 (CC).

⁸⁵⁸ GE Devenish *The South African Constitution* (2005) 57.

⁸⁵⁹ See *Brink v Kitshoff* 1996 4 SA 197 (CC) paras 31-44; *President of the RSA v Hugo* 1997 4 SA 1 (CC) para 41; *Harksen v Lane* 1998 1 SA 300 (CC) para 51; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 62.

⁸⁶⁰ In *Minister of Finance Van Heerden* 2004 6 SA 121 (CC) para 26 the Court said that '[t]he equality clause took shape against the backdrop of a society 'deeply divided, vastly unequal and uncaring of human worth', which produced a legacy of persistent and systemic under-privilege.' See also *Shabalala v Attorney-General, Transvaal* 1996 1 SA 725 (CC) para 26; *Azanian Peoples Organisation v President of the RSA* 1996 4 SA 671 (CC) para 31.

and the underlying values of the *Constitution*.⁸⁶¹ Substantive equality demands that affirmative action in the form of remedial or restitutive measures⁸⁶² be employed to address the ‘*stark social and economic disparities*’ between language groups which still plague SA as a result of its discriminatory past.⁸⁶³ The Constitutional Court’s equality jurisprudence recognises difference as a positive and indispensable feature of society.⁸⁶⁴ In the words of Langa CJ in *MEC for Education KwaZulu-Natal v Pillay*.⁸⁶⁵

It is a commitment that is totally in accord with this nation's decisive break from its history of intolerance and exclusion.... [O]ur constitutional project... not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains... our Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation.

In view of these findings, it is clear that all Constitutional provisions relating to minority language rights should be interpreted using the constitutional values of equality, dignity and inclusive diversity. This could be done in three ways. First, language choices can be driven by affirmation and inclusion instead of negation, hierarchies of linguistic forms, exclusion and disadvantage

⁸⁶¹ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 26. The Court referred to social justice, the aspirational objectives of restoring and protecting the equal worth of everyone, the creation of a non-racial, non-sexist society underpinned by human dignity, and the improvement of the quality of life of everyone. The Constitutional Court has frequently emphasised the centrality of the concept of dignity and self-worth to the idea of equality.

⁸⁶² *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.

⁸⁶³ *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.

⁸⁶⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) paras 131 & 134 held that ‘It is no exaggeration to say that the success of the whole constitutional endeavour in South Africa will depend in large measure on how successfully sameness and difference are reconciled... What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour.’ *Robinson v Volks* 2004 6 BCLR 671 (C) 682 held that ‘our constitutional society recognises the dignity of difference.’ *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) para 60 established that ‘[e]quality means equal concern and respect across difference.’

⁸⁶⁵ *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) paras 65 and 92.

using the principle of inclusive diversity or 'principle of difference'.⁸⁶⁶ Second, the principle of human dignity should be used to interpret directive principles of equitable treatment, parity of esteem, the development of historically diminished indigenous languages and promoting and ensuring respect for non-official community and religious languages.⁸⁶⁷ Finally, 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.⁸⁶⁸

4.3.1.2 Section 29 of the Constitution – minority language rights in education

Section 29(1) and (2) of the South African constitution provides for the right to access basic public education⁸⁶⁹ and progressive further education in either an official language or languages of choice where reasonably practicable. *Mahe v Alberta* established that '*... education in one's language provides an important way to preserve and promote the minority group's language and culture...*'⁸⁷⁰ Official minority languages can be potentially protected through section 29(1) and (2) of the constitution. However, section 29(2) totally excludes non-official minority languages. In enforcing this right, the state is enjoined to apply the proportionality principle by considering reasonable education alternatives and considering '(a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices.'

There are two consequences that flow from section 29(2) of the constitution. The first consequence is that if the official language used in the provision of education happens to be one's mother tongue, then that person will have access to education in the mother tongue. The second consequence is that if the official language chosen is not one's mother tongue, then

⁸⁶⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 134.

⁸⁶⁷ In *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) para 47 the Court established that '*all languages [are] not simply a means of communication and instruction, but a central element of community cohesion and identification for a distinct community in South Africa.*'

⁸⁶⁸ It has been established in SA language history that the two paradigms that underpinned the language policy and practice of the apartheid era were the ethnically determined geographical fragmentation of language rights and the privileged position of English and Afrikaans. The current reality is that the privileged position of Afrikaans as an official language has diminished considerably since 1994 but English has acquired the *de facto* status of the official *lingua franca*.

⁸⁶⁹ Section 3(1) of SA Schools act 84 of 1996 considers basic public education as education up to the ninth grade.

⁸⁷⁰ *Mahe v Alberta*, [1990] 1 SCR 342 [Mahe] (CanLII) at 362-63.

section 29(2) does not guarantee mother tongue education. For linguistic minorities, public education in an official language may be burdensome in that it prejudices the student's performance (since language plays a crucial role in cognitive development) and slows down the development of the minority language concerned.

What clearly emerges is that section 29(2) does not guarantee the right to mother tongue education⁸⁷¹ as such but the right to education in an official language of choice when reasonably practicable. This position was underscored in *Western Cape Minister of Education and others v Governing Body of Mikro Primary School and others*,⁸⁷² where the Minister of Education had instructed the principal of Mikro Primary Schools [an exclusively Afrikaans school] to admit and teach 21 students in English. The court held that section 29(2) of the Constitution guarantees that all pupils have a right to receive, *where practicable*, an education in the official language of their choice in public education institutions. The court further held that section 29(2) of the constitution does not proscribe single-medium schools.⁸⁷³ Again, the right to be educated in a language of your choice does not mean that the right can be exercised at every public institution.⁸⁷⁴

The *Mikro* decision had two implications. The first implication was that even if it was reasonably practicable to provide education in English at Mikro, the pupils did not have a constitutional right to receive English instruction at Mikro.⁸⁷⁵ In this regard, the *Mikro* decision discriminates against other language speakers that are not Afrikaans speaking. The second implication is that it opens room for government to support single medium schools. If for instance, there is a single medium school that teaches in a minority language, that school can be legitimately supported by government and can maintain its exclusivity. In this regard, the *Mikro* decision would protect minority languages.

⁸⁷¹ The *Belgium Linguistics Case* (n 288 above) already established that there is no right to education in the mother tongue at international law.

⁸⁷² SCA 140/05.

⁸⁷³ See also *Primary School Middelburg v Head of Department: Mpumalanga Department of Education* 2003 4 SA 160 T.

⁸⁷⁴ Para 31.

⁸⁷⁵ M Swart 'The constitutionalisation of diversity: an examination of language rights in South Africa after the *Mikro* case' (2008) 68 *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* 1083-1106 1089.

Perhaps, equally relevant to highlight is the fact that the section 29(2) right may only be claimed where instruction in an official language of choice is ‘reasonably practicable.’ South African courts have not yet dealt with the exact meaning of ‘reasonably practicable.’ However, it would appear from an interpretation of similar provisions in other jurisdictions that the standard of reasonable practicability is objective and justifiable.⁸⁷⁶ For example, the *Belgian Linguistic case*⁸⁷⁷ established that the standard of reasonableness means that where mother-tongue education is not provided there must be an objective justification for the denial of the right. According to Currie, this justification involves the following sliding scale formula:⁸⁷⁸

The larger the numbers of speakers of a language in a particular area, the greater is the obligation to provide mother-tongue education in that language in that area. The higher the level of education, the less pressing is the obligation to provide mother-tongue education in all the languages of a region.

This formulation accords with the aspirations⁸⁷⁹ of the Working Group on Values in Education. In their report to the Minister of Education entitled *Values, Education and Democracy*, they identify multilingualism as one of the six basic values that have to be promoted through the educational system. Among other important propositions, they state that:⁸⁸⁰

There are two main values we wish to promote in the area of language, which are, firstly, the importance of studying through the language one knows best, or as it is popularly referred to, *mother-tongue* education, and secondly, the fostering of multilingualism. We do believe that an initial grounding in mother-tongue learning is a pedagogically sound approach to learning. We also believe that multicultural communication requires clear governmental support and direction.

Interestingly, clause 5.4.3 of the SA’s ministry of education’s Norms and Standards regarding Language Policy published in terms of Section 6(1) of the South African Schools Act, 1996 clarifies the meaning of ‘where reasonably practicable’ to include local conditions, regional

⁸⁷⁶ This interpretation accords with the general limitation clause in section 36 of the SA constitution.

⁸⁷⁷ *The Belgian Linguistic case* (n 288 above) 284-285.

⁸⁷⁸ Currie & de Waal (n 58 above) 637. See also article 8 of the European Charter for Regional or Minority Languages. See also *Mahe v Alberta* 1 SCR 342 (1990).

⁸⁷⁹ Similar aspirations are expressed by paragraph 1.3.8 of the National language policy framework that provides for mother-tongue education dovetailed with education in an official language.

⁸⁸⁰ Page 15.

language policy and the need for a minimum number of students asking and/or willing to follow education in that language.⁸⁸¹

The reality on the ground though is that English is currently the dominant language of education. For instance, a survey conducted in respect of language policy at the 21 universities and 15 technikons operating in South Africa indicated that 16 exclusively use English as a medium of instruction, 5 institutions use English alongside (or perhaps at the expense of) Afrikaans and African languages have not quite been developed to be used in tertiary institutions.⁸⁸² This has in turn seen very limited use of both official and nonofficial minority languages in education.⁸⁸³

Section 29(3) further creates space for everyone to establish privately funded educational institutions. Official minority languages not used in terms of section 29(2) as well as non-official minority languages can be protected under this section. In *Ex parte Gauteng Provincial Legislature in re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill*, it was held that section 29(3) does not afford every person a right to demand from the state the establishment of schools based on a common culture, language or religion.⁸⁸⁴

4.3.1.3 Section 30 – Everyone’s right to use language and participate in cultural life

Section 30 of the Constitution provides that:

Everyone has the right to use their language and to participate in the cultural life of his or her choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

⁸⁸¹ Clause 5.4.3 says ‘It is reasonably practicable to provide education in a particular language of learning and teaching if at least 40 on Grade 1 to 6 or 35 in Grades 7 to 12 learners in a particular grade request it in a particular school.’

⁸⁸² n 770 above.

⁸⁸³ There is need for the full development of minority languages especially African minority languages if the right to education is to be effectively realized. Clause 3.3 of the Language policy framework for South African higher education, July 2001 states that ‘The ethos of the African Renaissance demands that special attention be given to the development and use of the languages of Africa. The simple fact is that there can be no serious talk of a regeneration of Africa without the full development of the African languages.’

⁸⁸⁴ 1996 3 SA 165.

This section relates to all languages (majority and minority languages). As argued in Chapter 2, language is an integral part of cultural participation. As such, minority language rights are implied from the right to participate in cultural life.

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. The caveat in section 30 is that the exercise of the right to use a language should be done in manner consistent with the Bill of Rights. This would mean that the limitation clause in section 36 (discussed below) applies to section 30.

Of course, there are obvious financial implications to this already addressed above. Availability of finances is one of the considerations to be made in ensuring that this right is fulfilled. Perhaps there is need to add Arzoz's voice on the matter. He comments thus on the use of minority languages in accessing government services:⁸⁸⁵

Of course, the provision... may have substantial resource implications. However, as persons belonging to minorities often point out, as taxpayers their needs should be taken into account according to the principles of equality and non-discrimination. Indeed, from the perspective of need, it may well be that special measures are required exactly for smaller groups who otherwise would be disadvantaged and normally would not compromise a sufficient economic base to generate their own financially justified "demand". In fact, economic and financial considerations are arguably over-stated in these cases...

4.3.1.4 Language rights in criminal proceedings

Section 35(3)(k) of the constitution affords every accused person a right '*... to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language.*'

Six observations can be made about this provision. First, just like in international law, language rights in criminal proceedings are afforded to everyone and are not peculiar to minority language

⁸⁸⁵ X Arzoz (n 229 above).

speakers. However, minority language speakers whose languages have been afforded official language status can access their minority language rights through general language rights in criminal proceedings. This position was underscored in *State v Matomela*⁸⁸⁶ where the Court in interpreting sections 6 and 35(3)(k) of the South African Constitution held that a court can conduct a hearing in a person's native language provided the language was one of the official languages and it is a language that an accused person understands.

The second observation is that subordinate legislation has been passed to ensure that the provisions of section 35(3)(k) are implemented. For example, section 6(2) of the Magistrates' Courts Act 32 of 1944⁸⁸⁷ provides for the provision of a competent interpreter if, in the opinion of the court, the accused is not sufficiently conversant in the language in which evidence is being given. This section places the onus on the court to determine whether the accused is sufficiently conversant in the language of the court and to provide a competent interpreter for the accused. An interpreter has been held to be incompetent if (s)he is blatantly unable to speak a language⁸⁸⁸ or if (s)he is incompetent due to inebriation.⁸⁸⁹

The third observation is that the rationale for affording language rights in criminal proceeding is to facilitate the participation of an accused person in a trial in SA's adversarial legal system. If minority language rights are not afforded to an accused person, then justice will be denied. R.H. Moeketsi convincingly argues that accused persons⁸⁹⁰

... are usually African, too poor to afford legal representation and too uneducated to follow the court proceedings, which are invariably conducted in Afrikaans or English. According to Styler (1993), 90% of the cases heard in the lower courts involve legally unrepresented African speakers. For this group the courtroom is a hostile environment which can easily bring their

⁸⁸⁶ 3 BCLR 339 (CK).

⁸⁸⁷ The said section 6(2) states: 'If, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given, is one of the official languages or of whether the representative of the accused is conversant with the language used in evidence or not.'

⁸⁸⁸ S v. Ngubane 1995 1 SACR 384 (T).

⁸⁸⁹ S v. Swarbooi [2003] JOL 11461 (E).

⁸⁹⁰ RH Moeketsi 'Redefining the role of the South African court interpreter' (1999) 8(3-4) *Newsletter of the National Association of Judiciary Interpreters and Translators*.

freedom, or their lives, to an end. This means that most South Africans, already deprived, handicapped and humiliated by segregation and apartheid, are further overburdened with linguistic and cultural shortcomings in judicial settings. Such deficiencies ultimately bar them from participating effectively in their own trials and thus force them to relinquish whatever legal rights they would have been entitled to.

The fourth observation is that section 35(3)(k) 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 but merely to be tried in a language that the accused person understands.⁸⁹¹ Even interpretation during trial has to be done in a language that a person understands.⁸⁹² Section 35(4) further buttresses this point when it provides that information during trial should be given in a language that the accused person understands.⁸⁹³ There is no guarantee that a trial can be conducted, interpretation be made and information be conveyed in a language that the accused speaks or in his/ her mother tongue. There are times when a language that one understands is different from the language that one speaks. If for example, a trial is conducted in English when an accused person who speaks the Nama language understands English, there will be no violation of section 35(3)(k) of the constitution.

The fifth observation is that in practice the main languages used in courts for trial and record keeping⁸⁹⁴ are English and Afrikaans. However, since 2005 other official languages have been used in courts for trial in KwaZulu-Natal, the Western Cape and Limpopo provinces of South Africa.⁸⁹⁵ For instance, in Mitchell's Plain in the Western Cape Magistrates Courts hear cases in isiXhosa. In Limpopo, the Magistrates Courts hear cases in Sepedi. Suffice to mention that the use of the other 9 official languages besides English and Afrikaans has been predominant in Magistrates Courts. Courts have begrudgingly accepted the Constitutional right to conduct trials in other indigenous languages, but have called for a sole language of record to be introduced in

⁸⁹¹ See *Mthethwa v De Bruin* NO 1998 3 BCLR 336 (N); *S v Damoyi* 2004 1 SACR 126 para 17 and *S v Pienaar* 2000 2 SACR 143 (NC).

⁸⁹² See *S v Ngubane* 1996 2 SCR 218 (C); *S v Siyotula* 2003 1 SACR 154 (E) and *Naidenov v Minister of Home Affairs* 1995 7 BCLR 891 (T).

⁸⁹³ *S v Melani* 1996 1 SACR 335 (E) 349g.

⁸⁹⁴ RH Moeketsi (n 879 above).

⁸⁹⁵ W den Hartigh 'African languages in SA Courts' 12 March 2009 http://www.medioclubsouthafrica.com/index.php?option=com_content&view=article&id=1018:indigenous-languages-in-sa-courts&catid=42:landnews&Itemid=110#ixzz2Sc6wIzBw (accessed 7 May 2013).

order to reduce the “impracticalities” that a multilingual justice system would create.⁸⁹⁶

The final observation is that South African courts have grappled with the concept of ‘practicality’ when determining whether or not to use a language the accused person understands in criminal proceedings. To this end, three cases are key. The first case is *S v Abrahams*⁸⁹⁷ where at the trial, the accused needed the assistance of an interpreter as he was hearing-impaired and communicated using sign language. The trial was conducted in Afrikaans, but the interpreter repeatedly told the court that his Afrikaans was weak. The interpreter also had to interrupt proceedings a number of times to indicate that he was unable to follow the proceedings and ask if everyone could speak more slowly. On review, the High Court held that failing to use a competent interpreter is an irregularity that vitiates the proceedings. Since this decision concerned sign language (a minority language), it can be safely argued that section 35(3)(k) to a degree, protects minority languages.

The second case is *Mthethwa v De Bruin NO and Another*.⁸⁹⁸ The accused requested that his trial be conducted in isiZulu, his mother tongue, even though he could understand and speak English. His request was rejected because although 98% of the cases in that magistrate’s court involved isiZulu speaking defendants, the practicalities of the situation suggested that it would be impossible to conduct trials in that language because (a) 4 out of the 37 regional magistrates could speak isiZulu, (b) 81 out of the Attorney-General’s 256 prosecutors could speak isiZulu and 6 out of the Attorney-General’s 41 advocates could speak the language; and (c) only one out of the 22 judges in the Natal Division of the High Court could speak isiZulu. On review, the High court upheld the decision on the Magistrates Court that it was impractical⁸⁹⁹ in the circumstances for the trial to have been conducted in isiZulu. The court further considered the fact that review proceedings needed at least two judges and only one judge could speak isiZulu. This may mean conversely that if the number of judicial officers speaking isiZulu improves in the future, isiZulu can be used in conducting criminal proceeding. Official minority languages can potentially be protected using section 35(3)(k) of the constitution.

⁸⁹⁶ *S v. Matomela*, 1998 3 BCLR 339 (Ck).

⁸⁹⁷ 1997 2 SACR 47 (C).

⁸⁹⁸ 1998 (3) BCLR 336 (N) p338.

⁸⁹⁹ Page 338.

The third case is *S v Matomela*.⁹⁰⁰ In this case the accused understood isiXhosa and the magistrate, the prosecutor and the accused also spoke the same indigenous language. Because of a severe shortage of interpreters at the time and to prevent undue delay in conducting the trial, the magistrate chose to conduct the trial in isiXhosa. The High court upheld this decision on automatic review. The Court however, suggested *orbiter* the adoption (by the Department of Justice) of one language of record for the use by the court system “*for practical reasons and for better administration of justice*,”⁹⁰¹ Giving heed to this suggestion, the Department of Justice suggested English as a language of record to be used in the court system.⁹⁰² This suggestion has the effect of elevating English above the other official and non-official languages.

A discussion of these cases reveals that South African courts have been grappling with the idea of ‘practicability’ and when it is appropriate to invoke practicality issues in order to serve the administration of justice. Their decisions have tended to depend on the circumstances of each case. The various court decisions also show that section 35(3)(k) not only provides for a communicative right to understand criminal proceedings but sometimes goes further to guarantee a language right where it is practical to do so.⁹⁰³ Finally, the usual remedy for violating section 35(3)(k) is the setting aside of both conviction and sentence.

4.3.2 Pillar 2 – Specific minority language rights

It has been argued throughout the thesis that second pillar of the two-pillar system of the effective protection of minority languages and linguistic minorities consists of specific minority rights and measures designed to protect and promote the separate identity of minority language groups. Such rights include the right to identity, the right to use a minority language in the public and private spheres. In the SA context, sections 6 and 31 of the Constitution embody such minority specific rights as analysed below.

⁹⁰⁰ 1998 3 BCLR 339 (Ck).

⁹⁰¹ Page 342.

⁹⁰² PM Maduna, the then Minister of Justice and Constitutional Development made this suggestion in his speech at the Opening of the Justice Colloquium on 19 October 2000 (accessed on 30 April 2014) at <http://www.info.gov.za/speeches/2000/001208345p1006.htm> www.info.gov.za/speeches/2000/001208345p1006.htm.

⁹⁰³ *S v Pienaar* 2000 2 SACR 143 (NC) categorically states that section 35(3)(k) provides for a right to criminal proceedings to be conducted in the language that the accused understands (in this case Afrikaans)

4.3.2.1 Section 6 of the Constitution

The main language rights article in the South African Constitution is section 6. It acknowledges the multilingual nature of the SA society and puts in place a constitutional framework for the accommodation of this linguistic diversity. More specifically, section 6 creates a constitutional framework for the protection of both official and non-official minority languages. This legal framework places an obligation on state organs (executive, legislature and judiciary) to practically implement the provisions of section 6 of the SA Constitution. It limits the state's freedom to develop and implement language policies that are contrary to the provisions of section 6. The extent to which this constitutional framework protects minority languages is what this chapter (and this section particularly) will focus on.

Pretorius⁹⁰⁴ rightly argues that section 6 has three distinct parts⁹⁰⁵ without an obvious organising principle and without clarity on how these parts are to interrelate in concrete cases. The three parts are the official language declaration,⁹⁰⁶ the directive principles of state language policy,⁹⁰⁷ and a catalogue of practical considerations to guide restrictive choices regarding official language use.⁹⁰⁸ These three parts will be analysed in detail below.

Suffice to mention that section 6 is part of the founding provisions of the SA Constitution. The jurisprudence of the SA Constitutional Court establishes that the values constituting the basic constitutional value system are mutually interdependent and that collectively they form a unified, coherent whole. *MEC for Education, KwaZulu-Natal v Pillay*⁹⁰⁹ held that '[t]hese values are not mutually exclusive but enhance and reinforce each other.' Also, *De Reuck v Director of Public*

⁹⁰⁴ JL Pretorius 'The Use of Official Languages Act: Diversity affirmed?' 2013 (16) 1 *Potchefstroom Electronic Law Journal/ Potchefstroomse Elektroniese Regsblad* 281 282.

⁹⁰⁵ Not counting s 6(5) which establishes the Pan South African Language Board.

⁹⁰⁶ Section 6(1) declares the official languages of South Africa to be Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

⁹⁰⁷ They are the directive to take practical and positive measures to elevate the status and advance the use of the historically diminished indigenous languages (s 6(2)), and the directives that all official languages must enjoy parity of esteem and equitable treatment (s 6(4)).

⁹⁰⁸ Section 6(3)(a) provides that the national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

⁹⁰⁹ 2008 1 SA 474 (CC) paras 63-64.

*Prosecutions, Witwatersrand Local Division*⁹¹⁰ established that ‘constitutional rights are mutually interrelated and interdependent and form a single constitutional value system.’ In *Matatiele Municipality v President of the RSA*,⁹¹¹ the Constitutional Court held as follows:

Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it ‘has an inner unity, and the meaning of any one part is linked to that of other provisions’. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.’

The constitutional values are used to interpret Constitutional provisions in order to preserve the Constitution’s normative unity or value coherence. For instance, in *Executive Council of the Western Cape Legislature v President of the RSA*⁹¹² established that interpretation of constitutional provisions must respect the ‘design and structure of the Constitution as a whole.’ *S v Mhlungu*⁹¹³ held that it is a necessary interpretative technique to give ‘force and effect to the fundamental objectives and aspirations of the Constitution.’ or to preserve the ‘overall design and purpose of the Constitution.’ The three main values that will be used to interpret language provisions are equality, dignity and inclusive diversity.

A. Are language rights provided for in section 6 subject to any limitation?

This question can be answered by an analysis of section 36 of the South African Constitution that provides for the following two limitations:

a. Limitation under the general limitation clause in section 36(1)⁹¹⁴ and or

⁹¹⁰ 2004 1 SA 406 (CC) para 55.

⁹¹¹ 2007 6 SA 477 (CC) para 36.

⁹¹² 1995 4 SA 877 (CC) para 204.

⁹¹³ 1995 3 SA 867 (CC) paras 45, 105.

⁹¹⁴ It states that ‘The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.’

- b. Limitation through any other provision of the constitution.⁹¹⁵

i. The general limitation clause [section 36(1) of the Constitution]

Limitation refers to justifiable infringement of a right in an open and democratic society based on human dignity, equality and freedom.⁹¹⁶ Section 36(1) is deemed a general limitation because it applies to all rights enshrined in the Bill of Rights no matter how individual provisions are phrased.

Woolman *et al*⁹¹⁷ argue that the limitation clause has a four-fold purpose. First, it functions as a reminder that the rights enshrined in the Bill of Rights are not absolute. Second, the limitation clause reveals that rights may only be limited where and when the stated objective behind the restriction is designed to reinforce the constitutional values.

Third, the test set out in the limitation clause enjoins courts to engage in a balancing exercise in order to arrive at a global judgment on proportionality. Finally, the limitation clause serves as a reminder that the counter-majoritarian dilemma is neither a paradox nor a problem, but an ineluctable consequence of South Africa's commitment to living in a constitutional democracy.⁹¹⁸

The courts usually ask two fundamental questions. First, whether a right in the Bill of Rights has been violated, impaired, limited or infringed by law or conduct?⁹¹⁹ Second, if the answer to the first question is in the affirmative, whether the infringement can be justified as a permissible limitation of the right?⁹²⁰

⁹¹⁵ Section 36 (2) of the South African Constitution provides that '*Except as provided in subsection (1) or any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*'

⁹¹⁶ Currie & de Waal (n 58 above) 151.

⁹¹⁷ S Woolman, T Roux & M Bishop *Constitutional law of South Africa: Student edition* (2007) 34-1 to 34-2.

⁹¹⁸ Put differently, powers of judicial review are best understood not as part of a battle for ascendancy between courts and legislatures or as a means of frustrating the will of the political majority, but rather as a commitment of South Africa's basic law to shared constitutional competence.

⁹¹⁹ In some cases, the Constitutional Court has dispensed with this first question and has proceeded on the basis of the second inquiry alone. Such cases include *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) and *S v Jordan* 2002 6 SA 642 (CC) [28] – [29]. A further analysis of this aspect is not useful to the subject under discussion in this thesis.

⁹²⁰ Currie & de Waal (n 58 above) 153.

The criteria for justifying the limitation of rights are arguably twofold. First, a law of general application may legitimately limit a right contained in the Bill of Rights. The law of general application is the rule of law⁹²¹ that includes legislation,⁹²² common law⁹²³ and customary law⁹²⁴ that is impersonal,⁹²⁵ applies equally to all and is not arbitrary in its application.

Second, the law of general application should be reasonable and justifiable⁹²⁶ in an open and democratic society that is based on human dignity, equality and freedom. Currie and de Waal convincingly contend that⁹²⁷

[it] must be shown that the law in question serves as a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purpose of the law).

This is referred to as the principle of proportionality and is considered as central to a constitutional democracy.⁹²⁸ Section 36(1) highlights five factors that are used to determine proportionality. The first factor is the nature of the right. Courts are usually enjoined to assess the importance of a particular right in the overall constitutional scheme of creating an open and democratic society based on human dignity, freedom and equality *vis a vis* the justifications of its infringement. For example, in *S v Makwanyane*,⁹²⁹ the right to life was viewed as more

⁹²¹ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).

⁹²² It includes Acts of Parliament and delegated legislation. See *Larbi-Odam v MEC for Education (North West Province)* 1998 1 SA 745 (CC) 27.

⁹²³ 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.

⁹²⁴ *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 44 & 136.

⁹²⁵ *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC).

⁹²⁶ Devenish (n 261 above) 181 says the limitation should be reasonable and proportional.

⁹²⁷ Currie & de Waal (n 58 above) 163.

⁹²⁸ 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.'

⁹²⁹ 1995 3 SA 391 (CC). In the court's words [326] to [327]: 'The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be a bearer of them... This concept of human life is at the centre of our constitutional values.. The right to life, thus understood, incorporates the right to dignity.... Without dignity, human life is substantially diminished. Without life, there cannot be dignity.'

important than the justifications of infringement of the right. Use of a minority language in government business is arguably very important to the preservation of linguistic identity and access to public service that its limitation would need to have a very reasonable justification.

The second factor is the importance of the purpose of the limitation. On one hand, reasonableness at the minimum requires that the limitation should serve some purpose.⁹³⁰ On the other hand, justifiability demands that the purpose of the limitation should be worthwhile and important in a constitutional democracy.⁹³¹ The application of the second factor depends on the circumstances of each case.

The third factor is nature and extent of the limitation. This factor enjoins the court to assess the effects of the limitation on the right concerned and not on the right holder.⁹³² In the context of the thesis, what is the effect of the limitation on the right to use a minority language? The law that limits the right should not do more damage to the right than is reasonable for achieving its purpose.⁹³³

The fourth factor is the relation between the limitation and its purpose. There must be a good reason for the infringement and proportionality between the harm done by the infringement and the beneficial purpose that the law is meant to achieve.⁹³⁴ *S v Bhulwana*⁹³⁵ indicates that

[t]he Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.

The final factor is the availability of less restrictive means to achieve purpose. The limitation will not be proportional if there are less restrictive (but equally effective) means that can be employed to achieve the same purpose of the limitation.⁹³⁶

⁹³⁰ *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC).

⁹³¹ See *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 632 (CC) & *Richter v Minister of Home Affairs* 2009 3 SA 615 (CC).

⁹³² *S v Meaker* 1998 8 BCLR 1038 (W).

⁹³³ *S v Manamela* 2000 3 SA 1 (CC) 34.

⁹³⁴ *S v Makwanyane* 1995 3 SA 391 [236].

⁹³⁵ *S v Bulwana* 1996 1 SA 388 (CC).

Suffice to mention that a textual interpretation of section 6 reveals that section 6 is not part of the Bill of Rights but part of the founding values and cannot be subjected to the limitation clause in section 36 of the Constitution.⁹³⁷ This argument is consistent with the SA Constitutional Court reasoning in *Van Rooyen v S (General Council of the Bar of South Africa Intervening)*⁹³⁸ where the Constitutional Court found that judicial independence was outside the Bill of rights and was therefore not subject to the general limitation in section 36(1).

However, a golden and purposive interpretation of section 6 takes into account the two major constitutional principles. The first is that constitutional provisions should be interpreted in the context of constitutional values like equality, dignity, inclusive diversity and the principle of proportionality. The second is that the implementation of section 6 involves the application of other rights in the Bill of Rights like equality, non-discrimination, dignity and freedom of expression that require the application of the proportionality principle. This would then mean that the proportionality principle applies to section 6 of the Constitution even though it falls outside the Bill of Rights.⁹³⁹ Pretorius⁹⁴⁰ argues that the application of proportionality to section 6 of the Constitution 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-reductionist⁹⁴¹ and non-hierarchical.⁹⁴²

⁹³⁶ *S v Makwanyane* 1995 3 SA 391 [123] and [128].

⁹³⁷ This strict interpretation would mean that all other sections (besides section 6) of the Constitution discussed in this thesis are subject to the limitation clause.

⁹³⁸ 2002 5 SA 246 (CC) [35]. In the Court's words '*[h]owever, institutional judicial independence itself is a constitutional principle and norm that goes beyond and lies outside the Bill of Rights. The provisions of section 36 of the Constitution dealing with the limitation to rights entrenched in the Bill of Rights are accordingly not applicable to it. Judicial independence is not subject to limitation.*'

⁹³⁹ See JL Pretorius (n 893 above) 295.

⁹⁴⁰ JL Pretorius (n 893 above) 299.

⁹⁴¹ 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.

⁹⁴² Non-hierarchical relatedness means that constitutional goods must not be pitched against each other in terms of an arbitrary abstract rank order.

ii. Limitation through any other provision of the constitution

Section 36(2) of the South African Constitution provides that '[e]xcept as provided in subsection (1) or **in any other provision of the Constitution**, no law may limit any right entrenched in the Bill of Rights.' Beyond the general limitation clause in section 36(1), this subsection essentially provides that constitutional rights can be legitimately limited in terms of '*any other provision of the Constitution*.'⁹⁴³ It follows that section 6 can be limited by the limitations contained in section 6 itself or any other provision⁹⁴⁴ of the Constitution that have a bearing on the rights provided for in section 6 of the Constitution. Below is an analysis of section 6.

B. Official language status

Section 6(1) of the Constitution reveals that SA has chosen the official language route as a means of implementing language rights enshrined in the international bill of rights discussed in chapter 2 above. Section 6(1) affords official language status to 11 languages namely Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.⁹⁴⁵

Chapter 1 has already defined an official language as a language used in the business of government (executive, legislature and judiciary).⁹⁴⁶ It further established that the state has the discretion to choose an official language.⁹⁴⁷ It has also been argued that 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 used in government business. This position accords with the definition of an official language cited above. It is also

⁹⁴³ Currie & de Waal (n 58 above) 172. The other possible limitation would be the general limitation of all rights (except freedom from torture and the abuse and exploitation of children) by the corresponding right to respect the rights of others. See *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Ors* 2002 6 SA 370 (CC).

⁹⁴⁴ Other Constitutional provisions with internal limitations include sections 9(3), 15(3), 24(b), 25(2), 26(2), 27(2), 29(1)(b), 29(2), 30, 31(2) and 32(2).

⁹⁴⁵ Section 1 of the National Language Policy Framework highlights that South Africa has approximately 25 languages. Of those 25, 11 were afforded official language status because they are spoken by 98% of the population.

⁹⁴⁶ UNESCO Report entitled 'The use of vernacular languages in education' (1953) 46. See also Malan (n 316 above) 387.

⁹⁴⁷ *Diergaardt case* (n 79 above); *Ballantyne case* above (n 78 above).

in line with the position of the European Court of Human Rights in *Mentzen alias Mencina v Latvia*, where it was established that⁹⁴⁸

...the Court acknowledges that the official language is [...] one of the fundamental constitutional values in the same way as the national territory, the organisational structure of the State and the national flag. A language is not in any sense an abstract value. It 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 both to impart and to receive information, without hindrance not only in their private lives, but also in their dealings with the public authorities. In the Court's view, it is first and foremost from this perspective that measures intended to protect a given language must be considered. 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 Varennes convincingly argues that⁹⁴⁹

... 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 official publications as well as in legislation and in the proceedings and records of the legislature.⁹⁵⁰ 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.

How then does one ascertain whether a language that has been afforded official language status is genuinely official? In attempting to answer this, Malan suggests that two factor should be considered. The first factor is to look at whether there are additional constitutional (or other)

⁹⁴⁸ Application no. 71074/01, admissibility decision of 7 December 2004.

⁹⁴⁹ de Varennes (n 86 above) 10.

⁹⁵⁰ MW Wenner 'The politics of equality among European linguistic minorities' in RP Claude (ed) *Comparative human rights* (1976) 184 193.

provisions that regulate the actual use of the languages. The second factor is to look at the actual use of such a language. This inquiry has the capacity of revealing whether a language is in fact official. Malan contends that the designation of official language status to a large number of the 11 official languages in South Africa is merely symbolic since it may not be financially and administratively feasible to use all the 11 languages regularly on a national scale.⁹⁵¹ It follows therefore that an official language that is either not used or has a low functional load in government business can rightly be deemed a minority language.

C. Use of official languages

It is important to note that sections 6(3) and 6(4) oblige national, provincial and municipal governments to actually use official languages.⁹⁵² The state obligation is crafted in a discretionary manner. The state is given a wide discretion to choose which official language to use at national, provincial and municipal levels. This discretion is three-fold.

The first aspect of the discretion is that section 6(3)(a) of the SA Constitution gives national and provincial governments the discretion to use a minimum - and not a maximum - of two official languages for purposes of government. This would mean that the use of less than two official languages would be in violation of section 6(3) of the constitution. This position was buttressed in the case of *Pansalb v The Compensation Commissioner, the Minister of Labour and the Director of the Department of Labour*⁹⁵³ where the Court held that the decision of the Respondents to adopt English as the only official language in which to communicate was unlawful and unconstitutional, and ordered this practice to be stopped.⁹⁵⁴ Given that inclusive diversity is one values of the Constitution, it would be encouraged for states to use as many official languages as possible provided it is practically possible to do so.

⁹⁵¹ Malan (n 786 above) 388.

⁹⁵² No such obligation extends to non-official minority languages. It can be safely argued that non-official minority languages are discriminated against in terms of public use in national, provincial and municipal governments in SA.

⁹⁵³ Case number No. 5830/2004 [TPD].

⁹⁵⁴ In the same case, the Department of Labour was further compelled to make forms available in all official languages on request, and to indicate, on these forms, the other official languages in which the forms were available. The Department was also ordered to train personnel to enable them to serve the public in official languages other than English. The Department was also issued a directive to align language policy and practice with the constitutional requirements, in consultation with Pansalb.

Suffice to mention that there is no definition of the phrase ‘for purposes of government’. However, ‘for purposes of government’ usually encompasses various activities of government that entail communication between the government, its officials and the public. Currie argues that government activities are divided into legislation and administration. Currie⁹⁵⁵ 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. This would imply the use of a sliding-scale approach that amplifies the government’s obligation to provide an important government service in a specific language if there is a higher degree of concentration of speakers of that language in a particular area. The sliding-scale approach clearly acknowledges that it is impractical to provide every government service in all the 11 official language in all SA provinces.

The second aspect of the discretion is that it is not absolute but is subject to the qualifying considerations. At the national and provincial level, the discretion should take into consideration the *‘usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned.’* This discretion enjoins the state to use a sliding scale approach in balancing the inclusion of as many official languages as possible on one hand and practicality and financial considerations on the other. The discretion is wide enough to allow national and provincial authorities to choose how often and for what purpose to use or not to use any specific official language. For example a national or provincial authority can be restrictive and choose only two official languages. Another national or provincial authority can fully embrace the inclusive diversity value and choose to use all the 11 official languages. Yet another national or provincial authority can tow the middle ground and choose one anchor official language and use other 10 official languages on a rotational basis as long as two languages are used. The discretion lies entirely with the national and provincial government concerned.

Municipalities on the other hand are obliged by section 6(3)(b) to take the language usage and preferences of their residents into consideration in determining which language to use. Unlike the national and provincial governments’ obligation to use at least two official languages, the SA

⁹⁵⁵ Currie & de Waal (n 58 above).

Constitution does not prescribe a minimum number of official languages to be used by municipalities. Again, instead of considering factors like *'usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned'* municipalities are only required to consider usage and the preferences of their residence. The discretion given to municipalities is so wide that a municipality can choose to use one, two or all eleven official languages. The obligation is for them to use official languages. A municipality that is minority friendly would ensure the use of as many official minority languages as possible. Conversely, a municipality that is minority insensitive could simply use English as the *lingua franca* and exclude the other languages.

A contextual reading of section 6(2) of the Constitution seems to suggest the use of affirmative action in advancing the use of official languages. The measures to be taken should be practical and positive. This affirmative action takes into account the diminished use and status of indigenous languages. It can therefore be argued that the history of discrimination against speakers of African languages chronicled above may see national, provincial and municipal authorities choosing to use official African languages.

The third aspect of the discretion obliges national and provincial governments to self regulate by setting up legislative and other measures to regulate and monitor the use of official languages.⁹⁵⁶ The exact nature of the legislative and other measures is not specified. It leaves open and unanswered the whole issue of remedies available to the aggrieved party in the event of breach of this obligation. The section does not even spell out the principles and guidelines that the national and provincial governments should follow. A purposive reading of the constitution would however, imply that the measures should be reasonable, foster inclusive diversity and be justifiable in a democratic society with equality, dignity and freedom.

i. Time frame for promulgation of legislation

One of the initial key limitations in sections 6(3) and (4) of the Constitution was that there was no time frame placed on when government should pass legislation regulating the use of official languages. The inevitable question is 'in the absence of a time frame, when is government obliged to pass a language specific piece of legislation?'

⁹⁵⁶ Section 6(4) of the Constitution.

A number of constitutional provisions assist in addressing this question. For instance, section 237 of the Constitution requires all constitutional obligations to be met diligently and without delay. Again, Item 21 of schedule 6 requires that legislation, which is required by the Constitution, must be enacted within a reasonable period. There is no definition of what constitutes a reasonable period. In *Minister of Justice v Ntuli*, 18 months was deemed to constitute reasonable period.⁹⁵⁷ In the same vein, Venter observed that the enactment of language legislation later than 1998 could be deemed unreasonable in terms of item 21 of schedule 6.⁹⁵⁸

The Constitutional Court matter of *Lourens v President van die Republiek van Suid Afrika en Andere*⁹⁵⁹ was one of the key decisions in pushing government to promulgate a language specific Act. It was alleged that by not promulgating a language specific piece of legislation, government was in violation of section 6(3) and (4) of the Constitution.

For 12 years, the provisions of section 6(3) and (4) of the Constitution were omitted, postponed, ignored and abrogated. This delay caused English to be the dominant language used by national, provincial and municipal governments. In response, government argued that government had a capacity problem. It did not have the financial means to implement the provisions of section 6(3) and (4) of the Constitution. The Court had to use the principle of proportionality to balance the delay in promulgating a language Act on one hand (a limitation of language rights) and the financial implications of such an exercise on the other.

Though the government's view was true to some degree, it overlooked three salient facts. Firstly, the exercise was not very costly as alleged. According to an independent report by Emzantsi Associates, the cost of implementation the provisions of section 6(3) and (4) would have amounted to only 0,18% of the budget.⁹⁶⁰ Secondly, the language policy would also have been phased in over a number of years to minimize cost and ensure progressive realization of the rights conferred by section 6(3) and (4) of the Constitution. Thirdly and in any event, the

⁹⁵⁷ *Minister of Justice v Ntuli* 1997 3 SA 772 (CC) para 39.

⁹⁵⁸ F Venter 'The protection of cultural, linguistic and religious rights: the framework provided by the Constitution of the Republic of South Africa.' (1996) 13 (2) *South African Public Law* 1996 438-459.

⁹⁵⁹ *Lourens v President van die Republiek van Suid Afrika en Andere* 2013 1 SA 499 (GNP)

⁹⁶⁰ Emzantsi Associates: 'Costing the draft language policy and plan for South Africa' 46.

principle that budgetary considerations had been dismissed as an invalid excuse in *Minister of Health v Treatment Action Campaign* when the Constitutional Court held that:⁹⁶¹

Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so.

In the end, the Constitutional Court in the *Lourens case*⁹⁶² established that the SA government had failed to regulate and monitor, through legislative and other measures, the use of at least two official languages as required under Sections 6(3) and (4) of the *Constitution*. The Court further concluded that there was in effect no legislation covering the national government's use of at least two official languages in the affairs of state and government. Government was therefore ordered to put in place legislative and other measures to regulate and monitor the use of official languages in SA. The implementation of this case saw the promulgation of the Use of Official Languages Act on 2 October 2012.

ii. Parity of esteem and equitable treatment of official languages

This is an aspect of the constitution where the principle of proportionality is applied to regulate the relationship between the directive principles of (parity of esteem, equitable treatment and the development of indigenous languages) to practical considerations which may stand in the way of their optimal realisation at a given moment in time. Section 6(4) does away with the equal treatment of official languages as was the case in the interim constitution⁹⁶³ and provides from parity of esteem and equitable treatment of languages.

It is interesting to note that the final Constitutional Court certification judgment seems to suggest that the 11 languages are by implication formally equal. It states that:⁹⁶⁴

...A separate objection goes to the status of Afrikaans in the NT (New Text). That objection did not allege the violation of any particular CP (Constitutional Principle). Rather it was that NT6 must

⁹⁶¹ 2002 5 SA 72 (CC).

⁹⁶² The decision was passed on 16 March 2010.

⁹⁶³ Section 3(2) of the Interim Constitution restricted the equality principle to the equal treatment of English and Afrikaans.

⁹⁶⁴ *Ex parte* Chairperson of the Constitutional Assembly 1996 4 SA 744 (CC) para 212.

be given content by reading it alongside IC (Interim Constitution) 3(2), (5) and (9), which, inter alia, require that the status of Afrikaans as an official language should not be diminished. It appears to be the contention that the status of Afrikaans is diluted under NT, relative to the IC. But NT6, like the rest of that document, must be tested against the CPs, and not against the IC. *(105) In any event, the NT does not reduce the status of Afrikaans relative to the IC: Afrikaans is accorded official status in terms of NT 6(1). Affording other languages the same status does not diminish that of Afrikaans.

However, this interpretation of equality of official languages contradicts section 6(4) of the Constitution that provides for equitable (and not equal) treatment and parity of esteem of all official languages. To this end, Currie correctly argues that the current SA Constitution ‘... *avoids any language that might give rise to a claim that the official languages must be treated equally.*’⁹⁶⁵

Currie describes equitable treatment as that which is just and fair in the circumstances and the circumstances include a history of official denigration and neglect of indigenous languages.⁹⁶⁶ The mere fact that a particular language is under-developed, or has historically enjoyed no or only modest popular preference as an official language, or would require the allocation of considerable resources to become an eligible candidate for official use, does not justify inaction as far as the constitutional instruction to take practical and positive measures to elevate its status and advance its use is concerned. On the contrary, what may be just and fair is to give preferential treatment to official African (minority) languages whose speakers have suffered a history of discrimination and denigration.

On the other hand, one may view equitability from the present reality that English as the dominant language be used as an anchor language and the other languages be used when they are most spoken. Malan establishes that parity of esteem is different from equal treatment and equitability is different from equality⁹⁶⁷ and argues that⁹⁶⁸ *‘[e]quitability may mean precisely that*

⁹⁶⁵ I Currie ‘Official languages and linguistic rights’ in Woolman *et al Constitutional law in South Africa* (2005) 65-66.

⁹⁶⁶ I Currie ‘Official languages’ in Chaskalson *et al Constitutional law of South Africa* (1998) 37.6.

⁹⁶⁷ K Malan (n 786 above) 391.

⁹⁶⁸ K Malan (n 786 above) 392.

English, being one language that is understood by all or at least most citizens and inhabitants, be used as the anchor language.' As regards parity of esteem, Malan rightly contends that:⁹⁶⁹

Esteem... refers to how a language is regarded; it pertains to the opinion which is held about a language. It therefore pertains to the reputation of a language. When section 6(4) therefore requires that all official languages must enjoy parity of esteem, it basically means that the state must have the same (high) regard for all of them. In the eyes of the state they must therefore have an equal reputation.

He further argues that all that parity of esteem and equitability does is to prohibit irrational and arbitrary decision making by government in relation to the use of the official languages. They enjoin the state to use the proportionality principle to regulate the use of official languages.

A number of questions arise. How does one gauge the reputation of a language?' How does one assess the extent to which languages are enjoying the same reputation? How is parity of esteem measured in a province where at least two languages should be used as official languages? How does a state exercise judicial control on the basis of parity of esteem?

Suffice to mention that the SA language history chronicled above does not permit parity of esteem to be viewed as a state of affairs but an element of progressive realisation. This would entail developed underprivileged minority languages, progressively upgrading their use and creating conditions that promote inclusive linguistic diversity. With time, the previously disadvantaged languages will have the same functional load in government business as the previously privileged language. This is clearly incompatible with language domination or hierarchisation, as well as with official monolingualism.

Equitable treatment and parity of esteem therefore affords national, provincial and municipal authorities a broad discretion on the content of the considerations to be made when deciding which official languages to use. As long as the national, provincial and municipal policy on the use of at least two official languages is rational and reasonable, section 6(4) of the Constitution would have been complied with.

⁹⁶⁹ K Malan (n 786 above) 392.

In reality however, the 11 SA official languages are not substantively equal. English has taken a prominent role in the business of government with some official languages not being used at all. South Africa has nine provinces namely the Eastern Cape, the Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, The Northern Cape, North West and the Western Cape. The *lingua franca* of all the nine provinces is English Language. This is despite constitutional and legislative provisions requiring provinces to adopt at least three languages as its official languages. F.W. de Klerk confirms this assertion when he states that ‘... *neither at the national nor at the provincial level were two official languages used...*’⁹⁷⁰

The dominance of English gives English language dominance over both official and non-official minority languages. This is despite the fact that English is not the predominant language used in most of these provinces. For instance, in terms of the official information provided,⁹⁷¹ *Eastern Cape* isiXhosa is spoken by 78.8% of the people and Afrikaans is spoken by 10.6%. In the *Free State*, Sesotho is spoken by 64.2% and Afrikaans by 12.7%. In *Gauteng*, isiZulu is spoken by 19.8%, English by 13.3%, Afrikaans by 12.4% and Sesotho 11.6%. In *KwaZulu-Natal*, isiZulu is spoken by 77.8% and English by 13.2%. In *Limpopo*, Sesotho is spoken by 52.9%, Xitsonga by 17% and Tshivenda by 16.7%. In *Mpumalanga*, siSwati is spoken by 27.7%, isiZulu by 24.1%, Xitsonga by 10.4% and isiNdebele by 10.1%. In *Northern Cape*, Afrikaans is spoken by 53.8% and Setswana by 33.1%. In *North West*, Setswana is used by 63.4% and Afrikaans by 9%. In *Western Cape*, Afrikaans is used by 49.7%, isiXhosa by 24.7% and English by 20.3%.

It is clear from these statistics that if the official languages are to be determined by the number of people that use the language in the province as provided for in the Use of Official Languages Act, English would not be the dominant language of use in government. The dominance of English in the business of government makes other official languages symbolic. These languages that are either not used or have a low functional load in government business can safely be deemed SA minority languages despite their official language status.

iii. The extent to which Use of Official Languages Act complies with Section 6(3) and (4) of the SA Constitution

⁹⁷⁰ *South African language rights bulletin* (2009) 3 (9) 2.

⁹⁷¹ ‘The nine provinces of South Africa’ October 2015
<http://www.southafrica.info/about/geography/provinces.htm#.UYjuAKJHKSo> (accessed 7th October 2015).

The Use of Official Languages Act No. 12 of 2012 was passed on 2 October 2012.⁹⁷² An analysis of the Act reveals three main features. The first feature is a positive one where section 4(2)(b) of the Act improves on section 6(3)(a) of the *Constitution* by prescribing the identification of at least three (instead of two) official languages that national departments, public entities and enterprises must use for government purposes. Section 4(3) demands that this process should take into account the entity's obligation to take practical and positive measures to elevate the status and advance the use of indigenous languages of historically diminished use and status.

The second feature that is also somewhat positive is that the Use of Official Languages Act has substantive provisions dealing with monitoring the use of official languages. For example, section 8(b) of the Use of Official Languages Act obliges every language unit in national departments, national public entities and national public enterprises to monitor and assess the use of official languages by the entity concerned. Section 8(c) obliges language units to monitor and assess the extent to which the public entities comply with its official language policy. Section 8(d) further enjoins the said language units to submit reports to the relevant minister and the PANSALB. These provisions ensure that the use of language by state institutions is ably monitored.

More specifically, section 9 of the Use of Official Languages Act is exclusively devoted to monitoring the use of official languages. This monitoring comes in the form of reports to the relevant minister. One weakness though is that in terms of section 9(5) the Minister is not given many options of dealing with a national public entity that does not submit a report. It merely empowers the minister to give such entity a time line to comply with the reporting requirement. It is also not clear what the minister does with the reports especially when (s)he realizes that an entity is not compliant with the monitoring requirements.

The third feature is a negative one where the Use of Official Languages Act does not deal with the actual regulation of the use of at least two official languages by national and provincial authorities. For example, the Act does not identify which official languages may be used under what conditions and where different languages could be used. The Act does not even spell out the criteria to be used in determining equitable treatment and parity of esteem of official languages. The Act however, leaves this to the absolute discretion of the national and provincial public entities. More specifically, the act leaves the actual regulation of use to the language

⁹⁷² The President assented to it on 2 October 2012.

policies to be adopted by national departments, national public entities and national public enterprises⁹⁷³ as well as language units within these departments.⁹⁷⁴ In this sense, the Use of Official Languages Act fails to give flesh and detail to the provisions of section 6(3) and (4) of the Constitution. It essentially fails to give guidelines to the discretion given to State institutions in regulating use of languages. This may result in the some minority languages not being used at all in institutions averse to the promotion of minority language rights.

The Act is devoid of normative substantive and interpretative guidelines regarding the standards for making official language choices. Instead, the Act relegates this crucial duty to administrative policy-making organs. This does not show legislative commitment to the Constitutional values enshrined in section 6(3) and (4) of the Constitution. It also compromises the principle of separation of powers in that it takes away legislative limitations or checks-and-balances to governmental discretion to choose official languages. It also compromises legal certainty as a fundamental tenet of the rule of law. To this end the Act does very little to achieve equity, clarity and predictability in official language use.

De Varennes⁹⁷⁵ convincingly argues that the Use of Official Languages Act contravenes section 6 of the Constitution in at least three ways. First, the Act does not even mention (expressly or impliedly) the criteria for the choice of use of official language detailed by section 6 namely practicality, expense, regional circumstances and the balance of the needs and preferences of the population. Yet these are primary criteria that a national and provincial government should make when deciding which official languages to use.

It should be highlighted however, that despite this defect, section 4(3) of the Use of Official Languages Act gives pre-eminence to indigenous languages whose use had been historically diminished when choosing three official languages. It states that:

In identifying at least three official languages as contemplated in subsection (2)(b), every national department, national public entity and national public enterprise must take into account its obligation to take practical and positive measures to elevate the status and advance the use of indigenous languages of historically diminished use and status in accordance with Section 6(2) of

⁹⁷³ See section 4 of the Use of Official Languages Act.

⁹⁷⁴ See section 6 of the Use of Official Languages Act.

⁹⁷⁵ de Varrenes (n 86 above) 63-68.

the Constitution.

This provision complies with section 6(2) of the SA Constitution and goes a long way in elevating the historically marginalized and discriminated indigenous official languages.

Second, the choice of which three official languages should be used in a national and provincial government is left to the discretion of the minister and the public entity concerned. This discretion does not include the criteria highlighted in section 6(3)(a) of the SA Constitution (namely practicality, expense, regional circumstances and the balance of the needs and preferences of the population) and section 6(4) of the Constitution (namely equitable treatment and parity of esteem). As a result, the Use of official Languages Act does not comply with section 6(3)(a) and (4) of the SA Constitution.

Third, the implementation of the Use of Official Languages Bill can be problematic. The use of a particular official language and the exclusion of others could amount to discrimination if it is 'unfair' under Section 9 of the Constitution as read with section 14 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000. This will depend on the circumstances of each case.

It is therefore clear from the above that the Use of Official Languages Act to a large extent abrogates the right to use at least two official languages for purposes of government enshrined in section 6(3) and (4) of the Constitution. Most official languages (especially minority languages) become symbolic in this regard if they are not used.

D. Promoting the use of official and other languages

Two provisions are key regarding the promotion of the use of languages. The first is section 6(2) of the Constitution that obliges the state to promote the use of official languages that had been historically diminished in terms of use. The other provision is section 6(5) of the Constitution that creates a Pansalb whose mandate is to promote the use of official and other languages.

Section 2 of the National Language Policy Framework echoes similar sentiments when it provides that the aims of the policy were to

... promote the equitable use of the 11 official languages; facilitate equitable access to government services, knowledge and information; ensure redress for the previously marginalised official indigenous languages; initiate and sustain a vibrant discourse on multilingualism with all language communities; encourage the learning of other official indigenous languages to promote national unity, and linguistic and cultural diversity; and promote good language management for efficient public service administration to meet client expectations and needs.

Perhaps before commenting on the actual meaning of these provisions, an analysis of the distinction between the actual use of a language and the promotion of the use of a language is critical. De Varennes⁹⁷⁶ convincingly argues that 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.

The second distinction is that in the promotion of the use of an official language, Administrative or Political branches of state apparatus decide the actual use. 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 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.⁹⁷⁷

⁹⁷⁶ de Varennes (n 86 above) 55.

⁹⁷⁷ 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.

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.

i. State obligation to promote use of indigenous languages

Turning to an analysis of the actual provisions, it should be reiterated that there are two regimes for the promotion of the use of official and other languages in SA. The first regime is the promotion of use of indigenous languages by the state. Section 6(2) obliges the state to take practical and substantial measures to promote the status and use of the indigenous languages⁹⁷⁸ in the context of the historical curtailment of their use and status. Three striking things arise from this provision. The first is that this obligation lies on the entire state (executive, legislature and judiciary) unlike section 6(4) that exclusively deals with national and provincial governments. The second is that the clause relates to all indigenous languages (official and non-official). The third is that the state obligation is peremptory or mandatory as shown by the use of the word 'must' in section 6(2).

This provision can legitimately be termed the affirmative action clause⁹⁷⁹ and attempts to address the marginalisation of indigenous African languages during the apartheid era. The

⁹⁷⁸ English and Afrikaans are excluded since their use was not historically diminished. Afrikaans is arguably an indigenous language. Barbara F Grimes (ed) *Ethnologue* (1996) argues that Afrikaans is a creole language, a variant of Dutch of the 17th Century colonists, with some lexical and syntactic borrowings from Malay, Bantu languages, Khoisan languages, Portuguese, and other European languages. This may qualify it to be an indigenous language. However, it will not be protected under section 6(2) since its status and use has not been historically diminished. English will not be affected much since it is currently dominant. However, Afrikaans will be affected by this provision since it is not currently as dominant as English.

⁹⁷⁹ Section 9(2) of the Constitution is its counterpart. It provides that '*Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*'

provision does not guarantee formal equality or equal treatment of languages. It can however be interpreted to promote equitable treatment and parity of esteem of languages. Elevation of status and advancement of use can arguably refer to modernization and expansion of the lexicons of the language concerned so that the language can be used for purposes of government.⁹⁸⁰ Currie argues that this will entail use of indigenous languages in legislation, administration and education.⁹⁸¹

Imperative in section 6(2) of the Constitution is the fact that there is no clarity regarding the nature of practical and positive measures that the state should take. It leaves these measures to the absolute discretion of the state. One would have hoped that the Use of Official Languages Act would have helped in giving guidelines on the nature of these measures. But there is nothing in the Use of Official Languages Act that assists in this regard. It leaves room for divergent interpretations in respect to the nature of the state measures to be taken.⁹⁸² Given that inclusive diversity is one of the core values of the Constitution, the thesis recommends reasonable practical and positive measures than ensure inclusion of indigenous minority languages previously disadvantaged.

ii. PANSALB obligation to promote the use of official and other languages

The second regime is the promotion of the use of official and other languages in SA by the PANSALB. There are two aspects to this regime. The first aspect concerns promoting, creating conditions for development and use of all official languages, Khoi, Nama, San languages and sign language.⁹⁸³ Suffice to mention that unlike the preceding section there is no clear mention of use of these languages for purposes of government.

Just like the Use of Official Languages Act, the Pan South African Languages Board Act 59 of 1995 does not regulate the use of official languages. It does not have any criteria to be used in

⁹⁸⁰ See Malan (n 786 above) 395-396.

⁹⁸¹ Currie & de Waal (n 58 above). He argues that use in education would include the provision of education at all levels in an indigenous language, subsidizing the production of dictionaries, textbooks and literature in that language and requiring the use of the language by the public broadcasting media.

⁹⁸² See T Du Plessis & JL Pretorius 'The structure of the official language clause: A framework for its implementation' (2000) *South African Public Law* 515-518.

⁹⁸³ Section 6(5)(a)(i), (ii) and (iii) of the SA Constitution. See also clause 4.9 of the National language policy framework.

determining which official language (as well as Khoi, Nama, San languages and sign language) to use where. Neither does it explain or give content to whether the use referred to in section 6(5)(a) is public or private use. The PANSALB Act does not put in place any framework for the use of these languages.

Section 3 of the PANSALB Act details a number of objectives of the PANSALB. These include creating condition for the development and for the promotion of the equal use and enjoyment of all the Official South African languages. This provision is inconsistent with section 6(4) of the Constitution that provides for equitable treatment and parity of esteem of official languages instead of equal use and enjoyment of languages. In reality however, the PANSALB has dismally failed to create conditions for the equal use and enjoyment of official languages as acknowledged in its 2012 annual report.⁹⁸⁴ The other objectives that the PANSALB openly acknowledged as having not yet achieved are the extension of languages spoken in the TBVCs to be official languages for the entire country, the promotion of multilingualism and the provision of translation facilities and the promotion of respect for heritage languages.⁹⁸⁵

Section 8 of the PANSALB Act affords the PANSALB a number of powers including recommending changes in language law, policy and practice, monitoring language policy and promoting multilingualism as well as development previously marginalized languages. The failure of the PANSALB is seen in the delay in the promulgation of the Use of Official Languages Act and its contribution to an Act that does not in fact regulate the use of official languages as already argued above.

The failure is further seen in the continued limited use of the Khoi, Nama, San languages and sign language. The Khoisan people have been referred to with derogatory names like 'Bushmen' and 'Hottentots.' In his 2012 State of the Nation Address delivered on 9 February 2012, President Jacob Zuma acknowledged the discrimination of the Khoi-San people as well as their languages. He specifically said that:⁹⁸⁶

⁹⁸⁴ PANSALB Annual report (2012) 12.

⁹⁸⁵ See PANSALB Annual report (2012) 12.

⁹⁸⁶ F Mitchell 'South African history online: towards a peoples' history' <http://www.sahistory.org.za/topic/khoisan-identity> (accessed 23 April 2013).

It is important to remember that the Khoi-San people were the most brutalized by colonialists who tried to make them extinct, and undermined their language and identity. As a free and democratic South Africa, we cannot ignore to correct the past.

Given this history of discrimination, the development and promotion of use of Khoi, Nama and San languages should therefore be prioritised by the PANSALB.

The PANSALB Act also provides for investigation and complaint procedures⁹⁸⁷ as part of the PANSALB implementation measures. The statistics indicate the limitations of these procedures. For instance, a number of complaints have been lodged with the Pansalb. For instance, in 2002, 82 complaints were lodged with the Pansalb.⁹⁸⁸ Of these complaints, 77% related to Afrikaans and 23% concerned other languages.⁹⁸⁹ In 2003, 26 language complaints were lodged with the Pansalb and 39 were lodged in 2004.⁹⁹⁰ Of the 26 cases lodged in 2003, only 5 were resolved and settled. Of the 39 lodged in 2004, only 15 were resolved and settled.⁹⁹¹ 21 Complaints were received in 2005, 5 complaints were received from the Afrikaans community in 2006 and all the four complaints were resolved. 31 complaints were received in 2007⁹⁹² and 10 complaints were resolved.⁹⁹³ According to Pienaar, the ineffectiveness of the PANSALB in dealing with complaints has led to the reduction of the number of complaints made to the PANSALB.⁹⁹⁴ Perry refers to the PANSALB as a 'toothless watchdog' because of this ineffectiveness.⁹⁹⁵ This ineffectiveness also led to the disbandment of the PANSALB in 2012.⁹⁹⁶

The second promotional aspect concerns the promotion and ensuring respect for all languages used by communities in South Africa including German, Greek, Gujarati, Hindi, Portuguese,

⁹⁸⁷ See sec 11 of the PANSALB Act.

⁹⁸⁸ *South African Language Rights Monitor* (2002) 48 & 49.

⁹⁸⁹ *South African Language Rights Monitor* (2002) 53.

⁹⁹⁰ *South African Language Rights Monitor* (2004) 27.

⁹⁹¹ *South African Language Rights Monitor* (2004) 32.

⁹⁹² *South African Language Rights Monitor* (2006) 87.

⁹⁹³ *South African Language Rights Monitor* (2007) 90-93.

⁹⁹⁴ M Pienaar 'A decline in language rights violation complaints received by PanSALB – The case of Afrikaans' (2008) 38 *Stellenbosch Papers in Linguistics* 125-137 129.

⁹⁹⁵ T Perry 'The Case of the toothless watchdog: Language rights and ethnic mobilisation in South Africa' in (2004) 4 *Ethnicities* 501.

⁹⁹⁶ See the Minister's report on the PANSALB 6 June 2012 <https://pmg.org.za/committee-meeting/14525/> (accessed 1 June 2014) where the minister makes it clear that the PANSALB had failed to discharge its mandate.

Tamil, Telegu and Urdu; and Arabic, Hebrew, Sanskrit and other languages used for religious purposes.⁹⁹⁷ Particularly noteworthy is the fact that this obligation does not include promotion of use of these languages. There is therefore no obligation on the state to use these languages even for limited government purposes. This shows discrimination based on these languages. The justification may be practicality and financial considerations where priority is given to national languages. The use of these languages for government purposes may have serious financial consequences. However, the sliding-scale approach could be used to balance practicability and promotion of use of these languages.

It is also interesting to note that there is no obligation to develop heritage languages listed in 6(5)(b)(i) and (ii) of the SA Constitution. The Board simply needs to promote and ensure respect for heritage languages. The obvious explanation is that these languages are already developed. The certification judgment justifies the distinction between the development of the Khoi, San, Nama and Sign Languages vis a vis heritage languages spoken by Indians in South Africa as follows:⁹⁹⁸

It is doubtless true that various languages spoken by communities of South Africans of Indian descent have been marginalised in the past. But those tongues have nevertheless enjoyed better protection in institutions such as community schools than have the indigenous languages referred to in NT 6(5)(a)(ii), the Khoi, Nama and San languages. Moreover, none of the Indian languages would be in danger of extinction, even if they were no longer to be used in South Africa. Although that would be a loss to the cultural heritage of the country, the languages would survive and flourish in their countries of origin. The South African indigenous languages, however, have suffered great historical neglect and are threatened with extinction. In that light it is neither unreasonable nor discriminatory for the NT to mandate the Pan South African Language Board to take special steps to protect these especially vulnerable indigenous tongues.

This affirmative action approach factors in the proportionality principle and produces an effect of substantive equality between non-official minority heritage languages and non-official minority languages [considered indigenous like Khoi, San languages and Nama].

⁹⁹⁷ See section 6(5)(b)(i) and (ii) of the SA Constitution. The other languages spoken in South Africa that are not mentioned in this section are Birwa, Fanagalo, Gail, Hindi, Korana, Nama, Nju, Oorlams, Ronga, Seroa, Swahili, Tsotsitaal, Tswa, Urdu, Xam, Xegwi, and Xiri.

⁹⁹⁸ *Certification of the Constitution of the Republic of South Africa* [CCT 23/96] 121-122 para 211.

A number of conclusions can be drawn from section 6 of the Constitution. First, section 6 contains specific language rights that apply to linguistic minorities. Second, even though section 6 falls outside the Bill of Rights its purposive interpretation allows for the use of the proportionality principle in limiting the rights enshrined therein. Third, the granting of official language status to most of the 11 official languages is mainly symbolic because there is limited use of the official languages in the government of business. This makes the bulk of the official languages minority languages because of no or limited functional use in the business of government. Fourth, the Use of Official Languages Act fails to deal with the use of official languages and relegates it to national, provincial and municipal governments who in turn have a wide discretion in choosing which official languages to use for purposes of government. Fifth, the 11 official languages are not to be treated equally but equitably and with parity of esteem. Finally, there has been limited promotion of the use of indigenous official and other languages by both the state and the PANSALB. Even though section 6 textually promises to protect minority languages, its implementation has seen English emerging as the *lingua franca* and minority languages have been used very little in government business, afforded very limited protection and experienced very little development in South Africa.

4.3.2.2 Section 31 – the specific rights of persons belonging to a linguistic group to speak their language

Section 31 of the constitution specifically provides for the right of linguistic minorities to use their languages and exercise their culture. Section 31(1)(a) states that:

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community— (a) to enjoy their culture, practice their religion and use their language;

This formulation of this section is substantially similar to article 27 of the CCPR considered in section 2. As argued in Chapter 2, article 27 of the CCPR prohibits assimilation and protects the rights of members of linguistic minorities to linguistic identity and use of language in private and public life.⁹⁹⁹ A similar interpretation could arguably be given to section 31(1)(a) of the South African constitution.

⁹⁹⁹ See the discussion in chapter 2 under section 2.4.

Again, the same obligations imposed on states by article 27 of the CCPR should be imposed on South Africa. Currie summarises South Africa's section 31 obligations as non-interference with a linguistic community's initiative to develop and preserve its language(s) and also supporting vulnerable or disadvantaged linguistic communities that do not have the resources for such initiatives.¹⁰⁰⁰

Section 31(1)(b) empowers persons belonging to a linguistic community the right to '*...form, join and maintain cultural, religious and linguistic associations and other organs of civil society...*' This right is specifically afforded to linguistic minorities.

Similar rights are conferred to everyone through the right to freedom of association,¹⁰⁰¹ freedom to form and participate in activities of political parties¹⁰⁰² and freedom to form and join a trade union or an employers' organisation.¹⁰⁰³ Commenting on the rights in section 31 of the Constitution, Justice O'Regan in *MEC for Education, KwaZulu-Natal and Others v Pillay* held:¹⁰⁰⁴

These rights are important in protecting members of cultural, religious and linguistic communities who feel threatened by the dominance or hegemony of larger or more powerful groups. They are an express affirmation of those members of cultural or other groups as human beings of equal worth in our society whose community practices and association must be treated with respect.

In *Christian Education South Africa v Minister of Education*, Sachs J explained the nature of the rights enshrined in section 31 as follows:¹⁰⁰⁵

The rights protected by section 31 are significant both for individuals and for the communities they constitute. If the community as community dies, whether through destruction or assimilation, there would be nothing left in respect of which the individual could exercise associational rights. Moreover, if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism... the protection of diversity is not effected through giving legal

¹⁰⁰⁰ Currie & de Waal (n 367 above) 629.

¹⁰⁰¹ Sec 18 of the constitution.

¹⁰⁰² Sec 19 of the constitution.

¹⁰⁰³ Sec 23 of the constitution.

¹⁰⁰⁴ 2008 1 SA 474 (CC) para 151.

¹⁰⁰⁵ 2000 4 SA 757 (CC) para 23.

personality to groups as such. It is achieved indirectly through the double mechanism of positively enabling individuals to join with other individuals of their community, and negatively enjoining the state not to deny them the rights collectively to profess and practise their own religion (as well as enjoy their culture and use their language.)

It is interesting to note that in terms of section 31(2), the exercise of the rights enshrined in section 31(1) should be consistent with the Bill of Rights. In *Christian Education South Africa v Minister of Education*, the Constitutional Court explained the scope of section 31(2):¹⁰⁰⁶

Section 31(2) ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of rights. These explicit qualifications may be seen as serving a double purpose. The first is to prevent protected associational rights of members of communities from being used to “privatise” constitutionally offensive group practices and thereby immunise them from external legislative regulation or judicial control. This would be particularly important in relation to practices previously associated with the abuse of the notion of pluralism to achieve exclusivity, privilege and domination. The second relates to oppressive features of internal relationships primarily within the communities concerned...

The rights enshrined in sections 30 and 31 of the constitution find implementation in the creation of a Commission for the promotion and protection of the rights of Cultural, Religious and Linguistic Communities in section 185 of the constitution.¹⁰⁰⁷ Even though the Commission for the promotion and protection of the rights of Cultural, Religious and Linguistic Communities Act does not clarify the scope of use of minority languages, it does have useful provisions regulating minority language rights.

For instance, section 21 of the Act promotes the unity in diversity principle. The Commission’s objectives in section 4 provide a legal framework for the human rights protection of minority languages. For instance, the Commission promotes the respect and protection of minority languages. The Commission promotes equality, non-discrimination and freedom of expression within language communities. These rights are bedrocks in the promotion, protection and fulfilment of minority rights generally. There is also provision for the Commission to promote the

¹⁰⁰⁶ 2000 4 SA 757 (CC) para 26.

¹⁰⁰⁷ See also the Commission for the promotion and protection of the rights of Cultural, Religious and Linguistic Communities Act.

historically diminished heritage of minority communities. Part of this heritage is language. This provision goes a long way in promoting minority language rights.

Section 7 of the Act empowers the Commission to carry out investigations that include violations of minority language rights. This power ensures that violators of minority language rights are made accountable for the said violations. As discussed before, the PANSALB has a similar role. This gives the assurance that more investigation of language rights violation will be carried out in South Africa since there are two bodies available to do it. The obvious challenge is that there may be duplication of roles if one complaint is brought before the two bodies given that there is no provision that prevents the same complaint from being brought before the two bodies.

It is interesting to note that the composition of the Commission includes experts in language issues as well as a broad representation of persons from linguistic minorities.¹⁰⁰⁸ This ensures that experience is dovetailed with expertise. The involvement of members of linguistic communities ensures participation of linguistic minorities in the activities of the Commission.

Finally, part 7 of the Act recommends the setting up of Community Councils whose purpose includes preserving, developing and promoting minority languages. The framework for the development and promotion of these languages is not quite clear. It leaves this aspect to the discretion of the community Councils themselves.

4.4 Chapter conclusion

The above discourse reveals a history of discrimination of the SA minority languages during the colonial and apartheid eras and the introduction of a constitutional framework to redress this. The new SA Constitutional framework provides a two-pillar system for the effective protection of minority languages and linguistic minorities with individual human rights like equality and non-discrimination clauses on one¹⁰⁰⁹ hand and specific minority rights¹⁰¹⁰ on the other hand. The study also shows the accommodation of linguistic diversity by introducing 11 official languages and a shift of the constitutional language framework from equal treatment of official languages to equitable treatment and parity of esteem of the 11 official languages.

¹⁰⁰⁸ Sec 9 of the Act.

¹⁰⁰⁹ Sections 9, 29, 30 and 35 of the SA Constitution.

¹⁰¹⁰ Sections 6 and 31 of the SA Constitution.

What clearly emerges is the state's wide discretion to choose which official languages to use in government and which ones to develop and promote its use. Questions that remain unanswered even with the new Use of Official Languages Act are how this discretion is exercised and what factors underpin this discretion.

It has also emerged that although section 6 textually promises to protect minority languages, its practical implementation has seen English emerging as the *lingua franca*. Other minority languages (official and non-official) have been used very little in government business, afforded very limited protection and experienced very little development in South Africa.

This beckon a relook of the implementation mechanism as well as legislation like the Use of Official Languages Act with a view of improving the mechanism of protecting official and non-official minority languages in SA. The recommendations in Chapter 6 may be a useful starting point in this direction.

Chapter 5

Constitutional framework for the protection of minority languages in Zimbabwe

5.1 Introduction

ZIM is a multilingual country with numerous linguistic population groups all of which (except the English and Shona speaking group) can be considered minority.¹⁰¹¹ On 23 May 2013, a new constitution came into force in ZIM. Part of the provision of the new constitution related to the constitutional recognition of minority language rights. The 2013 constitution therefore established a constitutional framework for the protection of minority languages and linguistic minorities. Like SA, ZIM exemplifies how the human rights framework towards the protection of minority languages and linguistic minorities defended in this study is and should be translated into a constitutional design for the accommodation of linguistic diversity.

This chapter contends that the constitutional application of the minority rights framework in African countries, as defended in this study, is necessary to address the issue of minority language rights. The chapter is divided into two sections. The first section traces ZIM's language history to identify how political power relations influenced ZIM language policies that has seen linguistic minorities suffering discrimination on the basis of language. The second section analyses the extent to which minority languages and linguistic minorities are protected through the ZIM constitutional design using the two-pillar system for the effective protection of minority languages and linguistic minorities identified in Chapter 1.

Because the ZIM constitution came into force on 23 May 2013, contains substantially similar provisions with the SA constitution and there is currently no jurisprudence on minority language rights, this Chapter uses SA jurisprudence to interpret similar constitutional provisions in the ZIM constitution. It is therefore unavoidable and inevitable for this Chapter to repeat some of the

¹⁰¹¹ It is interesting to note that only the Shona speaking group has a population above 50% of the entire country population and is predominantly used in government business. Even though English speakers do not exceed 50% of the population of the country, English is used as the ZIM *lingua franca*. English and Shona can therefore be arguably deemed ZIM's dominant languages leaving the rest of the languages as minority languages.

averments made in Chapter 4 in some sections.

5.2 Language history of Zimbabwe

Like SA and the bulk of other African countries, ZIM is a multicultural country inhabited by people belonging to different racial, ethno-linguistic and religious groups. ZIM language history chronicled below reveals how political power relations played a crucial role in determining ZIM language legislation and policy. The history is divided into four phases namely pre-colonial, colonial, independent and post-2013 constitutional ZIM.

5.2.1 Pre-colonial Zimbabwe

Before colonialism, the present day ZIM had diverse ethnic groups bound by kinship ties, language and culture. The languages they spoke culturally identified people.¹⁰¹² The major feature of this period is that people's linguistic expression was unhindered as there was no central administration and no nation state to regulate languages.

The pre-colonial period may be divided into four phases. The first phase saw the arrival of the Khoisan people followed by the Shona people around 200 AD.¹⁰¹³ They inhabited smaller territories than most distinguishable groups do today, and had mostly smaller population size. The people within the Khoisan and Shona groupings were free to speak their languages.

The second phase spans from 600 AD to around 1400 AD and it saw the establishment of small but distinct kingdoms led by a culturally identified core group.¹⁰¹⁴ This phase saw first the dominance of the Hungwe, then the establishment of Khami, Great Zimbabwe and Dhlo-Dhlo, the enslavement of the San group by the Gokomere, the ascension of the Mbire and the establishment of the Mutapa Empire that was later expanded to include the Venda, Ndau,

¹⁰¹² See chapter 1 that demonstrates that the relationship between culture, identity and language is still engrained in Africa today. Zimbabwe is a classic example of this relationship.

¹⁰¹³ 'Early history of Zimbabwe' 4 August 2008 <http://www.somalipress.com/zimbabwe-overview/early-history-zimbabwe-1140.html> (accessed 14 June 2012).

¹⁰¹⁴ This phenomenon was common in a number of African countries. For example, the Buganda, Ashanti, AmaZulu, Bakongo, Mossi, Munhumutapa, Rozvi, etc. See OC Okafor *Re-defining legitimate statehood: International law and state fragmentation in Africa* (2002) 23.

Barwe, Manyika, Ndau, Korekore, Shangwe, and Guruuswa.¹⁰¹⁵ The establishment of the Mapungubwe kingdom in 1100AD followed this period.¹⁰¹⁶ In essence, the situation remained unchanged as far as language use was concerned. The kingdom of Dzimba Dzemabwe eventually eclipsed the Mapungubwe kingdom.¹⁰¹⁷ The same period also saw the arrival in the territory of the Tonga people that settled in the Zambezi Valley.¹⁰¹⁸ There was no regulation of languages in these kingdoms. Different languages were spoken within the kingdoms.

The third phase saw the establishment of empires. These were polities with chiefdoms and kingdoms of various kinds with one centralized and hierarchical form of government.¹⁰¹⁹ Again, different languages were spoken during this period. Two main empires were established during this period. The first was the Mwanamutapa, led by the Karanga, that was established in 1420 AD. In 1490 AD, the Mwanamutapa Empire splits into two - Changamire in the south, including Great Zimbabwe, and Mwanamutapa in the north. The area around Great Zimbabwe became the trading capital of the wealthiest and most powerful society in South Eastern Africa of its era. The hilltop acropolis at Great Zimbabwe came to serve not only as a fortress but also as a shrine for the worship of *Mwari*, the pre-eminent Shona deity. The second empire was the *Rozvi* Empire established in 1690 AD as a result of the disintegration of the Shona kingdoms. As mentioned above, there was no regulation of languages in these empires and different languages were spoken.¹⁰²⁰

The fourth phase saw the invasion of these ethnic grouping by outside groups. The first attempt was in the 16th Century when a significant number of Portuguese arrived in the empires in the form of traders and soldiers from Mozambique, and tried to colonise the empires but failed.¹⁰²¹ The second time was between 1837 and 1838 AD when the Matebeles led by Mzilikazi invaded the Rozvi Empire. The Ndebele tribe then forced the Rozvi Empire to pay tribute and to

¹⁰¹⁵ OC Okafor *Re-defining legitimate statehood: International law and state fragmentation in Africa* (2002) 23.

¹⁰¹⁶ 'Zimbabwe' http://en.wikipedia.org/wiki/Zimbabwe#Pre-colonial_era_.281000.E2.80.931887.29 (accessed 12 June 2012).

¹⁰¹⁷ n 1002 above.

¹⁰¹⁸ Untitled <http://www.helium.com/items/2080146-a-history-of-the-tonga-people-of-zimbabwe> (accessed 14 June 2012).

¹⁰¹⁹ This phenomenon was common in a number of African countries. For example the Hausa and Niger Delta states of the current Nigeria and the Ndebele in Zimbabwe. See Wilson (n 209 above) 97.

¹⁰²⁰ 'Early history of Zimbabwe' (n 1002 above).

¹⁰²¹ Untitled <http://www.sokwanele.com/articles/homepage/aboutzimbabwe.html> (accessed 12 June 2012).

concentrate in the northeast of present-day ZIM, known as Mashonaland. King Mzilikazi and his tribe settled in the southwest of present-day ZIM in what became known as Matabeleland and established Bulawayo as their capital. King Mzilikazi further absorbed and assimilated other language speakers into Matabeleland. These included the Southern Ndebele, Swazi, Xhosa, Tswana, Sotho, Venda and Kalanga.¹⁰²² Again, there was no regulation of languages during this time. Different languages were spoken in the Southwest when the Ndebeles were dominant and in the Northeast where the Shona and other ethnic groups were dominant.

5.2.2 Colonial Zimbabwe

The process of colonialism began in the 1850s when the British explorers, missionaries and colonialists arrived. 1888 saw Cecil John Rhodes getting a mining concession from King Lobengula and the Ndebele people which led to the chartering of the British South Africa Company in 1889 and the establishment of settlement of Salisbury. During this time, English as well as the local languages continued to be used.¹⁰²³

Between 1896 and 1897 AD,¹⁰²⁴ the Shona staged their first unsuccessful uprising under the leadership of Mbuya Nehanada and Sekuru Kaguvi. This became known as the first Chimurenga war. During the same time the Ndebele [under the leadership of spiritual leader, Mlimo], also stage an unsuccessful uprising. This becomes known as the second Matabele war. In 1898, both Matabeleland and Mashonaland were forcibly amalgamated into one political unit under the domination of Cecil John Rhodes' administration. The official denotation of this amalgamation became known as 'Southern Rhodesia'.¹⁰²⁵

This amalgamation had a number of consequences. First, it saw the Shona group emerging dominant numerically by constituting more than 50% of the entire population. Second, the amalgamation saw the Shona and Ndebele ethnic groups which had a history of conflict, animosity and hatred, being brought under one territory. Third, there was the imposition of English language as an official language in the new territory of Southern Rhodesia. Shona, Ndebele and other minority African languages became increasingly marginalised.

¹⁰²² 'n 1002 as read with 450 above.

¹⁰²³ 'Early history of Zimbabwe' (n 1002 above).

¹⁰²⁴ n 1007 above.

¹⁰²⁵ 'Early history of Zimbabwe' (n 1002 above).

English became the language of learning, instruction, government, media, business and courts etc. The colonial language policies forced Africans to speak English as a medium of communication, a source of acquiring information and language of opportunity. Zimbabweans were forced to learn, write and speak the English language. English becomes superior to all other languages.

This scenario created black elites who became superior by virtue of their mastery of the foreign language. The foreign language became a language of opportunity and a pathway to good employment, material benefit and power in the colonial Africa. There was a growing number of the black elite during the colonial period. Dissatisfied with colonial policies, most of the black elites became the champions of the war of resistance commonly known as the second Chimurenga.

During the colonial period, African minority languages became secondary to the English language. Gondo argues that given that language is a mark of ethnicity and identity, the introduction of English becomes a sign of defeat, humiliation and embarrassment.¹⁰²⁶ Minority language speakers became second class citizens. Their languages were essentially relegated to futility in the business of government. Invariably, minority language speakers were also forced to lose their identity and try to emulate the white man. As a result, persons that had fluency in the colonial language also had access to government services.

The colonial period stretched from 1898 to 1980 when Zimbabwe became independent.¹⁰²⁷ The language policy described above obtained during this period. An interesting trend occurred in the 1970s that saw the white government led by Ian Smith and the black political parties beginning to negotiate for the coming up of the new constitution.

These negotiations culminated in the signing of the Lancaster House Constitution in 1979. The constitution did not contain any language-specific provision. Neither did the constitution make any provision for an official language. The relevant constitutional provision was the prohibition of discrimination on the basis of language contained in section 23 of the Constitution.

¹⁰²⁶ See KT Gondo 'Zimbabwe: language, culture key pillars of identity' *Herald Newspaper* 29 June 2010.

¹⁰²⁷ Zimbabwe became officially independent on 18 April 1980.

5.2.3 Independent Zimbabwe

Just like most African countries, independent ZIM was faced with the problem of how to manage and deal with the ethnic and linguistic diversity that obtained in the new independent state. It became necessary for the independent ZIM to begin the process of nation building. Like other African countries, ZIM had two possible approaches to nation building. The first approach was a multicultural model of nation-building that recognized the ethnic, cultural and linguistic diversity within a nation and would come up with effective state mechanisms and policies that accommodate, promote and ensure that such diversity finds expression. In this approach, national identity and unity is fostered through shared history, shared valued and shared state institutions. It engenders unity in diversity. ZIM did not choose this approach as evidenced by the civil war between the ZIM government and the Ndebele people in Matabelaland.

The second approach was the nation state model of nation building. This model valued possession of a shared state identity as a necessity to the unity and political stability of the independent state. In terms of language, the nation state model advocated for a standardized homogenous language to be used to effectively run government, courts, media, education, etc. Formal recognition of multiple languages and language communities was considered a significant barrier to national integration.¹⁰²⁸ Only section 23 of the Lancaster House Constitution prohibited discrimination on the basis of language.

ZIM maintained colonial boundaries and adopted the nation state model of nation building at independence. It did not put in any official language provision in the Lancaster House Constitution. However, the independent ZIM by way of policy adopted English as the official language of record. This unwritten language policy was aptly represented by the state run paper, *Sunday Mail* editorial comment on 19 October 1980, which stated that:

While greater use will be made of African languages, both written and spoken in this country, it is hoped that any temptation to have more than one official language other than English will be resisted.

¹⁰²⁸ Most African countries adopted the nation state nation-building model at independence. For a discussion of this, see J Blommaert 'Language policy and national identity' in T Ricento (ed) *An introduction to language policy: theory and method* (2006) 10.

This approach to language rights perpetuated the colonial language policy and clearly reveals the continued discrimination against minority language speakers based on their languages in post independent ZIM.

5.2.4 The post-2013 dispensation of the new constitution

The period 2008 saw an inclusive government between Zimbabwe African National Union Patriotic Front (ZANU PF) and two Movement for Democratic Change (MDC) factions. This government produced a negotiated constitution. The new constitution was published as a draft on 1 February 2013. The final draft constitution was passed via a referendum on 16 March 2013. 3 079 966 people voted for the adoption of the draft constitution and 179 489 voted against the document.¹⁰²⁹ The draft constitution was gazetted as a Constitutional Bill on 28 March 2013. The Bill was debated by the House of Assembly on 9 May 2013 and was unanimously voted for.¹⁰³⁰ It was deliberated in the senate and unanimously voted for with two amendments. The Bill came back to the House of Assembly on 15 May 2013 and was also unanimously voted for with the two amendments. The Constitutional Bill was assented to by the President on 22 May 2013 and was gazette in an extraordinary gazette on the same day.¹⁰³¹ It is now the Constitution of Zimbabwe promulgated as the Constitution of Zimbabwe Amendment (No. 20) of 2013.

5.3 Zimbabwean constitutional framework for the protection of minority languages

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. Two key issues are worth mentioning. First, at the time of writing of this thesis, the Zimbabwean Constitutional Court has not yet developed jurisprudence on minority language rights, equality, non-discrimination and the limitation clause. The analysis will therefore mainly be based on statutory interpretation of the legal text of the Constitution. Second, the Zimbabwean Constitutional provisions relevant to minority language rights are substantially similar to the South African

¹⁰²⁹ Untitled <http://www.gta.gov.zw/index.php/component/content/article/139-march-2013/7747-constitutional-bill-gazetted> (accessed 9 May 2013).

¹⁰³⁰ *The Herald* Newspaper 10 May 2013 1 and *The Zimbabwe Independent*, 10-16 May 2013 2.

¹⁰³¹ *The Herald* Newspaper 16, and 23 May 2013.

Constitutional provisions. To that end, this section will use SA cases to suggest possible interpretations that the Zimbabwean Constitutional Court can adopt in interpreting the new constitution. It will therefore be inevitable to have some content that is substantially similar to Chapter 4.

An analysis of the ZIM Constitution reveals that like SA has adopted a two-pillar minority language rights protection system. The first pillar consists of individual human rights of special relevance to linguistic that ensure that linguistic minorities are placed on a substantially equal footing with other nationals of the state. Such rights include equality, non-discrimination, freedom of expression, fair trial, culture, education and participation. The second pillar consists of specific minority rights and measures designed to protect and promote the separate identity of minority language groups. The only provision that qualifies as a minority specific right is section 6 relating to official language status, use and development of languages. This section analyses these rights not in their pillars like what Chapter 4 did but in the order in which they are presented in the ZIM Constitution.

5.3.1. 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 rights¹⁰³² and freedom, equality of all human beings, peace, justice, tolerance, fairness and the rule of law.¹⁰³³ The ZIM Constitutional Court has not yet made any pronouncements on the implications of constitutional values. However, the SA Constitutional Court jurisprudence has established that constitutional values are mutually interdependent and that collectively they form a unified, coherent whole.¹⁰³⁴ It has also been established that the constitutional values are used to interpret Constitutional provisions in order

¹⁰³² 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.*'

¹⁰³³ See the Preamble and sections 3 and 6 of the Constitution.

¹⁰³⁴ See *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.

to preserve the Constitution's normative unity or value coherence.¹⁰³⁵ In light of this jurisprudence, the thesis 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 now discussed.

5.3.2 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.

5.3.3 Rights of linguistic groups

Section 3(2)(i) of the Constitution recognizes 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. For linguistic minorities, this would mean the recognition of minority language rights by the ZIM Constitution. 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

¹⁰³⁵ *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.

to read into section 3(2)(i) international language rights norms discussed in Chapter 2. 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 CCPR. This can potentially protect the use of minority languages in the private and public domains.

5.3.4. Protection and promotion of official and other languages

Section 6 of the ZIM 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 ZIM. Like the European Languages Charter, the focus is on the protection and promotion of minority languages and not linguistic minorities *per se*.

However, before analysing the actual content of the rights enshrined in article 6 of the ZIM constitution, 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 ZIM 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.¹⁰³⁶

The second approach is a generous one that purposively interprets section 6 in the context of the ZIM Constitutional values and other rights¹⁰³⁷ 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 6.¹⁰³⁸

A careful look at section 86 reveals that it is substantially similar to section 36(1) of the SA Constitution. The limitation of rights is essentially two-fold. First, fundamental human rights should be limited by a law of general application. SA jurisprudence has defined the law of general application as the rule of law¹⁰³⁹ that includes legislation,¹⁰⁴⁰ common law¹⁰⁴¹ and

¹⁰³⁶ 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).

¹⁰³⁷ Examples include equality, non-discrimination, dignity and freedom of expression that require the application of the limitation clause.

¹⁰³⁸ See JL Pretorius (n 893 above) 295.

¹⁰³⁹ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).

customary law¹⁰⁴² that is impersonal,¹⁰⁴³ applies equally to all and is not arbitrary in its application.

Second, the law of general application should be fair, reasonable, necessary and justifiable¹⁰⁴⁴ in an open and democratic society that is based on openness, justice, human dignity,¹⁰⁴⁵ equality and freedom. This requirement introduces the proportionality principle (discussed in previous chapters) which is considered as central to a constitutional democracy.¹⁰⁴⁶

Section 86(2) lists six factors that are used to determine proportionality. Five of them are substantially similar to those listed in the SA constitution. The first is the nature of the right or freedom. Here, courts should balance the importance of the minority language right vis a vis the justification of its infringement. Use of a minority 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. Unlike the SA Constitution that does not list acceptable purposes 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 ZIM Constitutional Court is yet to be seized with matters that will see it formulating jurisprudence in this regard.

¹⁰⁴⁰ It includes Acts of Parliament and delegated legislation. See *Larbi-Odam v MEC for Education (North West Province)* 1998 1 SA 745 (CC) 27.

¹⁰⁴¹ 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.

¹⁰⁴² *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 44 & 136.

¹⁰⁴³ *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC).

¹⁰⁴⁴ Devenish (n 261 above) 181 says the limitation should be reasonable and proportional.

¹⁰⁴⁵ Section 86(3)(b) of the Constitution makes it clear that human dignity is one of the rights that cannot be limited.

¹⁰⁴⁶ 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.’

The third factor is the nature and extent of the limitation. SA Courts have established that this factor looks at the effects of the limitation on the right concerned and not on the right holder.¹⁰⁴⁷ In the context of the thesis, what is the effect of the limitation on the right to use a minority language? The law that limits the right should not do more damage to the right than is reasonable for achieving its purpose.¹⁰⁴⁸

The fourth factor is the relationship between the limitation and its purpose. Unlike the SA Constitution, section 86(2)(b) of the ZIM Constitution 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 the availability of less restrictive means to achieve the stated purpose. SA 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.¹⁰⁴⁹

The sixth factor which is present in the ZIM Constitution but is not present in the SA Constitution, 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, section 86 of the ZIM Constitution incorporates the principle of proportionality. Pretorius¹⁰⁵⁰ argues that the application of proportionality to section 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-reductionist¹⁰⁵¹ and non-hierarchical.¹⁰⁵²

Section 6 of the Constitution puts in place a constitutional framework for the accommodation of

¹⁰⁴⁷ *S v Meaker* 1998 8 BCLR 1038 (W).

¹⁰⁴⁸ *S v Manamela* 2000 3 SA 1 (CC) 34.

¹⁰⁴⁹ *S v Makwanyane* 1995 3 SA 391 [123] and [128].

¹⁰⁵⁰ JL Pretorius (n 893 above) 299.

¹⁰⁵¹ 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.

¹⁰⁵² Non-hierarchical relatedness means that constitutional goods must not be pitched against each other in terms of an arbitrary abstract rank order.

this linguistic diversity of both official and non-official minority languages in Zimbabwe. This legal framework places an obligation on state organs (executive, legislature and judiciary) to practically implement the provisions of section 6 of the Zimbabwean Constitution. This subsection will now proceed to analyse the extent to which the section 6 constitutional framework protects minority languages in Zimbabwe.

5.3.4.1 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.

Three key principles are worth highlighting about official language status from chapters 2 and 4 above. The first is that an official language is a language used in the business of government (executive, legislature and judiciary).¹⁰⁵³ The second principle is that each state has the discretion to choose an official language.¹⁰⁵⁴ It would appear from the ZIM context that the state discretion would have to be guided by the principle of multiculturalism and recognition of rights of linguistic groups discussed above.

The third principle is that 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 used in government business. 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 official publications as well as in legislation and in the proceedings and records of the legislature.¹⁰⁵⁵ 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.

¹⁰⁵³ UNESCO Report entitled 'The use of vernacular languages in education' (1953) 46; Malan (n 404 above)

387.

¹⁰⁵⁴ *Diergaardt case* (n 79 above); *Ballantyne case* (n 59 above).

¹⁰⁵⁵ MW Wenner (n 939 above) 193.

Unlike the SA Constitution, section 6(1) of the ZIM Constitution does not expressly mention anything about the use of the 16 languages in the business of government. Neither is there any criteria set for determination of how official languages ought to be used in ZIM. 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 ZIM 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 ZIM is a party, it would place an obligation on ZIM 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 to the entire 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.¹⁰⁵⁶ According to Turi¹⁰⁵⁷

¹⁰⁵⁶ 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.

... 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.

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 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 ZIM 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 taking 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 ZIM.

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 Koisian, 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. This point was sufficiently discussed in chapter 4. The state would need

¹⁰⁵⁷ JG Turi 'Typology of language legislation' in TS Kangas *et al* (1994) *Linguistic human rights: overcoming linguistic discrimination* 111-120.

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.¹⁰⁵⁸

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 ZIM 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. Hachipola¹⁰⁵⁹ has undertaken an interesting study of the Zimbabwean language demography and has identified areas where majority and minority languages are mainly spoken in ZIM. He has devised Map 1 below which provincial governments could use to determine which official languages should be used in which areas of ZIM.

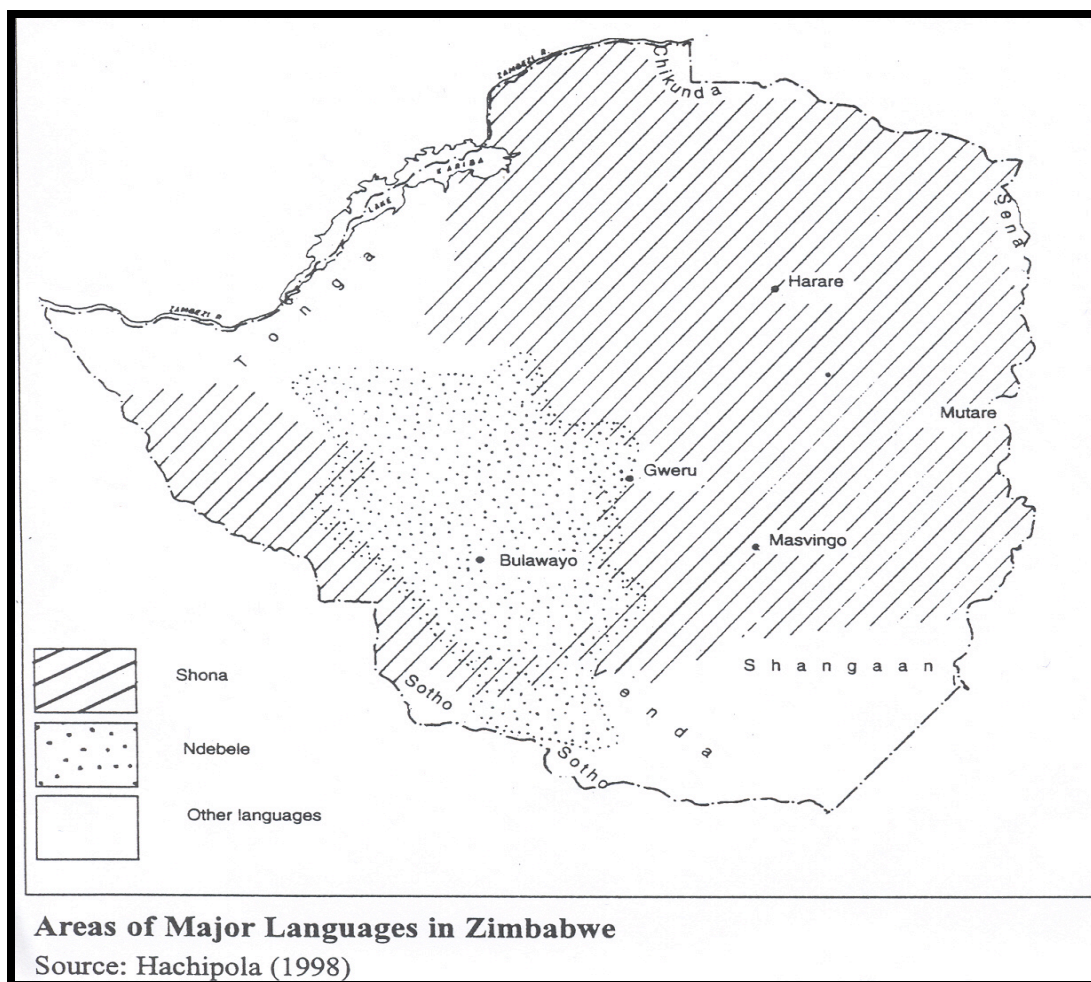
The challenge with this approach though is that out of the 16 official languages, only English, Shona and Ndebele will be afforded official language status and would be used for government business in ZIM's 10 provinces. Such an approach would be in violation of section 6(1) of the constitution in that 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.

¹⁰⁵⁸ 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.

¹⁰⁵⁹ SJ Hachipola *A survey of the minority languages of Zimbabwe* 1998 25.

There is need to vary approach in order for it to accommodate the other 13 official minority languages in a way that complies with section 6(1) of the ZIM 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.

Map 1

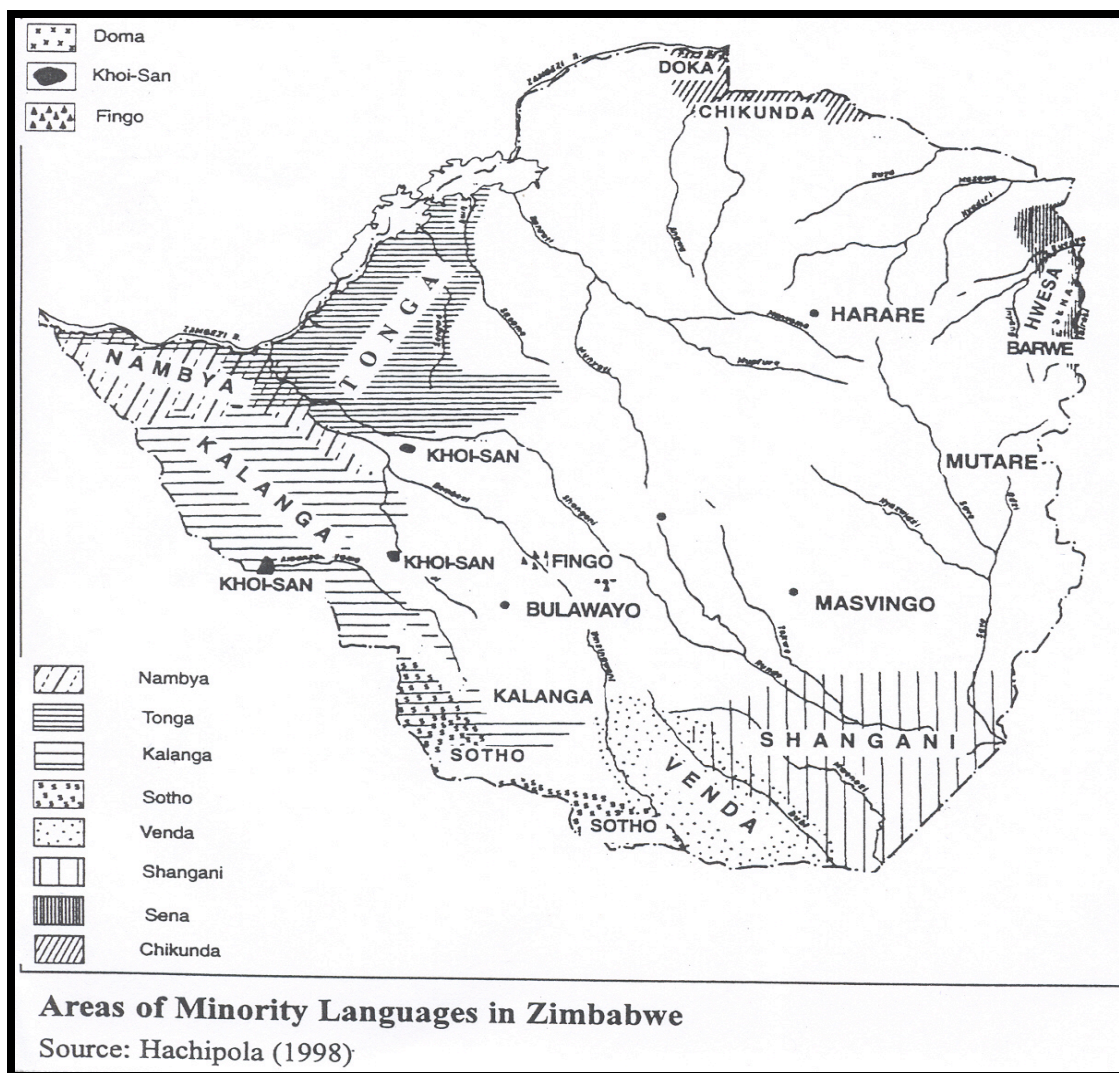


The second approach may be for Zimbabwe to adopt the Belgian model where official language status is afforded to languages spoken in regions. For instance, Belgium is divided into three regions namely Flanders where Dutch is official language, Wallonia where French and German

are official languages and Brussels where Dutch and French are official languages.¹⁰⁶⁰ The Zimbabwean language demography in Map 2 below by Hachipola can support this approach.

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.

Map 2



¹⁰⁶⁰ K Malan (n 786 above) 403.

A third approach may be to combine national official language status with regional and municipal (or metropolitan) official language status.¹⁰⁶¹ 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 below.

According to Hachipola,¹⁰⁶² the following languages are spoken in specified areas in Zimbabwe:

- (a) **Barwe** – mainly spoken in Nyaropa and Nyakombu districts in Nyanga as well as in the Muhezuru and Mukosa areas of Mudzi.
- (b) **Chewa/ Nyanja** – it is mainly spoken in mines and farms. It came through the chewa people of Malawi who were working in mines and farms. They have, to a large extent, kept their language identity. Chewa speakers can be found in mines like Alaska, Trojan, Wankie, Shamva, Madziba, Mazoe, Acturus, Antelope and Mangura mines. They are also found in Triangle and Hippo Valley sugar plantations as well as commercial mines around Zimbabwe. In Harare, they are concentrated in Mufakose, Mabvuku and Tafara. In Bulawayo, they are concentrated in Sizinda, Matshobana, Makokoba, Njube, Tshabalala and Luveve.
- (c) **Chikunda** – it is mainly spoken in the lower Guruve (Kanyemba and Chikafa) and Muzarabani districts.
- (d) **Doma** – is mainly spoken in the Chiramba, Koranzi, Chiyambo, Mugoranapanja and Kuhwe areas of the Guruve District. The Doma people mainly lead a nomadic lifestyle and are marginalized and discriminated against. Hachipola observes that:¹⁰⁶³

¹⁰⁶¹ More along the lines of Canada. See K Malan (n 404 above) 400-403.

¹⁰⁶² I have heavily relied on two books in formulating this section namely SJ Hachipola (n 1048 above) and I Mumpande (n 139 above) 7-9.

¹⁰⁶³ SJ Hachipola (n 1048 above) 52.

Since they are much despised they rarely identify themselves as Doma. Rather, they identify themselves by a totem or as Korekore... The Doma language has not been studied... This is one of the languages in Zimbabwe threatened with extinction because of the diminished number of people speaking it and also because of language loyalty which is shifting to Chikunda and especially Korekore.

(e) **Fingo/ Xhosa** – is mainly spoken in the Mbembesi area near Bulawayo, Fort Rixon, Goromonzi (in Chief Rusike's area), Msengezi, Marirangwe, and Gwatemba. Cecil John Rhodes brought in the earliest Fingo people when he moved from Cape Town to Bulawayo. He employed them as cooks, drivers etc.¹⁰⁶⁴

(f) **Hwesa** – is mainly spoken in the Northern part of the Nyanga District. Hachipola observes that.¹⁰⁶⁵

According to Mr C. Madzudza, the Hwesa people feel humiliated when they speak in public. A person who speaks this language in public is called names such as muserede and borwa (both meaning homeless)... Children are discouraged from using Hwesa in schools because their examinations will not be in Hwesa but in standard Zezuru. To this end, they are encouraged to speak Shona.

This clearly reveals the marginalization of the Hwesa language and discrimination of its speakers.

(g) **Kalanga** – is mainly spoken in the Bulilima and Mangwe Districts, Nyamandhlovu District, Kezi, Tsholotsho and Matobo Districts. They live among the Ndebele people and are often assumed to be Ndebele. It is estimated to have 700 000 speakers.¹⁰⁶⁶

(h) **Nambya** – is mainly spoken in Hwange, Tsholotsho and Western Lupane. They are also the traditional inhabitants of the area around Hwange National Park. They are approximately 100 000 speakers.¹⁰⁶⁷

¹⁰⁶⁴ SJ Hachipola (n 1048 above) 63.

¹⁰⁶⁵ SJ Hachipola (n 1048 above) 11.

¹⁰⁶⁶ 'Ethnologue Languages of the world: Zimbabwe' http://www.ethnologue.com/show_country.asp?name=ZW (accessed 5 June 2012).

¹⁰⁶⁷ n 1002 above.

(i) **Shangani (or Tsonga)** – The word Shangani means ‘followers of Soshangana. The language is spoken in the Chiredzi District, Beitbridge (Chikwalakwala), Mwenezi (in Chief Chitanga’s area), Zaka (in Chiefs Tshovani and Mutshipisi areas), Mberengwa and Chipinge (in Gonarezhou).

(j) **Sotho** – is mainly spoken in 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). Hachipola makes an interesting observation about the Sotho speakers. He says:¹⁰⁶⁸

...Sotho country in Zimbabwe may be roughly located in the area south and south-west of Gwanda up to Kezi. This area is dry and prone to drought as it is located in Regions 5 and 6, that is places in Zimbabwe where the rainfall is very poor...

This again shows the marginalization of the Sotho languages and discrimination of its speakers into very poor lands.

(k) **Tonga** – The general misconception has been that the Tonga speakers are only found in Binga. However, research has shown that Tonga is spoken in the 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).

(l) **Tswana** – is spoken in Bulilimamangwe District and Mpoengs (between Ramaguabane and Simukwe rivers that flow along the Botswana-Zimbabwe border). The Tswana are believed to have come into Zimbabwe during the time that King Mzilikazi was fleeing northwards from South Africa and he brought with him all the people he found in the northern Transvaal.

(m) **Tshwawo/ Khoisan** – is mainly spoken in Tsholotsho (Maganwini, Sinkente, Pumula, and Dombo Masili) and also Bulilimamangwe’s area of Siwowo. They are a nomadic type of people whose life depends on gathering food and hunting animals. They claim to

¹⁰⁶⁸ SJ Hachipola (n 1048 above) 12.

be related to the Basarwa in Botswana. There are at least 2 000 khoisan speakers in the Tsholotsho District.¹⁰⁶⁹

(n) **Venda** – mainly spoken in Beitbridge. It is estimated that there are 80 946 Venda speakers in Beitbridge.

(o) **Zimbabwe sign language** – this is used in schools, the Zimbabwe School Sign, Masvingo School Sign and Zimbabwe Community Sign

(p) **Sena** – is mainly spoken in Muzarabani, on plantations like Katiyo Tea Estate and other plantations, commercial farms and mines. It has its origins in Mozambique. The sena people came into Zimbabwe as migrant workers and some came during the liberation and post independence civil war in Mozambique.¹⁰⁷⁰

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

5.3.4.2. 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 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

¹⁰⁶⁹ SJ Hachipola (n 1048 above) 58.

¹⁰⁷⁰ SJ Hachipola (n 1048 above) 64.

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 ZIM 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.

5.3.4.3 Equitable treatment of languages

Section 6 (3) of the constitution makes it clear that:

...The 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 language. It does not go as far as the South African Constitution to provide for 'parity of esteem' of official languages. It has been established in Chapter 4 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.¹⁰⁷¹ 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:¹⁰⁷²

Equitability 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.

¹⁰⁷¹ Currie & de Waal (n 58 above).

¹⁰⁷² K Malan (n 786 above) 392.

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.

5.3.4.4 Promotion of use and development of all languages

Section 6 (4) of the constitution provides that:

... The 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,¹⁰⁷³ 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.

¹⁰⁷³ de Varennes (n 86 above) 55.

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 individual 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.¹⁰⁷⁴

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 ZIM 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.

¹⁰⁷⁴ 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.

Again 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). The thesis advocates for reasonable, practical and positive measures that take into consideration ZIM's language history.

The last part of section 6(4) of the ZIM 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.

Section Summary

The preceding discussion reveals that even though section 6 textually promises to protect minority languages, there is no jurisprudence from the ZIM 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 experienced very little development in Zimbabwe. There is still 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 ZIM.

5.3.5 Equality and non-discrimination

As argued in Chapter 2, minority language rights can be inferred from general equality and non-discrimination provisions. Section 56 (1) of the constitution provides that '*All 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 that proscribes discrimination on the basis of language constitute the usual equality and non-discrimination provisions that constitute the first pillar of the two-pillar system for the protection of minority languages and linguistic minorities.

The provisions of section 56 of the ZIM Constitution are substantially similar to those in section 9 of the SA Constitution. Again the ZIM Constitutional Court is yet to develop equality and non-discrimination jurisprudence to give interpretative clarity on the content of section 56 rights. Inspiration will therefore be drawn from the SA jurisprudence in interpreting equality and non-discrimination provisions in section 56 of the ZIM Constitution.

A summation of the jurisprudence indicates a number of key principles. First, just like the SA Constitution, section 56 of the ZIM Constitution rejects a formal conception of equality in favour of substantive equality¹⁰⁷⁵ because of the underlying values of the *Constitution*.¹⁰⁷⁶ Applied to the minority language rights discourse, 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.

Second, the ZIM Constitution distinguishes between mere differentiation and unfair discrimination.¹⁰⁷⁷ Mere differentiation occurs when there is differential treatment based on grounds that are not listed in section 56(3) of the ZIM Constitution¹⁰⁷⁸ and it is not prohibited by the Constitution. Mere differentiation acknowledges the existence of fair discrimination where such differentiation is warranted. Unfair discrimination occurs when a person or a group of people is treated differently to other people on illegitimate grounds listed in section 56(3) of the ZIM Constitution. One of those grounds is language. It is yet to be seen whether the ZIM Constitutional Court will be persuaded to include grounds analogous¹⁰⁷⁹ to those listed in

¹⁰⁷⁵ See the SA cases of *Brink v Kitshoff* 1996 4 SA 197 (CC) paras 31-44; *President of the RSA v Hugo* 1997 4 SA 1 (CC) para 41; *Harksen v Lane* 1998 1 SA 300 (CC) para 51; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 62.

¹⁰⁷⁶ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 26. The Court referred to social justice, the aspirational objectives of restoring and protecting the equal worth of everyone, the creation of a non-racial, non-sexist society underpinned by human dignity, and the improvement of the quality of life of everyone. The Constitutional Court has frequently emphasised the centrality of the concept of dignity and self-worth to the idea of equality.

¹⁰⁷⁷ Section 56(3) of the ZIM Constitution specifically mentions unfair discrimination.

¹⁰⁷⁸ ZIM Courts are likely going to be persuaded to consider the SA requirements for mere differentiation established in *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) [25] & *Weare v Ndebele* NO 2009 (1) SA 600 (CC) that there should be a legitimate purpose for the differentiation and that there should be a rational connection between the differentiation and the purpose which is proffered to substantiate or validate it.

¹⁰⁷⁹ *Harksen v Lane* NO 1998 (1) SA 300 (CC) [46].

section 56(3) and discrimination that results in the impairment of human dignity¹⁰⁸⁰ as SA jurisprudence has established.

Third, substantive equality demands that the state takes affirmative action measures in the form of remedial or restitutive measures¹⁰⁸¹ as provided for in section 56(6) of the ZIM Constitution. 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. Unlike the SA scenario where affirmative action is employed to address the '*stark social and economic disparities*' which still plague SA as a result of its discriminatory past,¹⁰⁸² section 56(6)(a) of the ZIM Constitution indicates that affirmative action should be used to redress circumstances of genuine need. These are yet to be defined by the Constitutional Court.

It is therefore clear from the above that implied in equality provisions is the substantive equitable treatment of all languages and their speakers. The non-discrimination provision protects minority language speakers from differential treatment based on language. These two rights compliment each other to ensure that minority language speakers are protected. Section 56 of the ZIM Constitution can arguably be used to address the past history of discrimination of linguistic minorities on the basis of language and place them on a substantively equal footing with the rest of the population.

5.3.6 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, it has been contended before that the

¹⁰⁸⁰ 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 has been already argued in Chapter 1 that it is inhuman for a human being to be discriminated on the basis of language.

¹⁰⁸¹ *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.

¹⁰⁸² *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.

right to freedom of expression includes the right to linguistic expression.¹⁰⁸³ 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)*¹⁰⁸⁴ where the court held that:

Language 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.

Varennnes was therefore correct when he argued that under international law, freedom of expression includes the right to linguistic expression.¹⁰⁸⁵ This argument finds support in *Ballantyne, Davidson & McIntyre v. Canada* where the UNHR Committee established that freedom of expression entails use of one's language as envisaged in article 27 of the CCPR.¹⁰⁸⁶ Freedom of expression therefore includes use of one's minority language and by implication protects minority language rights. This would 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.'¹⁰⁸⁷ 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

¹⁰⁸³ F de Varennnes '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.

¹⁰⁸⁴ [1988] 2 S.C.R. 712.

¹⁰⁸⁵ de Varennnes (n 86 above) 121.

¹⁰⁸⁶ *Ballantyne case* (n 78 above) paras 11.3 and 11.4.

¹⁰⁸⁷ 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.

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 media¹⁰⁸⁸ by minority language speakers in view of the fact that media is one of the important means of linguistic and cultural reproduction.¹⁰⁸⁹ 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.¹⁰⁹⁰ Again ZIM 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.¹⁰⁹¹

International law does not recognize the state's obligation to support linguistic minority media institutions.¹⁰⁹² It has been argued that article 27 of the CCPR 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.¹⁰⁹³ The state should not interfere with this right except to merely regulate the registration and licencing of media.

5.3.7 The right to use of a language and participate in the cultural life of choice

Section 63 affords every person a right to participate in the cultural life of their choice. It has been argued in Chapter 3 that within the African context, the right to culture implies cultural

¹⁰⁸⁸ Media in this context includes written press, radio and television.

¹⁰⁸⁹ 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.

¹⁰⁹⁰ de Varennes (n 86) 223.

¹⁰⁹¹ Henrard (n 13 above) 268-269.

¹⁰⁹² See de Varennes (n 86) 217-225.

¹⁰⁹³ See Henrard (n 13 above) 268.

identity. If this interpretation is to be accepted, it would mean that section 63 to a degree protects linguistic identity.¹⁰⁹⁴

Chapter 2 has established that language is an integral part of culture and the protection of the right to culture for linguistic minorities imply the use of one's minority language. For example, Ngugi wa Thiongo referred to language as the soul of culture.¹⁰⁹⁵ Makgoba argues that '*language is a culture and in language we carry our identity...*'¹⁰⁹⁶ 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.*'¹⁰⁹⁷ Examples include the Tonga, Ndebele and Shona in Zimbabwe. Prah contends that.¹⁰⁹⁸

If 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.

Clearly, implied in the right to culture are the rights to linguistic identity and to use one's minority language. It follows therefore that the protection of the right to culture therefore secures linguistic identity and 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

¹⁰⁹⁴ 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.'

¹⁰⁹⁵ 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 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.*'

¹⁰⁹⁶ Makgoba (n 305 above) 34.

¹⁰⁹⁷ V Webb & Kembo-Sure (n 28 above).

¹⁰⁹⁸ KK Prah 'Challenges to the promotion of indigenous languages in South Africa' (2007) Review commissioned by the Foundation for Human Rights in South Africa 3-4.

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 and 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 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.

ZIM could use the 'sliding-scale approach'¹⁰⁹⁹ 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.¹¹⁰⁰

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.¹¹⁰¹ The state however has an obligation to ensure that linguistic minorities have access to media by allocating linguistic minorities frequencies.¹¹⁰² Again ZIM 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.

¹⁰⁹⁹ de Varennes (n 86 above) 177.

¹¹⁰⁰ de Varennes (n 86 above) 177-178.

¹¹⁰¹ See de Varennes (n 86 above) 217-225.

¹¹⁰² de Varennes (n 86 above) 223.

The caveat in section 63 is that the exercise of the right to use a language should be done in manner consistent with the Bill of Rights. This right is subject to the limitation clause in section 86 discussed before.

5.3.8 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 ZIM'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 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 confirms this interpretation. Clause 5.3 of the United Nations Human Rights Committee General Comment 23 makes it clear that *'[a]rticle 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.'* In *Guesdon v France*,¹¹⁰³ the UNHRC established that the

¹¹⁰³ *Guesdon case* (n 333 above).

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*¹¹⁰⁴ 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.

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 ZIM'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,¹¹⁰⁵ section 49 of the High Court Act¹¹⁰⁶ and Section 31 of the Supreme Court Act¹¹⁰⁷ 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.

5.3.9 Language right 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 education namely language use in education, minority specific issues revolve around

¹¹⁰⁴ Communication 451/1991 *Harward v Norway* UNHR Committee (16 August 1994), UN Doc CCPR/C/51/D/451/(1991).

¹¹⁰⁵ [Chapter 7:10].

¹¹⁰⁶ [Chapter 7:13].

¹¹⁰⁷ [Chapter 7:13].

mother tongue education, curricular content and establishment of private minority educational institutions.

i. Mother tongues 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 concentrated¹¹⁰⁸ taking into account the number of minority students seeking education in their language and the extent of the burden this puts on public resources.¹¹⁰⁹ 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 the mother tongue.¹¹¹⁰ However, there was later a realisation that the right to education cannot be fully enjoyed without involvement of the mother tongue.¹¹¹¹

Education involves the transfer of information and this can be effectively done when the recipient understands the language used in transmitting education.¹¹¹² Mother tongue education is also important for the preservation of the language and traditions of the culture conveyed through it to future generations.¹¹¹³ Also, mother-tongue education impacts the emotional, cognitive and socio-cultural development of students.¹¹¹⁴ In any event, substantive equality and equality of opportunity demands 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' children¹¹¹⁵ and indigenous people

¹¹⁰⁸ Henrard (n 13 above) 260-261.

¹¹⁰⁹ de Varennes (n 86 above) 33.

¹¹¹⁰ See article 26 of the Universal Declaration, the *travaux préparatoires* of the Universal Declaration and the *Belgian Linguistic Case* 1 EHRR 252 (1965)

¹¹¹¹ 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.

¹¹¹² Skutnabb-Kangas 'Language policy and political issues in education' in May & Hornberger (n 319 above).

¹¹¹³ Henrard (n 13 above) 257-258.

¹¹¹⁴ Skutnabb-Kangas (n 321 above) 118-119.

¹¹¹⁵ Arts 45(3) and (4) of the CMW.

to be educated in their mother tongue are vividly recognised under the International Labour Organisation Conventions (ILO) No. 107¹¹¹⁶ and 169.¹¹¹⁷ Policies like additive bilingualism have been developed to ensure that learning a second language should not be to the detriment of the mother tongue.¹¹¹⁸

This approach seems to be the one adopted by the ZIM Education Act.¹¹¹⁹ Firstly, section 62 (1) of the Education Act provides that¹¹²⁰

... Subject 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 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.

¹¹¹⁶ Art 23.

¹¹¹⁷ Art 28(1).

¹¹¹⁸ 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.

¹¹¹⁹ [Chapter 25:05].

¹¹²⁰ 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.*'

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:

... 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 a minority language. However, the determination of which minority language should be used exclusively lies to the discretion of the minister of education¹¹²¹ and is limited to areas where that language is spoken. The subsection does not specify the consideration that the minister has to take before authorizing mother tongue education in an indigenous language. This gives the minister of education a wide discretion to choose which language should be taught.¹¹²² A minister that is unfriendly to minority languages will not authorize the teaching of such languages. In the

¹¹²¹ 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.*’

¹¹²² 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.*’

author's interview with the then Minister of Education, Sports and Culture, Senator David Coltart,¹¹²³ he indicated that he supported the teaching of minority languages in school. His ministry had developed a number of policy directives authorizing 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 authorize 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 it. No orthography has yet been devised for this language. Second, Venda is taught in primary and secondary schools.¹¹²⁴ 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.¹¹²⁵

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.¹¹²⁶ 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

¹¹²³ I interviewed him on telephone on 19 June 2012.

¹¹²⁴ SJ Hachipola (n 1048 above) 32-33.

¹¹²⁵ SJ Hachipola (n 1048 above) 41.

¹¹²⁶ SJ Hachipola (n 1048 above) 18-19.

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 Mumpande¹¹²⁷ 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 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 and the rest of the languages were 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 measures¹¹²⁸ as provided for in section 56(6) of the ZIM 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.¹¹²⁹

¹¹²⁷ (n 139 above). He said this when I interviewed him on 19 June 2012 at Silveira House.

¹¹²⁸ *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.

¹¹²⁹ *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.

Section 56(6)(a) of the ZIM 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.

ii. Curriculum content

Concerning the content of education, international law enjoins states to adopt a multicultural approach¹¹³⁰ where the education curricula should objectively reflect, among others the culture and language of historically disadvantaged language groups.¹¹³¹ Ideally, the text materials to be used should also be representative of the perspectives of members of different sections of society.¹¹³² This aspect is not reflected in section 62 of the Education Act and could be included in an Act of Parliament to be promulgated.

iii. Establishment of independent language institutions

¹¹³⁰ See Article 4 of the 1992 UN Declaration on the Rights of Minorities and Article 12 of the Framework Convention.

¹¹³¹ Henrard (n 13 above) 262-265.

¹¹³² It is interesting to note that arts 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.*¹¹³² *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.

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.¹¹³³ 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 institution, 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.¹¹³⁴

Article 5(1)(c) of the UNESCO Convention against Discrimination in Education recognizes 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.¹¹³⁵ The proposed Languages Bill could provide that language speakers are free to establish their own educational institutions at their own expense.

5.4 Implementation mechanisms

Before finalizing this discussion, a look at the implementation mechanism for minority language rights warrants discussion. One of the major weaknesses of section 6 of the ZIM Constitution is that there is no implementation mechanism put in place to 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. This could be an area where a language specific Act of Parliament can come in and address this key aspect.

¹¹³³ See Henrard (n 13 above) 265. At 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 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.*

¹¹³⁴ See art 5(1)(c) of the UNESCO Convention on the Elimination of Discrimination in Education.

¹¹³⁵ Henrard (n 13 above) 266.

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.¹¹³⁶

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.¹¹³⁷ According to Turi¹¹³⁸

... 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.

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

¹¹³⁶ de Varennes (n 86 above) 47.

¹¹³⁷ 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.

¹¹³⁸ JG Turi 'Typology of language legislation' in TS Kangaset *al* (1994) *Linguistic human rights: overcoming linguistic discrimination* 111-120.

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.¹¹³⁹

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 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 the human rights commission.¹¹⁴⁰ Such political mechanisms are required in ZIM if minority language rights provided for in the Constitution are to be promoted, protected and fulfilled.

5.5 Chapter conclusion

A few conclusions can be drawn from the Zimbabwean constitutional framework for the protection of minority languages. First, the ZIM Constitutional framework provides a two-pillar minority language rights protection system with equality and not discrimination clauses on one¹¹⁴¹ hand and specific minority rights¹¹⁴² on the other hand. 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 for 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

¹¹³⁹ 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.*'

¹¹⁴⁰ 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.

¹¹⁴¹ Sections 56, 61, 63, 70(1)(j) and 75 of the ZIM Constitution.

¹¹⁴² Sections 6 of the ZIM Constitution.

of Parliament that will clarify the constitutional provisions relating to minority language rights and also put in place implementation mechanism for the fulfilment of minority language rights.

CHAPTER 6

Conclusion and Recommendations

Introduction

We live in an era of multiculturalism and multilingualism and yet the issue of the protection of minority languages and linguistic minorities in Africa has received scant attention in legal literature, African treaties and African national constitutions.

This study's central aim is to examine and defend the use of a human rights framework for the protection of minority languages and linguistic minorities in Africa as an effective means to eliminate discrimination of linguistic minorities, preserve linguistic minority identity and foster substantive equality between linguistic majorities and linguistic minorities.

Such a study is justified in view of the fact that the concept of minority is still problematic and debatable in Africa. Africa's language history that saw political and economic dominance playing a critical role in determining which languages became dominant or vulnerable and eventually led to discrimination of linguistic minorities also justifies the undertaking of this study. The thesis addresses one of Africa's chief concerns of how to reasonably and appropriately accommodate linguistic diversity within multilingual states that value ethno-cultural inclusive democracy to cure the past history of discrimination of linguistic minorities. It presents African states with useful criteria they can use to balance different linguistic interests in their territories to accommodate such diversity.

The study employed three methods of investigation. First, the study identified the problem of discrimination based on language in colonial and post-colonial Africa which emphasized assimilation of linguistic minorities to create a nation state.¹¹⁴³ The second investigation identified the human rights framework for the protection of minority languages and linguistic minorities in Africa as an effective way of addressing the problem of discrimination of linguistic minorities.¹¹⁴⁴ The third line of investigation examined the extent to which the human rights

¹¹⁴³ This was addressed in the first parts of Chapters 1 and 3.

¹¹⁴⁴ The human rights framework was derived from a study of the International, European and African human rights system in Chapters 2 and 3.

framework for the protection of minority languages and linguistic minorities has been implementation in African states through the national constitutional framework. To this end, the study employed the case studies of South Africa and Zimbabwe. This Chapter outlines the conclusions drawn from the study and makes appropriate recommendations.

6.1 Conclusions drawn from the study

a. The problem of discrimination

The thesis identified that the discrimination of linguistic minorities was not based on the linguistic value of the minority language they speak but on political power relations. These political power relations are manifested in national policies regarding the public use of language and the choice of official languages of a country where the need to have one specific lingua franca for purposes of administrative efficiency is balanced with accommodation of linguistic diversity to preserve the identity of linguistic minorities.

A study of Africa's language history revealed that power relations saw a shift in language policy from free use of minority languages in pre-colonial Africa to imposition of colonial languages in the public affairs of the state in the colonial era to assimilation of linguistic minorities in post African states that embraced the drive to national unity and eventually to the constitutional protection of minority language rights aimed at enhancing ethno linguistic democracy that tries to reasonably accommodate linguistic diversity.

b. The human rights framework for the protection of minority languages and linguistic minorities

One of the research questions that the thesis sought to answer was the extent to which the African human rights system sufficiently protects minority languages and linguistic minorities in view of international law. In answer to this question, the thesis established that the human rights framework for the protection of linguistic minorities and minority languages is premised on substantive equality and the right to identity. Its aim is to effectively integrate linguistic minorities in a way that achieves substantive equality while allowing them to preserve their linguistic

identity.¹¹⁴⁵ The human rights framework has two pillars. The first pillar comprises of individual human rights of special relevance to linguistic minorities that ensure that linguistic minorities are placed on a substantially equal footing with other nationals of the state. The individual human rights include rights to equality and non-discrimination, freedom of expression, fair trial, culture, education and participation. The second pillar comprises of minority specific standards (rights and measures) designed to protect and promote the separate identity of minority language groups. The minority specific standards include the right to identity, to use one's language in private and in public, prevention of assimilation and positive state obligations to protect and promote the identity of minorities.

i. First pillar – Individual human rights

It was established that individual human rights of special relevance to linguistic minorities contribute to the effective protection of minority languages and linguistic minorities. Even though individual rights did not specifically deal with minority language rights, it was argued that minority language rights could be inferred or implied from the freedom of expression which included linguistic expression, from the right to culture since language was an integral part of culture, the right to work, fair trial provisions especially the right to be informed of a charge in a language that one understands, the right to protection of private family life and the right to a name. The following two individual rights are specifically singled out as rights that potentially protect linguistic minorities the most.

Equality and non-discrimination

One of the major claims of linguistic minorities in Africa is the prevention of discrimination caused by the political power relations in the colonial era and the post-independent nation state. Key to addressing this concern is the right to equality and its corollary right to non-discrimination on the basis of language aimed at ensuring that vulnerable linguistic minorities are placed on a substantially equal footing with other nationals of the state. Concepts like justified differential treatment¹¹⁴⁶ and substantive equality were advocated for to evaluate the actual political,

¹¹⁴⁵ See Henrard (n 13 above) 8 who argues that this process requires two things namely (a) ensuring that linguistic minorities are placed on a substantially equal footing with other nationals of the state and (b) preserving linguistic identity.

¹¹⁴⁶ Like affirmative action.

economic and social disparities amongst language speakers in a bid to eliminate past discrimination and come up with differential measures aimed at placing linguistic minorities on a substantially equal footing with other nationals of the state.

Interesting differences were identified between the developed equality jurisprudence in the UN and European human rights system, on the one hand, and the evolving equality jurisprudence under the African human rights system, on the other. For instance, there are equality principles found under the UN and European law that are not clearly provided for under the African human rights system, such as the issue whether enumerated grounds for discrimination are scrutinized differently from the other grounds covered by the term 'other status.'¹¹⁴⁷ There is also no clarity on whether indirect discrimination is recognized.¹¹⁴⁸ It is also not clear whether positive action is recognized in view of the fact that the African Commission has so far not dealt with cases on positive action.¹¹⁴⁹ The African Commission has not yet adopted a three-step¹¹⁵⁰ assessment of whether a differentiation in treatment has a reasonable and objective justification established in International law.

It was argued that given that the issue of minorities in Africa remains controversial and problematic¹¹⁵¹ and that most African states are reluctant to recognise groups as minorities within their territories for fear that recognition may lead to secession,¹¹⁵² the equality principle could be a potentially important avenue to enhance linguistic minority protection because it is not minority specific. However, the scope of protection of minority language rights and linguistic minorities through the equality principle depends on the willingness of the African Commission

¹¹⁴⁷ Henrard (n 8 above) 245-246.

¹¹⁴⁸ See *Legal Resources Foundation v Zambia* para 70 which seems to suggest though that the African Commission is concerned about discriminatory effects.

¹¹⁴⁹ However, the 2005 report of the African Working Group 77 argues that articles 2 and 3 of the African Charter imply a duty on states to protect indigenous groups against discrimination by private individuals. There are still no cases that have authoritatively decided on this interpretation.

¹¹⁵⁰ As shown in chapter 1, the first step establishes whether or not there is a *prima facie* case of discrimination. The second step assesses whether there is reasonable and objective justification for the discrimination. The third step involves a legitimate aim and a proportionality requirement.

¹¹⁵¹ Murithi, "Developments under the African Charter on Human and Peoples' Rights relevant to minorities" in Henrard (n 3 above) 385.

¹¹⁵² Report on the first seminar on Multiculturalism in Africa: Peaceful and constructive group accommodation in situations involving minorities and indigenous peoples held in Arusha, Tanzania, 13-15 May 2000, E/CN.4/Sub.2/AC.5/2000/WP.3, para 28.

and the African Court to interpret equality and prohibition of discrimination in a way that furthers substantive equality and the right to identity of minorities.

Right to participation

One of the concerns of linguistic minorities emanating from Africa's language history is exclusion from participating in the political processes of the state. This concern could be cured by the application of the right to participation. According to Eide, the right to participation can be implemented where segments of the population obtain a degree of autonomy and several forms of territorial decentralisation like federalism, regional or local self-government.¹¹⁵³ Territorial decentralisation plays a very pivotal role in the protection of minority languages in instances where linguistic minorities are concentrated in certain regions. The decisions of the African Commission on the right to self-determination enshrined in article 20 of the ACHPR reveal the reluctance of the African Commission to encourage secession but to encourage territorial decentralisation as a way of preserving territorial integrity and sovereignty.¹¹⁵⁴ Territorial decentralisation is analysed in Chapters 4 and 5 in the context of the SA and ZIM constitutions as one of the possible ways of protecting minority languages and linguistic minorities.

The thesis highlights that individual human rights under both the UN, European and the African human rights systems are not absolute but could be limited, if the limitation serves an objective that is reasonable and justifiable. Even though the technical aspects are different under the various human rights systems, they boil down to the principle of proportionality which takes a number of factors into account to ascertain whether the means used by a state to limit a right are proportional to the aim sought. The study further notes that the doctrine of margin of appreciation developed under the European human rights system has found limited resonance under the African human rights system but also notes that the African Commission clarified that the doctrine of margin of appreciation does not preclude an assessment by the African Commission of the reasonableness of the limitation of rights in terms of section 27(2) of the ACHPR.¹¹⁵⁵

¹¹⁵³ Eide, "Approaches to minority protection" in Phillips & Rosas (n 110 above) (1993) 89.

¹¹⁵⁴ See Communication 75/92, *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) (8th Annual Activity Report).

¹¹⁵⁵ Viljoen (n 235 above) 333.

ii. Second pillar – Minority specific rights

The thesis established that minority specific rights and measures also contribute to the effective protection of minority languages and linguistic minorities. Two major concerns have been raised against specific minority rights. The first is that minority rights are group specific and this could lead to the escalation of secessionist movements and eventually to the territorial fragmentation of the state which in turn hampers the nation-building. This argument may be countered by the argument that real unity is not forcefully imposed. Real unity accommodates ethno-cultural diversity, fosters integration without assimilation and protects the identities of the minority. The second concern is that minority rights should be rejected because they create outside the human rights framework. The thesis demonstrated that minority rights are not situated outside the human rights framework, but are considered to be part and parcel of it. For instance, article 1 of Framework Convention for the Protection of National Minorities highlights that minority rights form '*an integral part of the international protection of human rights.*' Specific minority rights are 'special' measures and rights afforded to minorities (linguistic) to cure past discrimination and inequality by placing members of minorities in a substantively equal position as the rest of the population. They also aid minorities to preserve their identity.

At the UN level, article 27 of the CCPR was identified as the *Grundnorm* regarding minority rights. Implied in article 27 of the CCPR are four rights. The first is prevention from assimilation. This right is crucial to cure the assimilationist policies of colonial and post colonial Africa identified in Chapter 3.

The second is the right to identity. It was established that the essence of minority protection is to preserve the linguistic identity of minorities and ensure that linguistic minorities are placed on a substantively equal footing with linguistic majorities. The point of departure though is that the African conception of identity is cultural identity. Intrinsic in the protection of cultural identity is the prevention of the erosion of minority languages. Protection of cultural identity (and by extension linguistic identity) is therefore a necessary aspect of effective protection of minority languages and linguistic minorities.

Third, article 27 enshrines the qualified right to non-state interference in the use minority languages in private and in public. For linguistic minorities, this right would include qualified use

of minority languages in names, education,¹¹⁵⁶ public media, courts, communication with public officials and official recognition of minority languages as official languages.

The fourth right is the right to use a minority language. Private use of language is not a contested issue. However, the use of language with public in communication with public authorities, in public media and in education is one of the linguistic minorities' chief concerns. The use of languages in the public domain is usually determined by the extent of development of the language as well as the actual language situation in each country.

As regards use of minority languages in the public service, it was established that states do not 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. African states could use the 'sliding-scale approach'¹¹⁵⁷ 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.¹¹⁵⁸ Such an approach is practical in Africa where linguistic minorities are usually territorially concentrated and most social and economic affairs are conducted at local levels in the regional or local vernacular. States can accord official language status at regional or municipal levels to languages spoken regionally or locally and national official language status to widely spoken language/s in a nation. This approach balances the interest of having a common national language with the need to recognise regional and local minority languages to empower their hitherto neglected speakers.

The thesis found that minority specific issues on the use of language in education revolve around mother tongue education, curricular content and establishment of private minority

¹¹⁵⁶ 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 Chapter 2.

¹¹⁵⁷ de Varennes (n 86 above) 177.

¹¹⁵⁸ de Varennes (n 86 above) 177-178.

educational institutions. Mother tongue education is justified on the basis that the transfer of information through education can be effectively done when the recipient understands the language used in transmitting education. Mother tongue education is also important for the preservation of the language and traditions of the culture conveyed through it to future generations. Also, mother-tongue education impacts the emotional, cognitive and socio-cultural development of students. In any event, substantive equality and equality of opportunity demands 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.

The study observed that the choice of which mother tongue should be used in education in which areas in a state could be guided by the 'sliding-scale approach' where the state could provide mother tongue education in areas where linguistic minorities are concentrated¹¹⁵⁹ taking into account the number of minority students seeking education in their language and the extent of the burden this puts on public resources.¹¹⁶⁰

Concerning the content of education, states are enjoined to adopt a multicultural approach¹¹⁶¹ where the education curricula should objectively reflect, among others the culture and language of historically disadvantaged linguistic minority groups.¹¹⁶² Ideally, the text materials to be used should also be representative of the perspectives of members of different sections of society.¹¹⁶³

Mother tongue education could easily be effected where minorities are able to establish their own educational institutions at their cost subject to national standards of quality education. Even

¹¹⁵⁹ Henrard (n 13 above) 260-261.

¹¹⁶⁰ de Varennes (n 86 above) 33.

¹¹⁶¹ See Article 4 of the 1992 UN Declaration on the Rights of Minorities and Article 12 of the Framework Convention.

¹¹⁶² Henrard (n 13 above) 262-265.

¹¹⁶³ It is interesting to note that arts 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.*¹¹⁶³ *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.

though the state does not generally have the obligation to fund such institution, 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.¹¹⁶⁴

The use of language in media has two aspects. The first relates to right of linguistic minorities to establish print or electronic media in minority languages.¹¹⁶⁵ The state does not generally have an obligation to support linguistic minority media institutions. The second relates access to media. This can be realized if states allocate linguistic minorities frequencies.¹¹⁶⁶ Language is the vehicle through which these aims are achieved. The 'sliding-scale approach' is useful in determining the extent of state obligations in this area. Accordingly, the size and geographical concentration of the minority population, the capacity of the state concerned, and the needs and interests of minorities should be taken into account.

The analysis ultimately revealed that both individual human rights and the current minority rights standards are important for the protection of minority languages and linguistic minorities. However, the degree of protection at the level of these two categories of rights remains in many ways deficient. For the African human rights system under study, the level of protection offered by individual human rights and minority rights was very deficient. For individual rights, there is limited jurisprudence on the content of minority language rights implied in the individual rights mentioned. For minority specific rights, there is no treaty devoted to specific minority language rights. The concept of minority itself is a contestable issue. The express provisions that somewhat provides for some minority language rights are weak in formulation and have not yet been interpreted by supervisory bodies to give content to the minority language rights.

This normative deficiency beckons for a need to clarify the content of specific minority language rights either through progressive interpretation of existing minority language norms and or the introduction of a specific charter or protocol on language rights that embodies clear norms on minority language rights

c. Implementation of the human rights framework through the national constitutional design

¹¹⁶⁴ See art 5(1)(c) of the UNESCO Convention on the Elimination of Discrimination in Education.

¹¹⁶⁵ See de Varennes (n 86 above) 217-225.

¹¹⁶⁶ de Varennes (n 86 above) 223.

The second research question that the thesis sought to answer was the extent to which African constitutional democracies (represented by SA and ZIM) use their constitutional designs to protect minority languages and linguistic minorities. In answer to this question, the thesis identified a new wave of constitutional democratic change after 1990 that was focused on addressing authoritarianism, unlimited government, human-rights violations and the lack of a human-rights culture, multiparty elections. Key was the entrenchment of minority language rights in national constitutions as a necessary way of accommodating linguistic diversity in an ethno-linguistically inclusive and deliberative democracy.

Some deficiencies identified are that even though South Africa recognises 11 official languages and Zimbabwe recognises 16 languages, most official languages are not used for government business and in the public domain leading to conclusions that the granting of official language status was merely symbolic for most languages. In both countries, the implementation of section 6 of the Constitution has seen the dominant use of English in government business. Zimbabwe does not have a language specific Act of Parliament and Zimbabwean courts have not yet developed jurisprudence to clarify the normative content of the language rights provided for in section 6 of the Constitution.

The study established that the post 1990 constitutional framework, as represented by Zimbabwe and South Africa, still requires more details on the content of official language status, use of official and non-official languages, languages of record, mother tongue education, use of languages in criminal proceedings, the criteria to be used by national, regional and municipal governments in determining which languages to use, development of languages for use, promotion of use of official languages and the legal, political and administrative implementation mechanisms that need to be put in place for the enjoyment and fulfilment of minority language rights.

These deficiencies beckon a dire need for clarity of the normative content and improvement on implementation mechanism for the protection of minority languages in African states. This clarity can come from either introduction of new language legislation in individual countries, the amendment of existing legislation, improved judicial interpretation of minority language rights norms using the implied rights theory and clear mechanisms on how these language rights norms can be accessed by minority language speaker.

This thesis has successfully argued that even though the international and regional standards are general and often qualified and have some gaps and deficiencies, they provide a human rights framework for the protection of minority languages in Africa.

6.2 Recommendations

The final research question that the thesis sought to address is 'what can be done at the national and continental levels to ensure an adequate protection of linguistic minorities and minority languages?' This section addresses this question by providing recommendations for South Africa, Zimbabwe and Africa as a whole. The first subsection focusses on recommendations for South Africa based on the findings made in Chapter 4. The second subsection details recommendations for Zimbabwe based on the findings in Chapter 5. The third subsection makes recommendations for Africa based on the findings of the entire thesis as a whole.

6.2.1 Recommendations for South Africa

The thesis identified two major weaknesses in the SA constitutional framework for the protection of minority language rights. The first weakness is that the official language status granted by section 6 of the SA Constitution is symbolic. This is shown by the limited use of official languages and the absence of provisions regulating the use of official languages in SA. This weakness can be cured by introduction of legal provisions regulating the use of language and the actual use of the languages.

As regards legislation, the thesis recommends an amendment of the current Use of Official Languages Act to comply with the constitutional obligations set out in sections 6(3)(a) and 6(4) of the Constitution in terms of the absolute need to regulate by legislation the use of at least two official languages for the purposes of government. The amendment should specifically provide for criteria for the selection of which official languages to use in the provinces. The criteria should include issues like history of discrimination, affirmative action, number of language speakers in a specific territory, extent of use of the language in a specific area, practicality, financial consideration, preference and proportionality. The choice of which official language to use should not unfairly discriminate against some official languages.

Regarding the actual use of official languages, there are possible variations that SA can adopt. The first is the continued use of English language (and add one common used indigenous African official language) as the language of record and business for the whole country and then add other official languages as official languages where they are most spoken in SA's nine provinces. Devenish¹¹⁶⁷ suggests the following:

Indeed some would say that what emerges from the Constitution is a veritable tower of Babel. A pragmatic approach is to use English as the lingua franca of government and commerce. The most commonly used African language can then be used as an official language together with English and in some cases Afrikaans in the provinces according to their needs and wishes.

Such an approach complies with section 6(2) of the Constitution that requires the national government to use at least two official languages and the Use of Official Languages Act that requires provincial governments to use at least three official languages.

SA can use the demographic statistics available to accord official language status based on use of language, practicability and proportionality in each province. For instance, in English, isiXhosa and Afrikaans can be used as official languages in *Eastern Cape* where isiXhosa is spoken by 78.8% of the people and Afrikaans is spoken by 10.6%.¹¹⁶⁸ In the *Free State*, English, Sesotho and Afrikaans can be used as official languages where Sesotho is spoken by 64.2% and Afrikaans by 12.7%. In *Gauteng*, English, isiZulu, Afrikaans and Sesotho can be used as official languages where isiZulu is spoken by 19.8%, English by 13.3%, Afrikaans by 12.4% and Sesotho 11.6%. In *KwaZulu-Natal*, English and isiZulu can be used as official languages where isiZulu is spoken by 77.8% and English by 13.2%. In *Limpopo*, English, Sesotho, Xitsonga and Tshivenda can be used as official languages where Sesotho is spoken by 52.9%, Xitsonga by 17% and Tshivenda by 16.7%. In *Mpumalanga*, English, siSwati, isiZulu, Xitsonga and isiNdebele can be used as official languages at different levels of government where siSwati is spoken by 27.7%, isiZulu by 24.1%, Xitsonga by 10.4% and isiNdebele by 10.1%. In *Northern Cape*, English, Afrikaans and Setswana could be used as official languages where Afrikaans is spoken by 53.8% and Setswana by 33.1%. In *North West*, English, Setswana and Afrikaans could be used as official languages where Setswana is used by 63.4%

¹¹⁶⁷ GE Devenish *A commentary on South African Constitution* (1998) 40.

¹¹⁶⁸ The statistics for each of the nine provinces in South Africa contained in this paragraph can be found at http://www.southafrica.info/about/geography/provinces.htm#_UYjuAKJHKSo (accessed 7th May 2013).

and Afrikaans by 9%. In *Western Cape*, English, Afrikaans and isiXhosa could be adopted as official languages where Afrikaans is used by 49.7%, isiXhosa by 24.7% and English by 20.3%.

The second approach may be one suggested by Fernand de Varennes where English, Afrikaans, isiZulu and isiXhosa only are used in central institutions of national governments and the rest of the languages are used in provincial and municipal governments using principles of practicality, preference and concentration of speakers in certain areas. The choice of use of English, Afrikaans, isiZulu and isiXhosa in central institutions (like Parliament and Constitutional Court) is informed by a long tradition of use in of these languages in the said institutions which carries with it the practical benefits of already existing technical terminology, documentation and even civil servants able to function effectively in these languages in terms of administrative usage. The state can then use municipal and provincial governments to progressively develop the use of the other 7 languages until such a time that they can carry the functional load at the central institutions level. This approach would comply with section 6 of the SA Constitution.

The second major weakness of the SA constitutional framework for the protection of minority language rights identified in the thesis is the absence of administrative, legal and political institutions involved with and capable of ensuring the proper implementation of the use of official languages for the purpose of government. This huge and important role is left to the discretion of one individual – the Minister.

The thesis makes three proposals to address this weakness.¹¹⁶⁹ First, at the political level, the implementation of the use of official languages for purposes of government requires either the creation of a political institution like a well resourced Ombudsman or Commissioner of Official Languages. Alternatively, legislation can extend the mandate of the PANSALB to include regulating the actual use of official languages for purposes of government.

Second, at the administrative level, the law should be amended to specify that a Government department instead of an individual Minister should oversee the implementation of the use of official language for purposes of government. Examples would include the office of the President, Ministry of Culture or Department of Public Service and Administration.

¹¹⁶⁹ Reliance has been placed on F de Varennes' report (n 177 above) 82-83 in formulating these three recommendations.

Third, there should be some sort of an effective legal remedy available should the Government fail to use an official language for purposes of government. Other options is the setting up of either a distinct tribunal or a special language court within the Magistrates or High Court specifically dealing with the use of official languages for government purposes and language rights issues provided for in the SA Constitution and subordinate legislation.

6.2.2 Recommendations for Zimbabwe

Just like SA, the official language status granted by section 6 of the ZIM Constitution is symbolic because only English is practically used as a language of record in government business. However, unlike the SA Constitution, section 6(1) of the ZIM Constitution does not expressly mention anything about the use of the 16 languages in the government of business. Neither is there any criteria set for determination of how official languages ought to be used in ZIM. The absence of such legislation deprives content to the exact scope of official language status and robs official minority language speakers of practical measures for the implementation of their rights.

The thesis recommends the promulgation of an Act of Parliament regulating the use of official languages in Zimbabwe. The legislation can specify the criteria to be used to determine which language is used for government business where. The criteria should include issues like history of discrimination, affirmative action, number of language speakers in a specific territory, practicality, financial consideration, preference and proportionality. The choice of which official language to use should not unfairly discriminate against some official languages.

The thesis has identified that the Constitution is devoid of a mechanism that should be used to ensure that the 16 official languages are practically and proportionally used in the entire country taking into account the practical and financial implications of doing so.

There are three ways Zimbabwe could approach this. The first approach entails Zimbabwe adopting the Ethiopian model where one language (Amharic) is the official language of the whole country through the medium of which federal services are provided and regional

governments can confer official language status to the one or more languages spoken in that region.¹¹⁷⁰

Using the Ethiopian model, Zimbabwe could have English as its official language of record (as is currently obtaining) and have other languages declared official at a provincial level (together with English) taking into account the number of the speakers of that language in each particular province. This may be possible given that section 264 of the constitution allows for devolution of powers and responsibilities to provincial and metropolitan councils. 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.

The second approach may be for Zimbabwe to adopt the Belgian model where official language status is afforded to languages spoken in provinces, cities and towns. The main consideration would be to look at the number of language speakers in a province, city or town to determine whether official language status should be given at a provincial, city or town level. This approach accommodates all the 16 languages and minimises the cost of implementing section 6(1) of the constitution. Such an approach could 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.¹¹⁷¹ 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 highlighted in Chapter 5.

¹¹⁷⁰ 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 Human Rights Law Journal* 501.

¹¹⁷¹ More along the lines of Canada. See K Malan (n 786 above) 400-403.

The thesis has identified the absence of administrative, legal and political institutions involved with and capable of ensuring the proper implementation of the use of official languages for the purpose of government and general use of non-official languages.

The thesis recommends three things. At the political level, Zimbabwe could create well-resourced political institutions (answerable to Parliament) ¹¹⁷² like the Ombudsman, Commissioner of Official Languages, a language board, the Human Rights Commission or a generic Arts and Culture Commission suggested by section 142 of the National Constitutional Assembly (NCA) Draft Constitution.¹¹⁷³

At the administrative level, there is need for mechanisms to monitor the use of official languages in ZIM. 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 like Ministry of Sports, Arts and Culture, the government and other more political entities.

At the legal level, there should be some sort of an effective legal remedy available should the Government fail to use an official language for purposes of government. This may entail the setting up of either a distinct tribunal or a special language court within the Magistrates or High Court specifically dealing with the use of official languages for government purposes and language rights issues provided for in the ZIM Constitution and subordinate legislation.

6.2.3 Recommendations for Africa

Introduction

The thesis proposes two possible approaches to resolving the normative deficiencies in the African human rights system for the protection of minority languages and linguistic minorities namely the *progressive interpretation and supplementary binding standards* approaches. This section is divided into three subsections. The first subsection deals with the proposed progressive interpretation approach. The second sub-section focuses on the proposed standard

¹¹⁷² To foster the necessary checks-and-balances.

¹¹⁷³ 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.*'

setting approach. The third section details the contents of the proposed African Languages Charter.

6.2.3.1.1 The progressive interpretation approach

This approach does not propose the introduction of new standards for the protection of minority languages and linguistic minorities in Africa but allows the African Commission and African Court¹¹⁷⁴ to use articles 60 and 61 of the ACHPR to draw inspiration from the UN, European, Inter-American and national human rights norms to imply or infer minority language rights from existing individual and peoples' rights provided for in the ACHPR. In particular, the African Commission and African Court can imply minority language rights from the rights to equality¹¹⁷⁵ and non-discrimination on the basis of language,¹¹⁷⁶ right to identity,¹¹⁷⁷ freedom of expression,¹¹⁷⁸ right to culture,¹¹⁷⁹ right to work,¹¹⁸⁰ right to education,¹¹⁸¹ right to the protection of the family,¹¹⁸² the right of every child to a name¹¹⁸³ and the right to a fair trial.¹¹⁸⁴ The African Commission can use the implied rights theory in conjunction with the teleological interpretation, effectivity principle and the principle of positive obligations discussed in Chapter 3 to strengthen the protection of minority language rights and linguistic minorities.

At the UN level, the African Commission can draw inspiration from the jurisprudence of the UN Human Rights Committee on equality and non-discrimination provisions, the right to education, the right to participation as well as article 27 of the CCPR discussed in Chapter 2. More particularly, inspiration can be drawn from article 27 of the CCPR (as well as the Human Rights Committee interpretation in its General Comments discussed above) which obliges member states to afford individuals belonging to linguistic minorities (whether citizens or non-citizens) in

¹¹⁷⁴ Article 7 of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights allows the African Court to apply the provisions of the African Charter.

¹¹⁷⁵ Arts 3 and 19 of the ACHPR.

¹¹⁷⁶ Arts 2 of the ACHPR, 3 of the ACRWC and 2 of the African Youth Charter.

¹¹⁷⁷ Art 17 of the ACHPR.

¹¹⁷⁸ Arts 9 & 25 of the ACHPR, 7 of the ACRWC and 4 of the African Youth Charter.

¹¹⁷⁹ Arts 17(2) and (3) and 22 of the ACHPR, 12(1) of the ACRWC and 10 and 20 of the African Youth Charter.

¹¹⁸⁰ Arts 13 and 15 of the ACHPR.

¹¹⁸¹ Arts 17(1) of the ACHPR and 11 of the ACRWC.

¹¹⁸² Arts 18 of the ACHPR, 18(1) of the ACRWC and 8 of the African Youth Charter.

¹¹⁸³ Art 6 of the ACRWC.

¹¹⁸⁴ Art 17 of the ACRWC.

a state the individual and collective right to use their language among themselves, in private or in public. Other explicit rights granted to linguistic minorities include the rights of children of migrant workers and indigenous peoples to be taught in their mother tongue.¹¹⁸⁵ The Commission can also draw inspiration from the CRC and CMW to afford members of national minorities a qualified right to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, teaching of their own language.¹¹⁸⁶ The right to use a minority language can be implied in the right to private and family life, as well as the right to freedom of expression,¹¹⁸⁷ and non-discrimination.¹¹⁸⁸ The Commission can also adopt the interpretation that under international law, freedom of expression includes the right to linguistic expression.¹¹⁸⁹ The African Commission can also embrace the Human Rights Committee's view in the *Diergaardt* case that minority language speakers are entitled by articles 26 and 27 of the CCPR to the use of their mother tongue in administration, justice, education and public life.¹¹⁹⁰

From the Inter-American system, the African Commission and African Court can infer minority language rights from the rights like freedom of expression¹¹⁹¹ and freedom from discrimination on the ground of language.¹¹⁹² From the European human rights system, the African Commission and African court can draw inspiration from the jurisprudence of the European Commission and European Court on the ECHR, the European Framework Convention on Minorities and the European Languages Charter. The The African Commission and African Court can even draw inspiration from the European Language Charter to establish state obligations relating to protection of minority languages. For instance, article 8 of the European Language Charter obliges states to make available pre-school, primary, secondary, technical, vocational, university and higher education or a substantial part of it in the relevant regional or minority languages. The curriculum should also include the history and the culture that is

¹¹⁸⁵ Arts 45(3) and (4) of the CMW and articles 23 and 28(1) of the ILO Conventions 107 and 169 respectively.

¹¹⁸⁶ Article 5(1) of the UNESCO Convention against Discrimination in Education.

¹¹⁸⁷ Articles 19 of the Universal Declaration, 19 of the CCPR, 13 of the CRC and 13 of the CMW.

¹¹⁸⁸ Articles 2.1 of the Universal Declaration, 2, 24 and 26 of the CCPR, 2 CESC and 1 & 7 of the CMW.

¹¹⁸⁹ de Varennes (n 86 above) 121.

¹¹⁹⁰ *Diergaardt* case (n 79 above).

¹¹⁹¹ Article 13 of the American Convention on Human Rights.

¹¹⁹² Articles 2 of the American Declaration of the Rights and Duties of Man, 1 & 8 of the American Convention on Human Rights and 3 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

reflected by the regional or minority language. Article 9 obliges states to ensure that, if the interests of justice are not hampered, minority languages are used in criminal and civil proceedings and proceedings before the courts that involve administrative matters in both procedural and substantive issues. Article 10 provides for the use of minority languages by administrative authorities and in public service. This includes use of minority languages in family names, documents used, deliberation, and recruitment. Article 11 obliges states to guarantee protection the use of minority languages in the media. States should ensure that there is at least one radio station and television channel in a minority language and must encourage the training of journalists in minority languages. Article 12 enjoins states to facilitate the use of minority languages in all cultural activities and even create a board to regulate this aspect. Article 13 obliges states to guarantee the use of minority languages in economic and social life that includes public and private companies and hospitals. It even encourages state parties to enter into bilateral agreements that benefit regional language speakers who speak a similar language.

The progressive interpretation approach also allows the African Commission to set up a Working Group on Minority Languages in Africa along the same lines as the Working Group on Indigenous Peoples' Rights, which can come up with the African Commission's position and interpretation of the normative content of minority language rights. The mandate of the working Group could include (a) an examination of the concept of minority languages, (b) determination of the normative content of the minority language rights, (c) considering appropriate recommendation for the monitoring and protection of the rights of indigenous communities.¹¹⁹³ The Commission can use the norms as interpretative tools in examining state reports and dealing with either individual or interstate complaints.

The African Commission can also appoint an Independent Expert on Minority Language Issues. The mandate will include (a) promoting implementation of all language rights provisions in the UN and African systems; (b) identifying best practices and possibilities for technical cooperation with the African Commission at the request of Governments; (c) cooperating closely, while avoiding duplication, with existing relevant African Union bodies, mandates, mechanisms as well as regional organizations; (d) submitting annual reports on his/her activities to the African Commission, including recommendations for effective strategies for the better implementation of minority language rights; (e) increasing understanding on minority language rights issues in

¹¹⁹³ Inspired by the Working Group on Indigenous Populations/ Communities in Africa whose mandate is detailed at <http://www.achpr.org/mechanisms/indigenous-populations/> (accessed 14 May 2013).

Africa and mainstream minority language rights in all the work of the African Union and the African Commission.¹¹⁹⁴

The African Commission can also protect minority language rights through its protective and promotional mandates. For instance, the African Commission can use the normative content of minority language rights to examine state reports and make recommendations for implementation thereto. It can use article 45 of the ACHPR to commission research, undertake fact finding missions, minority language rights education, organize seminars, symposia and conferences as well as disseminate information on minority language rights.

The progressive interpretation approach is a robust way of dealing with Africa's linguistic situation and will reasonably accommodate the view that the solution to Africa's failure to realize human rights does not lie in making new treaties but implementing the ones that already exist. It affirms the averment that all treaties are living documents that need to be (re)interpreted continuously in the light of changing and contemporaneous circumstances.¹¹⁹⁵

The desirability of the progressive interpretation approach is further justified by two factors. Firstly, the ACHPR is ratified by 53 out of 54 African states¹¹⁹⁶ and has been used to interpret rights in most domestic jurisdictions.¹¹⁹⁷ It provides a solid foundation for broadening protection of linguistic minorities in all African states.

Secondly, courts are likely going to declare the ACHPR a self-executing treaty.¹¹⁹⁸ For instance, in the Zimbabwean case of *Kachingwe v Minister of Home Affairs (NO)*,¹¹⁹⁹ even though the

¹¹⁹⁴ Inspired by the mandate of the Independent Expert on minority issues in the Office of the United Nations Office of the High Commissioner for Human Rights.

¹¹⁹⁵ This approach was adopted by the European Court of Human Rights in the cases of *Selmouni v France* (2000) 29 EHRR 403, para 101; *Stafford v UK* (2002) 35 EHRR 32.

¹¹⁹⁶ South Sudan is yet to ratify the ACHPR.

¹¹⁹⁷ The ACHPR was used to interpret rights in *Opeyemi Bamidele v Williams and another* Unreported, Suit No. 13/ 6m/ 89, (Benin Division), *Rono v Rono* (2005) LLR 4242 (CAK) pg 6-7, *Longwe v International Hotels* [1993] 4 LRC 221, *NPP v Inspector-General of Police Ghana and Others* No. 4/ 93 delivered on (30/11/93) *AG Botswana v. Dow* (1998) HRLRA I.

¹¹⁹⁸ *Sale V Haitian Centers Council Inc* (1993) 509 U.S. 155 defined a self-executing treaty as 'an international agreement...that directly accords enforceable rights to persons without the benefit of Congressional implementation.' It is one which of its own force furnishes a rule of municipal law for the guidance of domestic Courts in deciding cases

Supreme Court did not decide on whether the ACHPR is self executing, it conceded with the argument that the ACHPR is part of the domestic law because it did not impose fiscal obligations on Zimbabwe.¹²⁰⁰ Courts in dualist common law jurisdictions are likely to use the Bangalore principles to declare the ACHPR a self-executing treaty. Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms states that:

It is within the proper nature of the judicial process and well-established functions for national courts to have regard to international obligations which a country undertakes- whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or the common law.

This approach was used in the Kenyan case of *Rono v Rono*¹²⁰¹ where the Court relied on Principle 7 of the Bangalore Principles. Again, the Nigerian Federal High Court case of *Punch Nigeria Limited & Anor v AG and Others*¹²⁰² where the court relied on the domestication of the ACHPR in Nigeria¹²⁰³ as well as the Bangalore Principles to secure the rights of journalists during national states of emergency.

Declaring the ACHPR self-executing enables minority language speakers to secure their rights through national courts and demand (through advocacy and litigation) the setting up of national structures that ensure the protection of minority languages. The liberal approach therefore potentially provides protection of minority languages.

However, even though the progressive interpretation approach is robust and progressive, it has a number of weaknesses. First, the outcome of this approach is not predictable in that it makes the protection of minority languages dependent on the philosophical outlook and epistemology

involving the rights of individuals. Such a treaty operates directly and immediately within the domestic legal system and should be enforceable through judicial remedies.

¹¹⁹⁹ SC - 145/04.

¹²⁰⁰ Of course *Mike Campbell (Pvt) Ltd and Others v Zimbabwe* SADC (T) Case No. 02/2007 and *Mike Campbell (Pvt) Ltd and Another v Zimbabwe* SADC (T) Case No. 03/2009 indeed shows that the ACHPR imposes fiscal obligations on the state.

¹²⁰¹ *Rono v Rono* (2005) *African Human Rights Law Report* (AHRLR) 107 (KeCA 2005).

¹²⁰² *Nigeria Limited & Anor v AG and Ors* Nigeria F.H.C. July 29, 1994.

¹²⁰³ *Nigeria: Abacha and Others v Fawehinmi* (2001) AHRLR 172 (NgSC 2000) makes it clear that the ACHPR was domesticated in Nigeria by African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990.

of knowledge of the Commissioners in the African Commission or the Judges of the African Court. Progressive Commissioners or Judges can use it to protect minority languages and conservative commissioners can use it to promote language assimilation.

Second, the progressive interpretation approach presupposes the existence of a clear source of guidance on the normative content of language right at the global level. Yet Chapter 2 reveals that the normative content of minority language rights at the UN and European human rights systems level is contestable and open to different interpretations. This limits the effectiveness of the liberal approach in protecting minority languages.

Third, states may choose to ignore the recommendations made by the African Commission because they lack clear binding force. Fourth, the progressive interpretation approach depends heavily on the initiative of litigants and their vigilance to litigate at the African Court levels in countries that have ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights. For minority language speaker whose states have not ratified the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights, there is no access to the African Court to litigate on minority language rights. Fifth, state parties that have ratified the Protocol to the African Charter on Human and Peoples' Rights may not implement the decisions passed by the African Court. This may make it difficult for minority language rights to be protected and fulfilled.

6.2.3.1.2 The standard-setting approach

This approach entails the drafting of a specific treaty setting out new standards for the protection of minority languages and linguistic minorities. The treaty can be in the form of an African Languages Charter couched along the lines of the European Charter for Regional or Minority Languages or a Protocol to the African Charter on Human and Peoples' Rights on Minority Language Rights in Africa. The treaty would aim to fill the gap created by the normative deficiencies identified above. It clarifies the actual content of minority language rights in Africa that the progressive interpretation approach may not be able to do. The treaty will be binding on all states that ratify it.

The difference between the choice of a stand alone Charter and a protocol will lie in the supervisory body to the treaty. For a self-standing Charter, the supervisory body will be a new African Language Rights Committee that will be established in terms of the treaty. The Committee would comprise of language rights experts drawn from state parties. Its mandate would cover promoting language rights in Africa, examination of state reports, receiving individual and inter-state communications and undertaking fact finding missions. The Committee would likely be facing the challenge of lack of resources to fund its operations,¹²⁰⁴ delay in buy in from state parties and difficulty in constituting the Committee like what happened with the African Children's Rights Committee.¹²⁰⁵ The resultant effect may be a delay in the implementation of the treaty.

To overcome these challenges, the African Union could adopt a Protocol whose supervisory body will be the existing African Commission. The protocol can extend the existing mandate of the African Commission to cover minority language rights. Such an approach is not expensive in that instead of establishing a new treaty body the Protocol could use the existing African Commission's mandate to supervise the protection of minority language rights. The African Commission could appoint a special rapporteur on Language rights in Africa and a Working Group on Language Rights to assist it in the execution of its mandate to enhance the protection of minority languages and linguistic minorities in Africa.

The recommendations made in the preceding discussion have been incorporated into the proposed Protocol to the African Charter on Human and Peoples' Rights on Minority Language Rights in Africa below.

6.3 The Proposed Protocol to the African Charter on Human and Peoples' Rights on Minority Language Rights in Africa

Explanatory Notes

The following four features are distinct in the Protocol:

¹²⁰⁴ The financial challenges can be gleaned from the one member secretariat that administers the African Children's Rights Committee.

¹²⁰⁵ F Viljoen (n 235 above) 397-398.

a. Values and principles

The Protocol should be based on the values of multilingualism and ethnolinguistic democracy as well as the principles of substantive equality and preservation of linguistic identity.

b. Language rights

Chapter three has identified minority language rights that can be implied from the individual and group rights that currently exist in the ACHPR. These rights have been grouped under the two-pillar system for the effective protection of minority languages and linguistic minorities.

The first pillar comprises of individual human rights from where minority language rights norms can be inferred. The rights include the rights to equality, non-discrimination on the basis of language, freedom of expression, fair trial, culture, education, participation and fair ensure that linguistic minorities are placed on a substantially equal footing with other nationals of the state.

The second pillar comprises of minority specific rights aimed at preserving the identity of linguistic minorities. These rights include prevention of assimilation of linguistic minorities, right to identity and the right to use minority languages in public and in private. The content of these rights as interpreted by UN, European and African human rights systems' supervisory bodies could be incorporated in the Protocol to the African Charter on Human and Peoples' Rights on Minority Language Rights in Africa.

Minority language rights are in some instances presented as individual and sometimes collective when they belong to members of a linguistic minority group. The Protocol is alive to the fact that where linguistic minorities are concentrated in a specific region, minority language rights will assume a territorial flair. The protocol will also provide for possibilities of states to apply the sliding scale approach when administering territorial minority language rights.

The Protocol acknowledges that minority language rights are not absolute but can be limited where there is a reasonable and justifiable limitation. The Protocol uses the proportionality principle as gleaned from the jurisprudence of the UN, European and African human rights system as well as the SA and ZIM constitutions.

Interestingly, the Protocol acknowledges the application of the margin of appreciation doctrine but highlights that the application of the margin of appreciation doctrine does not preclude the African Commission from making an inquiry on whether or not the limitation is justifiable.

c. Supervisory body

The Protocol identifies the African Commission as the supervisory body and extends the mandate of the African Commission to protect minority language rights and linguistic minorities.

d. Ratification

The Protocol stipulates that it will come into effect if 5 member states have ratified it. This approach follows the one adopted by the European Charter for Regional or Minority Languages that require 5 ratifications in order for the treaty to come into force. Considering the level of discrimination of linguistic minorities in Africa identified in Chapters 1 and 3 above, a threshold of 5 ratifications ensures that the Protocol is likely into force sooner than the Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the African Charter on the Rights and Welfare of the Child that required 15 ratifications.

Preamble¹²⁰⁶

The State Parties to this Protocol,

CONSIDERING that article 66 of the African Charter on Human and Peoples' Rights provides for special protocols or agreements, if necessary, to supplement the provisions of the ACHPR;

CONSIDERING that articles 2, 3 and 19 of the African Charter on Human and Peoples' Rights enshrines the principle of non-discrimination of an individual or a people group on the basis of language;

¹²⁰⁶ This Preamble is largely inspired by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the European Charter for Regional or Minority Languages, the UN Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities the Constitutive Act of the African Union, the Cultural Charter for Africa and the Charter for African Cultural Renaissance.

NOTING that articles 60 and 61 of the African Charter on Human and Peoples' Rights recognise international and regional human rights instruments and African practices consistent with international norms on human and peoples' rights as being important reference points for the application and interpretation of the ACHPR;

RECALLING that minority language rights have been recognised and guaranteed in most international human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, social and Cultural Rights, Convention on the Rights of the Child and all other international and regional conventions and covenants relating to minority language rights as being inalienable, interdependent and indivisible human rights;

AWARE that Africa's colonial history has seen the marginalisation of minority languages and discrimination against linguistic minorities;

RECOGNISING the worth of all languages as carriers of ecological information,¹²⁰⁷ a medium of communication,¹²⁰⁸ a mirror of cultural identity,¹²⁰⁹ a source of power, social mobility and opportunities,¹²¹⁰ conveyors of instruction and prerequisites for effective participation.

COGNISANT of the richness of the linguistic diversity in Africa and its potential as a resource for all types of development and that the optimal use of African languages is a prerequisite for maximizing African creativity and resourcefulness in development activities;

CONSIDERING that, in order to ensure peaceful coexistence between language communities, overall principles must be found so as to guarantee the promotion, protection and respect of all languages and their social use in public and in private;

¹²⁰⁷ Inspired by D Keebe 'Language policy and linguistic theory' in J Marais & M Morris (eds) *Languages in a globalising world* (2003) 47-58 and D Nettle & S Romaine 'Vanishing voices: The extinction of the world's languages' (2000) 5; D Crystal *Language death* (2000).

¹²⁰⁸ Inspired by Dr B.S Ngubane in the South African national policy framework, 12 February 2003 3.

¹²⁰⁹ Inspired by I Mumpande *Silent voices: Indigenous languages in Zimbabwe* (2006) 1.

¹²¹⁰ Inspired by JD Williams and GC Snipper *Literacy and bilingualism*, (1990).

CONCERNED that despite the ratification of the African Charter on Human and Peoples' rights and other human rights instruments by the majority of State Parties, linguistic minorities still continue to be victims of discrimination;

GUIDED by the ideal that multilingualism is good and helps unify nations within African continents and that substantive equality and preservation of linguistic identity are bedrocks for the effective protection of minority language rights;

INSPIRED by the conviction that an African Language Charter is required in order to correct linguistic imbalances with a view to ensuring the respect and full development of all languages and establishing the principles for a just and equitable linguistic peace throughout Africa as a key factor in the maintenance of harmonious social relations;

REALISING THAT Africa now needs to create a legal framework for linguistic diversity that will embody the normative content of language rights in Africa from which African states can promulgate language legislation and create language policies;

DETERMINED to ensure that minority language rights are promoted, realised and protected in order to enable linguistic minorities to enjoy fully all their rights;

HAVE AGREED AS FOLLOWS:

Part 1 – General Provisions

Article 1 - Definitions¹²¹¹

For purposes of the present Protocol:

- a. *Discrimination on the basis of language* means any distinction, exclusion, restriction or preference which is based on language and which has the purpose or effect of nullifying

¹²¹¹ This section is couched from an analysis of Section 27 of the International Covenant on Civil and Political Rights as read with paragraphs 5.1 and 5.2 of the United Nations Human Rights Committee General Comment No. 23. Also the Kenyan High Court in *IL Chamus v The Attorney General and Others* MISC Civil Application N0. 305/2004, article 1 of the European Charter for Regional or Minority Languages. United Nations Special Rapporteur Francesco Capotorti's definition of minority.

or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

- b. *Language community* refers to any human society established historically in a particular territorial space, whether this space be recognized or not, which identifies itself as a people and has developed a common language as a natural means of communication and cultural cohesion among its members.
- c. *Language group* refers to any group of persons sharing the same language which is established in the territorial space of another language community but which does not possess historical antecedents equivalent to those of that community. Examples of such groups are immigrants, refugees, deported persons and members of diasporas.
- d. *Language specific to a territory* refers to the language of the community historically established in such a space.
- e. This Protocol considers nomad peoples within their areas of migration and peoples established in geographically dispersed locations as language communities in their own historical territory.
- f. *A minority language* is a language (including sign language) that has limited or no use in the public or official or government domain. Its speakers are a politically, economically and socially non-dominant distinct linguistic population group within a nation and they show a collective will and mutual solidarity focused on preserving their language
- g. A minority language does not need to be defined for it to enjoy the rights contained in the Charter.
- h. A minority language is one that has the following characteristics: a) its speakers must have a stable linguistic characteristic that differ sharply from those of the rest of the population; b) its speakers must be politically, economically and socially non-dominant; c) its speakers must have a collective will to survive and maintain these distinct linguistic characteristics and d) the language must have limited use in the public or government domain.

- i. Member State refers to the African state that will ratify this Protocol. They are also referred to as State Parties in this Protocol.

Article 2 – Existing regimes of protection

- a. Nothing in this Protocol shall be construed as limiting or derogating from any of the rights guaranteed by the African Charter on Human and Peoples' Rights or any other African treaty.
- b. The provisions of this Protocol shall not affect any more favourable provisions concerning the status of languages, or the legal regime of persons belonging to minorities that may exist in a State Party that ratifies this Protocol or are provided for by relevant bilateral or multilateral international agreements.

Article 3 – Existing obligations

Nothing in this Protocol may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under international law, including the principle of the sovereignty and territorial integrity of Member States.

Article 4 – Information

Member States undertake to see to it that the authorities, organisations and persons concerned are informed of the rights and duties established by this Protocol.

Part II

Objectives and Principles

Article 5 – Objectives

The objectives of this Protocol are as follows:

- a) To establish the normative content of language rights in Africa that will enable African states to promulgate language legislation, develop language policies and create implementing mechanisms for the promotion, protection and fulfilment of language rights;
- b) To promote multilingualism in Africa;
- c) To promote freedom of linguistic expression and cultural democracy.
- d) To ensure redress for the previously marginalised African languages and their speakers;
- e) To preserve and promote the African linguistic heritage through preservation, restoration and rehabilitation;
- f) To combat and eliminate all forms of alienation, exclusion and linguistic oppression everywhere in Africa;
- g) To integrate linguistic objectives in development strategies;
- h) To strengthen the role of language in promoting peace and good governance;
- i) To provide African peoples with the resources to enable them to cope with globalization
- j) To promote the use of African languages in education, media, justice, business, politics, and civil service.
- k) To encourage the learning of the mother tongue in order to promote national unity, and linguistic and cultural diversity as far as practically possible; and
- l) To promote good language management within State Parties.

Article 6 – Principles

In order to fulfil the objectives set out in Article 5, the Member States solemnly subscribe to the following principles:

- a) Respect of language rights as fundamental to the process of nationalism;
- b) Substantive equality aimed at placing linguistic minorities at substantially the same footing as the rest of the population within a state;
- c) Effective integration linguistic minorities that allows them to preserve their linguistic identity;
- d) The recognition of all languages as an expression of cultural wealth;
- e) The development of all languages as mediums of speech, writing and learning;
- f) Respect for national and regional identities in the area of culture as well as the language rights of minorities;
- g) Strengthening the role of science and technology, including endogenous systems of knowledge, in the life of the African peoples by progressively incorporating the use of African languages;
- h) A commitment to the promotion of language equity and language rights as required by a democratic dispensation;
- i) Recognising that languages are resources to maximise knowledge, expertise and full participation in the political and socio-economic domains;
- j) Working in collaborative partnerships to promote multilingualism;
- k) Preventing the use of any language for the purposes of exploitation, domination and discrimination;

- l) Enhancing people-centeredness in addressing the interests, needs and aspirations of a wide range of language communities through ongoing dialogue and debate.
- m) Linguistic diversity and multilingualism is a world heritage that must be valued and protected.¹²¹²
- n) Every linguistic community has the right for its language to be used in its territory.
- o) School instruction must contribute to the prestige of the language spoken by the linguistic community of the territory.
- p) It is desirable for citizens to have a general knowledge of various languages, because it favours empathy and intellectual openness, and contributes to a deeper knowledge of one's own tongue.
- q) The media is a privileged loudspeaker for making linguistic diversity work and for competently and rigorously increasing its prestige. As such, majority and minority languages should be promoted by the media.
- r) The right to use and protect one's own language in private and in public is recognised by the African Union.
- s) All languages are the expression of a collective identity and of a distinct way of perceiving and describing reality and must therefore be able to enjoy the conditions required for their development in all functions.
- t) All languages are collectively constituted and are made available within a community for individual use as tools of cohesion, identification, communication and creative expression.

Part III

Equality of languages¹²¹³

¹²¹² Inspired by the the Girona Manifesto on Linguistic Rights.

Article 7

- a) Any African language and its dialects shall enjoy the protection of this Protocol and national laws in state parties.
- b) Despite their political strength, all languages are equal in worth. They deserve respect, careful study, development and the same level of legal protection.
- c) All language speakers – majority and minority – should have access to a legal system that protects their languages.
- d) Every language is capable of being a vehicle for complicated human interaction and complex thought, and can be the basis for a complex culture and civilization.
- e) All languages are worthy of preservation in written form by means of grammars, dictionaries, and written texts. This should be done as part of the heritage of the human race.
- f) Every language group in Africa deserves to see its language in print and to have some literature written in it depending on the number of its speakers and the availability of resources.

Part IV

Language rights¹²¹⁴

Article 8 – Universality of language rights

Language rights are individual rights and are *indivisible, universal, independent and interrelated*

¹²¹³ This section is couched from the Linguistic Creed by Benjamin F. Elson, September 1987 taken from http://www.sil.org/sil/linguistic_creed.htm (accessed 23 June 2012).

¹²¹⁴ These have been couched from the normative content established in chapter 2. Inspiration was also derived from the Universal Declaration of Linguistic Rights adopted at the World Conference on Linguistic Rights in Barcelona, Spain on 9 June 1996

Article 9 – The right to language use

- a) Every language speaker, majority and minority – official or non-official – has a right to use their language in speech and writing in family, correspondence, communication, education, media, courts, business, politics, religion, government and civil society.
- b) In those States in which linguistic minorities exist, persons belonging to such minorities shall have the right to use their own language amongst themselves in public and in private.
- c) The state's discretion to accord official language status to any language shall be exercised using international law principles and shall not be used to deny other language speakers the right to use their non-official languages.
- d) In States where minority languages are spoken in specific areas, the minority language speakers have a right to use their language as an official language and to access public services in that area depending on the number of language speakers, their territorial concentration, state resources and the nature of the service.
- e) The rights contained in this article shall be exercised reasonably and with due regard for the rights and freedoms of other persons.

Article 10

The right not to be discriminated against on the basis of language

- a) All language communities shall, as far as is reasonably practicable, be treated equitably despite the national categorisation as official, regional or minority.
- b) All majority and minority language speakers are equal before the law and shall have the right to equal protection and benefit of the law.
- c) No one shall be discriminated against on the basis of language whether it be based on their degree of political sovereignty, their situation defined in social, economic or other

terms, the extent to which their languages have been codified, updated or modernized, or on any other criterion.

- d) A person is deemed to be treated in a discriminatory manner for the purposes of (c) if –
 - i. they are unreasonably subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or
 - ii. other people are unjustifiably accorded directly or indirectly a privilege or advantage which they are not accorded.
- e) Member states must take reasonable legislative and other positive measures to promote the achievement of equality and to redress, protect or advance linguistic minorities who have been historically disadvantaged by discrimination on the basis of language and such state measures shall not be regarded as unfair.
- f) Every minority language group has a right not to be assimilated into the dominant language group(s).
- g) Every language group has a right to the continued survival and transmission of their language.

Article 11 – The right to linguistic identity

- a) Everyone has a right to be identified by their mother tongue;
- b) Everyone has a right to a name and surname in any language of their choice in all spheres of life;
- c) In countries where people are historically identified by the languages they speak, such persons may be entitled to citizenship on the basis of language;
- d) Linguistic minorities shall have the right freely to express, preserve and develop their linguistic identity, as far as reasonably practicable to study and to be taught in their mother tongue, as well as unite in organizations and societies for the protection of their interests and identity;

- e) All language communities have the right to preserve and use their own system of proper names in all spheres and on all occasions;
- f) All language communities have the right to use place names in the language specific to the territory, both orally and in writing, in the private, public and official spheres;
- g) All language communities have the right to establish, preserve and revise autochthonous place names. Such place names cannot be arbitrarily abolished, distorted or adapted, nor can they be replaced if changes in the political situation, or changes of any other type, occur;
- h) All language communities have the right to refer to themselves by the name used in their own language. Any translation into other languages must avoid ambiguous or pejorative denominations.
- i) In areas inhabited by significant numbers of persons belonging to a national minority and when there is sufficient demand, public authorities shall make provision for the display, also in the minority language, of local names, street names and other topographical indications intended for the public.

Article 12 – The right to freedom of linguistic expression

- a) Every person is free to express themselves in any language of their choice. In other words, everyone has a right to linguistic expression.
- b) As far as is reasonably practicable, everyone has a right to access, seek, receive and impart public information in a language that they speak.
- c) All language communities are reasonably entitled to have at their disposal whatever means of translation into and from other languages are needed to guarantee the exercise of the rights contained in this Charter

Article 13 – The right to language development

- a) Every language speaker and community has the right to maintain and develop their own language without the interference from the state;
- b) All language communities have the right to organize and manage their own resources so as to ensure the use of their language in all functions within society.
- c) All language communities are entitled to have at their disposal whatever means are necessary to ensure the transmission and continuity of their language.
- d) All language communities have the right to codify, standardize, preserve, develop and promote their linguistic system, without induced or forced interference.
- e) Member states shall, as far as reasonably practicable, assist language speakers – especially minority languages speakers that have suffered a history of discrimination – to realise the rights contained in this article.

Article 14 – Language rights in courts

- a) Every person who is charged with a criminal offence has the right to:
 - i) be informed in detail as soon as reasonably practicable, in a language that he or she understands, of the nature of the offence charged.
 - ii) be assisted by an interpreter at the state's expense;
 - iii) be tried in a language they understand;
 - iv) access court records in a language they understand.

Article 15 – Language rights in education

- a) As far state resources will permit, every citizen has a right to be progressively taught in the mother tongue in primary and secondary education especially in areas where their language is mainly spoken;
- b) The state should, where practicable, make progressively available and accessible mother-tongues education of children of migrant workers concurrently with education in an official language(s);
- c) Minority language speakers have a right to establish their own educational facilities that promote their languages and the member states should not interfere with this right;
- d) All language communities have the right to reasonably participate in decisions relating to the extent to which their language is to be present, as a vehicular language and as an object of study, at all levels of education within their territory: preschool, primary, secondary, technical and vocational, university, and adult education.
- e) All language communities are entitled – depending on the availability of resources – to have at their disposal substantial human and material resources necessary to ensure that their language is present to the extent they desire at all levels of education within their territory: properly trained teachers, appropriate teaching methods, text books, finance, buildings and equipment, traditional and innovative technology.
- f) All language communities are reasonably entitled to an education which will enable their members to acquire a full command of their own language, including the different abilities relating to all the usual spheres of use, as well as the most extensive possible command of any other language they may wish to know.
- g) All language communities are reasonably entitled to an education which will enable their members to acquire knowledge of any languages related to their own cultural tradition, such as literary or sacred languages which were formerly habitual languages of the community.
- h) All language communities are reasonably entitled to an education which will enable their members to acquire a thorough knowledge of their cultural heritage (history, geography,

literature, and other manifestations of their own culture), as well as the most extensive possible knowledge of any other culture they may wish to know. This right does not exclude the right to acquire oral and written knowledge of any language which may be of use to him/her as an instrument of communication with other language communities.

Article 16 – Language rights in media

- a) Every language community has the right to an equitable presence of their language in the communications media;
- b) All language communities have the right to receive, through the communications media, a thorough knowledge of their cultural heritage (history, geography, literature and other manifestations of their own culture), as well as the greatest possible amount of information about any other culture their members may wish to know.
- c) Everyone has a right to operate private broadcasting – at their own expense – in a language of his or her choice. State regulation of the broadcast media shall be based on objective and non- discriminatory criteria and shall not be used to restrict enjoyment of minority rights.
- d) All language communities have the right to reasonably participate in deciding the extent to which their language is to be present in the communications media in their territory, whether local and traditional media, those with a wider scope, or those using more advanced technology, regardless of the method of dissemination or transmission employed.
- e) As far as reasonably practicable, all language communities are entitled to have at their disposal substantial human and material resources required in order to ensure the desired degree of presence of their language and the desired degree of cultural self-expression in the communications media in their territory: properly trained personnel, finance, buildings and equipment, traditional and innovative technology.
- f) Every language community is entitled – depending with the availability of resources – to an equitable representation of their language in the communications media of the

territory where they are established or where they migrate. This right is to be exercised in harmony with the rights of the other language groups or communities in the territory.

- g) Language speakers should have access to broadcast time in their own language on publicly funded media. At national, regional and local levels the amount and quality of time allocated to broadcasting in the language of a given minority should be commensurate with the numerical size and concentration of the national minority and appropriate to its situation and needs.
- h) In the field of information technology, depending on the availability of resources and without undue restriction – all language communities are entitled to have at their disposal equipment adapted to their linguistic system and tools and products in their language, so as to derive full advantage from the potential offered by such technologies for self-expression, education, communication, publication, translation and information processing and the dissemination of culture in general.

Article 17 – Language rights in culture

- a) All language communities have the right to use, maintain and foster their language in all forms of cultural expression.
- b) All language communities must be able to exercise this right to the full without any community's space being subjected to hegemonic occupation by a foreign culture.
- c) All language communities have the right to full development within their own cultural sphere.
- d) All language communities are entitled to access to the works produced in their language.
- e) All language communities are entitled to access to intercultural programmes, through the dissemination of adequate information, and to support for activities such as teaching the language to foreigners, translation, dubbing, post-synchronization and subtitling.

- f) All language communities have the right for the language specific to the territory to occupy a preeminent position in cultural events and services (libraries, videothèques, cinemas, theatres, museums, archives, folklore, cultural industries, and all other manifestations of cultural life).
- g) All language communities have the right to preserve their linguistic and cultural heritage, including its material manifestations, such as collections of documents, works of art and architecture, historic buildings and inscriptions in their own language.

Article 18 – Language rights in business

- a) Every person has the right to use their minority language at work.
- b) All language communities have the right to establish the use of their language in all socio economic activities within their territory.
- c) Within the territory of his/her language community, everyone has the right to use his/her own language with full legal validity in economic transactions of all types, such as the sale and purchase of goods and services, banking, insurance, job contracts and others.
- d) No clause in such private acts can exclude or restrict the use of the language specific to the territory.
- e) Within the territory of his/her language community, everyone has the right to use his/her own language in all types of socioeconomic organizations such as labour and union organizations, and employers', professional, trade and craft associations.
- f) All language communities have the right for their language to occupy a pre-eminent place in advertising, signs, external signposting, and in the image of the country as a whole.
- g) Within the territory of his/her language community, everyone has the right to receive full oral and written information in his/her own language on the products and services

proposed by commercial establishments, such as instructions for use, labels, lists of ingredients, advertising, guarantees and others

- h) All public indications affecting the safety of persons must be expressed at least in the language specific to the territory, in conditions which are not inferior to those of any other language.
- i) Everyone has the right to carry out his/her professional activities in the language specifically recognized as official in the territory unless the functions inherent to the job require the use of other languages, as in the case of language teachers, translators or tourist guides.
- j) All persons, including linguistic minorities, have the right to operate private enterprises in the language or languages of their choice. The State may require the additional use of the official language or languages of the State only where a legitimate public interest can be demonstrated, such as interests relating to the protection of workers or consumers, or in dealings between the enterprise and governmental authorities.

Article 19 – Language rights in public entities

- a) In localities where at least half of the permanent residents belong to an ethnic minority, all persons shall have the right to receive answers from state and local government authorities and their officials in the language of that ethnic minority.
- b) All language communities are entitled to the progressive official use of their language within their territory.
- c) All language communities progressively [depending on the availability of resources] have the right for legal and administrative acts, public and private documents and records in public registers which are drawn up in the language of the territory to be valid and effective and no one can allege ignorance of this language.
- d) All language communities are progressively entitled to have at their disposal and to obtain in their own language all official documents pertaining to relations which affect the

territory to which the language is specific, whether such documents are in printed, machine-readable or any other form.

- e) Forms and standard administrative documents, whether in printed, machine-readable or any other form, must progressively be made available and placed at the disposal of the public in all territorial languages by the public authorities through the services which cover the territories to which each language is specific.
- f) All language communities progressively have the right for laws and other legal provisions that concern them to be published in the language specific to the territory.

Article 20 – Limitation of language rights

- a) The language rights set out in this Protocol must be exercised reasonably and with due regard for the rights and freedoms of other persons.
- b) The language rights set out in this Protocol may be limited when it is necessary to preserve the interests of defence, public safety, public order, public morality, public health or general public interest.
- c) The language rights set out in this Protocol may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on inclusive diversity, human dignity, equality, freedom and justice, taking into account all relevant factors, including –
 - i. the nature of the right or freedom concerned;
 - ii. the purpose of the limitation
 - iii. the nature and extent of the limitation;
 - iv. the relationship between the limitation and its purpose and
 - v. the existence of less restrictive means to achieve the purpose.
- d) The application of the doctrine of the margin of appreciation shall not preclude an inquiry on the reasonableness and justification of the limitation of rights contained in this Protocol.

Part V
Duties of all language speakers¹²¹⁵

Article 21

Every language speaker [majority and minority] has the following duties towards their family, society, state, other legally recognized communities and the international community:

- a) To exercise their rights and freedoms with due regard to the rights of others, collective security, morality and common interest;
- b) To ensure the survival of their language;
- c) To transmit their languages to future generations;
- d) To respect the language rights of others;
- e) To preserve and strengthen social and national solidarity;
- f) To preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
- g) To preserve and strengthen the independence and the integrity of his country;
- h) To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity.
- i) To respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

¹²¹⁵ The issue of duties or obligations is not new to the African Human Rights Systems and the African culture. Articles 27-29 of the African Charter on Human and Peoples' Rights as well as article 31 of the African Charter on the Rights and Welfare of the Child provide for these duties. Hence the inclusion of these duties.

- j) Not to compromise the security of the State whose national or resident he is;

Part VI
State Obligations¹²¹⁶

Article 22

Member States agree to do the following:

- a) In bilingual African states, the State shall guarantee the promotion of multilingualism throughout the country in a bid to promote, protect and fulfill majority and minority language rights.
- b) State Parties shall progressively ensure that education is available, accessible, acceptable and adaptable in both majority and minority languages.
- c) Member States shall reasonably provide broadcasting in majority and minority languages.
- d) Member States shall put in place affirmative action programs designed to ensure that minorities language groups develop and use their languages.
- e) State Parties shall promote the creation of conditions for learning and developing sign language.
- f) State Parties shall promote the learning of minority languages;
- g) In Countries where there is the historically diminished use and status of the minority languages, the states must take practical and positive measures to elevate the status and advance the use of those languages.

¹²¹⁶ Inspiration was derived from the European Language Charter.

- h) Municipalities must take into account the language usage and preferences of their residents in determining which language to use as an official language.
- i) State Parties should establish independent national language institutions with specific duties to regulate and monitor the implementation of official and minority language rights. The independent national language institutions must promote and create conditions for the development and use of all official and minority languages.
- j) The independent national language institutions shall have the power, as regulated by national legislation, to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.
- k) The composition of the independent national language institutions must be broadly representative of the majority and minority linguistic communities in each state.
- l) State Parties shall ensure that at least half the languages spoken in that country are accorded official language status.
- m) In countries where there is one language of record, the Member States shall ensure that:
 - i) within 10 years of ratifying this Protocol, other official languages are developed to become languages of record concurrently with the language of record
 - ii) Within 30 years of ratifying this Protocol, other minority languages are developed to become languages of record concurrently with the language of record in the areas where the minority language is predominantly spoken.
- n) State Parties shall ensure that their constitutions and laws are accessible to both majority and minority language speakers as follows:
 - i) For constitutions, within 10 years of the ratification of this Protocol.
 - ii) For other acts of parliament, within 25 years of ratification of this Protocol.

- o) Member States should guarantee in their constitutions, the free development, use and protection of majority and minority languages.
- p) All State institutions and agencies at every level must ensure that all the official and minority languages are treated equitably.
- q) State Parties must take positive measures to promote and advance the use of all languages spoken in their country, including sign language, and must create conditions for the development of these languages.
- r) Member States shall develop minority languages with a view of ensuring cultural advancement and accelerating economic and social development.
- s) State Parties should progressively introduce minority languages at all levels of education. The introduction of minority languages at all levels of education should have to go hand-in-hand with literacy work among the people at large.
- t) State Parties shall recognize the rights of young people from linguistic marginalized groups or youth of indigenous origin, to use their own language in community with other members of their group.
- u) State Parties shall harness the creativity of youth to promote local cultural values and traditions by representing them in a format acceptable to youth and in a language and in forms to which youth are able to relate.
- v) State Parties shall promulgate legislation that ensures that whenever national courts are interpreting language rights issues, courts shall draw inspiration from international law particularly conventions and jurisprudence in the United Nations, European and African human rights systems.
- w) State Parties must take all appropriate steps to implement the rights proclaimed in this Protocol within their respective areas of jurisdiction. More specifically, State Parties should source international funds to foster the exercise of linguistic rights in communities which are demonstrably lacking in resources. Thus Member States must provide the

necessary support so that the languages of the various communities may be codified, transcribed, taught, and used in the administration.

- x) Member States must ensure that the official bodies, organizations and persons concerned are informed of the rights and correlative duties arising from this Protocol.
- y) Member States must establish, in the light of existing legislation, the sanctions to be applied in cases of violation of the linguistic rights laid down in this Protocol.
- z) Member States who have more than one territorially historic language within their jurisdiction must publish all laws and other legal provisions of a general nature in each of these languages, whether or not their speakers understand other languages.
- aa) State Parties shall train language practitioners in the various professions and produce teaching and learning resources including those required for second-language teaching/learning;
- bb) State Parties shall develop language databases and/or language banks at national and regional levels, as well as create channels for exchange of information and expertise on language matters;
- cc) State parties shall establish a central language planning service or institute to serve as a formal body charged with the responsibility for language issues such as translation services and compilation of terminologies;
- dd) State Parties shall give economic and other practical forms of value to the languages by specifying language requirements for specific domains such as education, training, employment, and citizenship.
- ee) State Parties shall develop inter-university exchanges and African Studies in all the African universities – moving towards an open African university that promotes African languages.

- ff) State Parties shall apportion resources from its national budget and other international, inter-African and national co-operations to ensure that that language rights contained herein are promoted, protected and fulfilled.
- gg) State Parties shall – within 5 years of ratifying this Protocol – develop and put in place a national language policy that ensures that language rights enshrined herein are progressively promoted, protected and fulfilled.
- hh) State parties shall undertake to provide for appropriate remedies to any member of a linguist minority group whose rights and freedoms have been violated.
- ii) State parties shall ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the law.

Chapter VII

Supervision¹²¹⁷

Article 23 – The African Commission on Human and Peoples’ rights

1. This Protocol shall be supervised by the African Commission on Human and Peoples’ Rights using its promotional, state reporting, communications and investigative missions mandates provided for in the African Charter on Human and Peoples’ Right.
2. The African Commission may appoint a Special Rapporteur on Minorities in Africa and a Working Group on Minorities to assist it in the protection of minority languages and linguistic minorities.

Article 24 – Implementation and monitoring

1. State Parties shall ensure the implementation of this Protocol at the national level, and in their periodic reports submitted in accordance with Article 62 of the African Charter on Human and

¹²¹⁷ Inspired by the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in africa.

Peoples' Rights, indicating the legislative and other measures undertaken for the full realisation of the minority language rights provided for in this Protocol.

2. State Parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the minority language rights provided for in this Protocol.

Article 25 – Interpretation

The African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol.

Part VIII Final Provisions

Article 26 – Signature, ratification and accession

1. This Protocol shall be open for signature, ratification and accession by State parties, in accordance with their respective constitutional procedures.
2. The instruments of ratification or accession shall be deposited with the Chairperson of the Commission of the African Union.

Article 27 – Entry into force

1. This Protocol shall enter into force immediately after the deposit of the fifth (5) instrument of ratification.
2. For each State Party that accedes to this Protocol after its coming into force, the Protocol shall come into force on the date of deposit of the instrument of accession.
3. The Chairperson of the Commission of the African Union shall notify all Member States of the coming into force of this Protocol.

Article 28 – Amendment and Revision

1. Any State Party may submit proposals for the amendment or revision of this Protocol.
2. Proposals for the amendment or revision shall be submitted, in writing, to the Chairperson of the Commission of the African Union who shall transmit the same to the States parties, in accordance within thirty (30) days of receipt thereof.
3. The Assembly shall examine these proposals within one (1) year following notification of States parties, in accordance with the provisions of paragraph (b) of this article.
4. The Assembly shall adopt amendments or revisions by a consensus, failing which, by a simple majority.
5. Amendments or revisions shall enter into force for each State Party, which has accepted them, thirty (30) days after the Chairperson of the Commission of the African Union has received notice of acceptance.

Article 29 – Status of the Present Protocol

None of the provisions of the present Protocol shall affect more favourable provisions for the realisation of minority language rights contained in the national legislation of State Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these State Parties.

6.4 Final word

The adoption of a Protocol to the African Charter on Human and Peoples' Rights on Minority Language Rights in Africa can be useful in clarifying the normative content of minority language rights in Africa. Such normative clarity could contribute immensely to the human rights framework for the effective protection of minority languages and linguistic minorities in Africa and resolving the normative and implementation deficiencies currently bedevilling Africa. Given that *'[t]he tie of language is... the strongest and most durable that can unite mankind'*¹²¹⁸ - who

¹²¹⁸ Alexis de Tocqueville (n 43 above).

knows? – Perhaps African states could become more stable and more united by the accomodation of inclusive linguistic diversity.

This thesis is not intended to be and cannot be the final word on the human rights protection of minority languages in Africa. On the contrary, it is couched in cautious pragmatism that engenders visibility of and lays a foundation for further studied of minority language rights in Africa. There is room for future further research to be undertaken on the implementation of international minority language rights norms in other African states that are not SA and ZIM. More future research can also be undertaken on the contribution of self-determination to the effective protection of minority languages and linguistic minorities in Africa. Not even the sky will limit possible further studies on the subject.

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2. DISSERTATIONS AND THESES

Unpublished: Chere Mekonnen Mitiku 'The recognition of language rights under international human rights law: analysis of its protection in Ethiopia and Mauritius' unpublished LLM dissertation, 2009

Unpublished: Dersso Ayele Solomon 'Taking ethno-cultural diversity seriously in constitutional design: Towards an adequate framework for addressing the issue of minorities in Africa'
Unpublished PhD thesis, University of the Witwatersrand, 2010

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3. HUMAN RIGHTS INSTRUMENTS AND MATERIALS

African Union

African Charter on Human and Peoples' Rights

African Charter on the Rights and Welfare of the Child

African Youth Charter

Constitutive Act of the African Union

Cultural Charter for Africa

Pretoria Declaration on Economic, Social and Cultural Rights in Africa

Protocol to the ACHPR establishing the African Court on Human and Peoples' Rights

Council of Europe

Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights

Charter of Fundamental Rights of the European Union

European Charter for Regional or Minority Languages

European Convention for the Protection of Human Rights and Fundamental Freedoms

European Convention on the Legal Status of Migrant Workers

Framework Convention for the Protection of National Minorities

Hague Recommendations Regarding the Education Rights of National Minorities

Organisation of American States

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights

American Convention on Human Rights

American Declaration of the Rights and Duties of Man

United Nations

Convention on the Rights of the Child

Declaration on the Human Rights of Individuals who are not Nationals of the Country in Which They Live

Declaration on the Rights of Asian Indigenous Tribal Peoples

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

Draft Declaration on the Rights of Indigenous Peoples.

Draft Recommendation on the Promotion and Use of Multilingualism and Universal Access to Cyberspace

International Court of Justice Statute

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

International Convention on the Rights of Migrant Workers and Members of their Families

International Labour Organisation Conventions 107

International Labour Organisation Convention 169

UNESCO Constitution

UNESCO Convention Against Discrimination in Education

UNESCO Universal Declaration on Cultural Diversity

UNESCO Declaration on Race and Racial Prejudice

United Nations Charter

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United Nations Human Rights Committee General Comment No. 24

Universal Declaration on Cultural Diversity

Universal Declaration of Human Rights

Universal Declaration of Linguistic Rights

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