



Linguistic inequality in South African courtrooms: A Constitutional analysis of Interpretation barriers and access to justice

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ABSTRACT

This paper conducts a rigorous constitutional law analysis of the systemic failure to realise language rights within South African courtrooms, three decades into the democratic dispensation. It posits that the persistent dominance of English and the chronic inadequacy of interpreting services constitute a prima facie breach of the state's positive and immediate obligations under Sections 6, 7(2), 9, 10, 30, 31, and 35(3)(k) of the Constitution of the Republic of South Africa, 1996. Through a doctrinal analysis of pivotal jurisprudence from the Constitutional Court and superior courts, the paper demonstrated how judicial tolerance of substandard interpreting services violates the inviolable right to a fair trial and fundamentally undermines the foundational constitutional value of equitable multilingualism. It argued that this failure represents a form of unconstitutional systemic under-enforcement, which perpetuates colonial-era linguistic hierarchies and denies substantive justice and equal protection under the law to most citizens. By applying core constitutional law principles, including transformative constitutionalism, the doctrine of objective normative value, and the test for reasonableness in fulfilling positive state duties, the paper constructs a normative framework for assessing the state's compliance. The paper contributes to the scholarship by proposing targeted, constitutionally mandated reforms, asserting that the realisation of linguistic justice is a non-negotiable component of the state's duty to respect, protect, promote and fulfil the Bill of Rights, and is essential for the decolonisation and legitimacy of the post-apartheid legal order.

Keywords: Constitutional Law, Language Rights, Section 35(3)(k), Fair Trial, Transformative Constitutionalism, Positive State Obligations, Judicial Remedies.

INTRODUCTION

The South African Constitution is expressly transformative, conceived as an instrument to heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights.¹ Central to this transformative project is the constitutional entrenchment of language

¹ Preamble of the Constitution of the Republic of South Africa, 1996.

rights, a direct response to the apartheid regime's use of language as a tool of oppression and exclusion.² Section 6 recognises eleven official languages, committing the state to advance their equitable use and to take practical measures to elevate the status of historically diminished indigenous languages.³ More critically for the administration of justice, Section 35(3)(k) entrenches, as an indispensable and non-derogable component of the right to a fair trial, the right of every accused person to be tried in a language that the accused understands or, if that is not practicable, to have the proceedings interpreted in that language.⁴ This provision, read within the broader scheme of the Bill of Rights, imposes a positive and immediate obligation on the state to ensure meaningful participation in legal proceedings, irrespective of linguistic competence.

Despite this unambiguous constitutional mandate, a profound and persistent deficit exists between constitutional text and courtroom practice. English retains its hegemony as the de facto language of record, procedure, and legal reasoning, thereby marginalising the vast majority of citizens whose primary linguistic competence lies in indigenous African languages.⁵ This paper argues from a foundational constitutional law standpoint that this discrepancy transcends administrative inefficiency; it constitutes a systemic violation of the Bill of Rights and a failure of the state's core duties under Section 7(2).⁶ The provision of incompetent, inaccessible, or absent courtroom interpretation is framed not merely as a logistical failure but as a substantive denial of access to justice, an infringement of the right to equality before the law, and a violation of human dignity.

The central constitutional questions this paper addresses are threefold. Firstly, how do prevailing language practices in South African courts contravene specific, interrelated provisions of the Bill of Rights, particularly the rights to equality (Section 9), human dignity (Section 10), cultural and linguistic freedom (Sections 30 & 31), and most directly, a fair trial (Section 35)?⁷ Secondly, what is the precise nature and scope of the state's positive obligation to provide competent interpreters, and how has the judiciary, through its jurisprudence, defined and enforced this duty?⁸ Thirdly, given the systemic nature of the failure, what constitutional remedies, including declaratory orders, mandatory interdicts, and structural relief, are appropriate and effective for addressing this entrenched constitutional violation?⁹ By applying established constitutional law doctrines, including the directive of Section 39(2) to promote the spirit, purport, and objects of the Bill of Rights, the concept of objective normative value that infuses all law, and the reasonableness standard developed in socio-economic rights jurisprudence, this study moves beyond a sociolinguistic or policy critique.¹⁰ It provides a rigorous legal analysis of the state's constitutional default, arguing that the judiciary itself bears a responsibility to regulate its processes to align with the supreme law. The analysis demonstrates that the gap between constitutional promise and practice in the realm of language represents a critical test for South Africa's transformative constitutional project.¹¹

THEORETICAL FRAMEWORK

Constitutional Foundations: The Architecture of Language Rights and State Obligations *The Foundational Status of Multilingualism (Section 6)*

² Constitution of the Republic of South Africa, 1996, Preamble; Klare KE 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 150; Currie I & De Waal J *The Bill of Rights Handbook* (2013) 6th ed Cape Town: Juta & Co. at 34.

³ Constitution of the Republic of South Africa, 1996, s 6(2) & (4).

⁴ Constitution of the Republic of South Africa, 1996, s 35(3)(k).

⁵ Statistics South Africa Census 2022: Language. Statistical Release P0301.4 (2023) Pretoria: Stats SA at 15.

⁶ Constitution of the Republic of South Africa, 1996, s 7(2).

⁷ Constitution of the Republic of South Africa, 1996, ss 9, 10, 30, 31, 35.

⁸ *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009) at para 49.

⁹ *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009) at paras 65-70.

¹⁰ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 54; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 41.

¹¹ Currie I & De Waal J *The Bill of Rights Handbook* (2013) 6th ed. Cape Town: Juta & Co. at 105. See also Klare KE 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* at 150-153.

Section 6 of the Constitution is not a mere symbolic or policy directive; it is a founding provision located in Chapter 1 that establishes a normative framework for interpreting the entire constitutional text.¹² In *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, the Constitutional Court underscored the profound significance of this clause, stating it provides a solid foundation for the promotion of multilingualism in our country.¹³ The Court further elaborated that the state is not passive but must take ‘positive measures’ to elevate the status and advance the use of indigenous languages.¹⁴ The judiciary, as a core branch of the state under Section 165 of the Constitution, is therefore unequivocally bound by this imperative.¹⁵ The current, entrenched anglophone dominance in courtrooms, from the language of pleadings and judgments to daily proceedings, directly contravenes the constitutional injunction to treat all official languages on a footing of equitable parity.¹⁶ It represents a failure to enact the ‘positive measures’ required to advance multilingualism in one of the most consequential spheres of public life: the administration of justice.¹⁷ This failure undermines the constitutional project of affirming the identity and dignity of all language communities.¹⁸

The Unqualified Right to a Fair Trial and Interpretation (Section 35(3)(k))

Section 35(3)(k) creates a concrete, justiciable right for an accused person. The Constitutional Court and the Supreme Court of Appeal have consistently affirmed its fundamental nature. In *S v Matomela*, the Supreme Court of Appeal held that this right is ‘fundamental to a fair trial’ and that its infringement strikes at the very heart of justice.¹⁹ A careful textual reading reveals a two-tiered structure: the primary, preferential right is to be tried in a language one fully understands. Interpretation is a secondary, subsidiary right triggered only when the primary right is demonstrably not practicable.²⁰ The pervasive institutional assumption that English is *per se* practicable for all proceedings represents a constitutional misdirection and an abrogation of the state’s duty to first explore the feasibility of conducting trials in an accused’s mother tongue. The provision imposes a positive, immediate obligation on the state to provide competent interpretation services. Unlike certain socio-economic rights, this obligation is not subject to ‘progressive realisation’ within available resources. It is an immediate procedural guarantee essential for the integrity of every criminal trial. The standard required is one of effective communication, ensuring the accused comprehends the case against them and can participate meaningfully in their defence.

Intersectionality with Other Fundamental Rights

The language deficit in courts does not exist in a constitutional vacuum; it violates a constellation of other fundamental rights, creating a compounded injustice. This intersectional approach is vital for a complete constitutional understanding.²¹

Equality (Section 9): The unequal enjoyment of justice based on language proficiency constitutes unfair discrimination on the grounds of culture, language, and birth, which are listed as prohibited grounds in Section 9(3).²² A system that systemically advantages English speakers while disadvantaging

¹² *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) at para 8.

¹³ *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) at para 9.

¹⁴ *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) at para 11.

¹⁵ Currie I & De Waal J *The Bill of Rights Handbook* (2013) 6th ed. Cape Town: Juta & Co at 22.

¹⁶ Constitution of the Republic of South Africa, 1996, s 6(4); See also Statistics South Africa Census 2022: Key Results (Stats SA Report No. P0301.4, 2023) at 19.

¹⁷ *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) at para 11. See also *S v Mamabolo* 2001 (3) SA 409 (CC) at para 38.

¹⁸ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) at para 328. See also de Vos P & Freedman W (eds), *South African Constitutional Law in Context* (Oxford University Press 2014) at 357.

¹⁹ *S v Matomela* 1998 (2) SA 1 (Ck) at paras 23-24.

²⁰ Constitution of the Republic of South Africa, 1996, s 35(3)(k).

²¹ De Vos P and Freedman W *South African Constitutional Law in Context* (Oxford University Press, 2021), 361 - 365; Klare KE ‘Legal Culture and Transformative Constitutionalism’ (1998) 14(1) *South African Journal on Human Rights* 156-159.

²² Constitution of the Republic of South Africa, 1996, s 9(3). See also *Harksen v Lane* 1998 (1) SA 300 (CC) at paras 46-53.

isiZulu, Sesotho, or Xitsonga speakers creates a tiered system of justice, in direct conflict with the equality clause.

Human Dignity (Section 10): Being unable to comprehend or participate meaningfully in proceedings that determine one's liberty, reputation, or livelihood is inherently demeaning and violates the right to inherent dignity, the cornerstone of the Bill of Rights.²³ As stated in *S v Makwanyane and Another*, dignity is about 'the worth of human beings' and their ability to participate in society, linguistic marginalisation in court negates this worth.²⁴

Cultural and Linguistic Community Rights (Sections 30 & 31): The suppression of indigenous languages in the formal and authoritative legal forum denies individuals the right to participate in the cultural life of their choice (Section 30) and denies communities the right to enjoy their culture and use their language (Section 31).²⁵ The courtroom becomes a site of cultural alienation rather than a neutral arbiter of justice.

METHODOLOGY

This research employs a qualitative doctrinal legal analysis, which is the primary methodology for conducting rigorous legal research by systematically analysing existing legal sources.²⁶ This study examined linguistic inequality in South African courtrooms and its impact on constitutional rights and access to justice. The research focused mainly on analysing legal principles, constitutional provisions, legislation, and court judgments dealing with language rights, interpretation services, and the right to a fair trial. A doctrinal approach was appropriate because the paper aimed to evaluate whether current courtroom language practices comply with the Constitution and the broader goals of transformative constitutionalism.

The research relied on both primary and secondary sources. Primary sources included the Constitution of the Republic of South Africa, 1996, legislation such as the Use of Official Languages Act 12 of 2012, and relevant case law from the Constitutional Court, Supreme Court of Appeal, and High Courts. An important case is *S v Matomela*, which was analysed to determine how courts have interpreted and enforced language rights in practice. Policy documents, reports from the South African Human Rights Commission, and official statistics from Statistics South Africa were also considered to provide context on language use and access to justice.

Secondary sources included academic books, journal articles, and scholarly commentaries on constitutional law, language rights, transformative constitutionalism, and access to justice. These materials assisted in identifying recurring legal and practical challenges relating to courtroom interpretation and the continued dominance of English within the legal system. The study further applied constitutional law principles such as equality, dignity, fair trial rights, and positive state obligations to assess whether the state has taken reasonable steps to fulfil its constitutional duties.

A limitation of the study is that it did not involve primary empirical research such as interviews, surveys, or courtroom observations. The paper therefore relied heavily on existing literature, judicial decisions, and published reports to evaluate the problem. However, the use of authoritative legal sources and established academic research provided a reliable basis for analysing the constitutional implications of linguistic inequality in South African courts. Future research could strengthen the discussion by including empirical data from interpreters, legal practitioners, judicial officers, and court users across different provinces.

²³ Constitution of the Republic of South Africa, 1996, s 10.

²⁴ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) at para 328.

²⁵ Constitution of the Republic of South Africa, 1996, ss 30, 31.

²⁶ Hutchinson T & Duncan N 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law* 83–119.

DISCUSSION

Constitutional Breaches: A Doctrinal Analysis of Jurisprudence and Systemic Failure

The jurisprudence of South African courts provides a damning record of systemic failures that rise to the level of constitutional violations.²⁷ A doctrinal analysis of key cases reveals persistent patterns of breach and highlights an area of jurisprudence where remedies, particularly for systemic issues, remain underdeveloped.²⁸

Direct Violations of Section 35(3)(k): From Mistranslation to Absence

The appellate courts have repeatedly confronted cases where poor interpretation has corrupted the trial process.

S v Matomela remains the seminal case. The Supreme Court of Appeal overturned a conviction because a Xhosa interpreter mistranslated ‘ngabom’ (intentionally) as ‘accidentally,’ a fundamental error going to *mens rea*. The Court held this was ‘a gross irregularity’ that vitiated the entire trial, stating unequivocally that the right to a fair trial is illusory if an accused cannot understand the case against him.²⁹ This judgment establishes that a material mistranslation of a key legal concept is a *per se* violation of Section 35(3)(k), requiring no additional proof of prejudice.

Recognising Systemic Failure and Enforcing Positive Obligations

In another jurisprudence regarding the systemic nature of the problem, moving beyond individual case rectification to broader remedial orders. *Mazibuko and Others v City of Johannesburg and Others* is a landmark constitutional law decision. The Court held that the state had failed in its Section 7(2) duty to ‘respect, protect, promote and fulfil’ the rights in the Bill of Rights.³⁰

The Constitutional Imperative for Reform: From Negative Obligation to Enforced Positive Duty

Constitutional law analysis dictates that remedies and reforms must be grounded in the nature and scope of the state’s positive obligations.³¹ The current crisis stems from a historic treatment of language interpretation as a logistical afterthought rather than a core, constitutionally mandated component of the justice system.³²

Legislative and Policy Reform as a Constitutional Mandate

The *Use of Official Languages Act 12 of 2012*, while a step forward, has proven demonstrably inadequate in transforming courtroom practice. Its provisions are often discretionary and lack enforcement mechanisms specific to the judiciary.³³ A constitutional amendment is likely unnecessary, but new enabling legislation or significant amendments are required to give precise, actionable content to Section 35(3)(k). Such legislation must include:

- Establishing a statutory body or mandating the Department of Justice to set nationally recognised qualifications, mandatory certification exams, and compulsory continuous professional development for all court interpreters.³⁴
- The state’s obligation under Sections 7(2) and 237 (which requires the state to perform all duties diligently and efficiently) demands a ring-fenced, equitable budgetary allocation for interpreter services. The chronic shortages, particularly in rural provinces, likely fail the ‘reasonableness

²⁷ Kruger R ‘Language Rights in South African Courts: A Legacy of Systemic Non-Compliance’ (2021) 28 *Southern African Journal on Human Rights* at 315-320. See also *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009) at paras 44-52.

²⁸ Currie I & De Waal J *The Bill of Rights Handbook* (2013) 6th ed Cape Town: Juta & Co. at 645.

²⁹ *S v Matomela* 1998 (2) SA 1 (Ck) at para 24.

³⁰ *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009) at para 49.

³¹ Currie I & De Waal J *The Bill of Rights Handbook* (2013) 6th ed Cape Town: Juta & Co. at 143-146. See also *Minister of Health v Treatment Action Campaign* (No 2) 2002 (5) SA 721 (CC) at paras 95-99.

³² South African Human Rights Commission (SAHRC), *Access to Justice and Language Rights* (2022) at 23-25. See also *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009) at para 50.

³³ *Use of Official Languages Act 12 of 2012*, Government Gazette No. 36017.

³⁴ South African Human Rights Commission ‘Access to Justice and Language Rights’ (2022) *Pretoria: SAHRC* at 78-82.

test’ developed in socio-economic rights jurisprudence (*Grootboom, Treatment Action Campaign*).³⁵ The state must demonstrate that its allocation of resources to this constitutional imperative is reasonable, transparent, and targeted to overcome historic disparities.

The Judiciary’s Proactive Role in Realising Multilingualism

The judiciary is not a passive victim of executive failure. Under Section 6(4) of the Constitution, every court must ‘regulate its own proceedings’ with due regard to official language usage.³⁶ This grants judicial officers, particularly the Judges’ President in the provinces, the authority and duty to develop and implement proactive court-specific language policies.³⁷ This could involve issuing practice directives that prioritise the use of indigenous languages in pleadings where possible; managing court rolls to align with interpreter availability; and most significantly, piloting designated multilingual courts in linguistically homogeneous regions.³⁸ Such pilots would be a direct operationalisation of the state’s Section 6 duties and a powerful exercise of the judiciary’s institutional role in transformative constitutionalism.³⁹

Expanding Constitutional Remedies and Structural Interdicts

Following the precedent in *Phiri*, public interest litigators, legal aid bodies, and the South African Human Rights Commission (SAHRC) should increasingly seek structural interdicts to address systemic failures in specific jurisdictions.⁴⁰ The SAHRC, exercising its potent constitutional mandate under Section 184 to monitor and report on the observance of human rights, must treat inadequate court interpreting as a priority investigative issue.⁴¹ Its reports and recommendations carry significant moral and political authority and can lay the groundwork for litigation. Furthermore, considerations of costs in constitutional litigation should be applied in a manner that does not deter challenges to systemic injustice, as affirmed in *Biowatch Trust v Registrar, Genetic Resources*.⁴²

CONCLUSION

The Constitution of South Africa envisions a legal system that is accessible, equitable, and reflective of the nation’s pluralistic identity. The persistent linguistic inequality in its courtrooms is a stark betrayal of this vision and represents a tangible, ongoing breach of multiple, interrelated constitutional provisions. This paper has argued that the provision of competent, accessible interpretation is not a marginal welfare issue or a matter of administrative convenience. It is a core positive duty imposed on all arms of the state by the supreme law, essential for the actualisation of the rights to equality, dignity, cultural freedom, and, most urgently, a fair trial.

A doctrinal analysis of the jurisprudence confirms that failures in this domain are not trivial. They directly violate the right to a fair trial (Section 35(3)(k)), undermine the guarantee of equality before the law (Section 9), and negate the foundational commitment to multilingualism (Section 6). While courts like the Constitutional Court in *Phiri* have begun to recognise the systemic nature of the failure and grant innovative remedies, the jurisprudence requires further development to consistently provide robust, structural relief that compels executive and legislative action.

Ultimately, achieving linguistic justice demands a concerted, multi-faceted constitutional effort. It requires precise legislation to define standards, reasonable and equitable resource allocation to fulfil them, proactive judicial management to implement multilingualism, and a transformative shift in the professional legal culture away from Anglophone hegemony. The decolonisation of South African law, a process demanded by the Constitution’s transformative nature, must begin with the democratisation

³⁵ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at paras 41-44; *Minister of Health v Treatment Action Campaign* (No 2) 2002 (5) SA 721 (CC) at paras 34-38.

³⁶ Constitution of the Republic of South Africa, 1996, s 6(4).

³⁷ Section 8(3)(b) of the Superior Courts Act 10 of 2013. See also *S v Mamabolo* 2001 (3) SA 409 (CC) at para 38.

³⁸ South African Human Rights Commission Report on Access to Justice and Language Rights (SAHRC, 2022) at 78-81.

³⁹ Langa JP in ‘Transformative Constitutionalism’ (2006) 17(3) *Stellenbosch Law Review* at 360. See also Klare KE ‘Legal Culture and Transformative Constitutionalism’ (1998) 14(1) *South African Journal on Human Rights* at 153-154.

⁴⁰ *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009).

⁴¹ Constitution of the Republic of South Africa, 1996, s 184.

⁴² *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) at para 22.

of its language. Until an isiXhosa, Sesotho, or Tshivenda-speaking accused can engage with the court system with the same ease, understanding, and authority as an English-speaking one, the transformative promise of the 1996 Constitution remains profoundly unfulfilled. Linguistic justice is not an adjunct to the constitutional project; it is one of its essential foundations.

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